INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LATAM HYDRO LLC, on its own behalf, and on behalf of CH MAMACOCHA, S.R.L., and CH MAMACOCHA, S.R.L.,

Claimants

v.

THE REPUBLIC OF PERU

Peru

CLAIMANTS' REPLY ON JURISDICTION AND THE MERITS

ICSID CASE NO. ARB/19/28

July 20, 2021

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TABLE OF CONTENTS

Page

I. EXECUTIVE SUMMARY 1

II. PERU'S FACTUAL NARRATIVE IS MISLEADING, INCOMPLETE, AND CONTRADICTED BY THE FACTUAL RECORD 17

A. Peru's Mischaracterization Of The RER Contract Contradicts The Overall Purpose Of The RER Promotion 17

1. Peru's Interpretation Of The RER Contract's Allocation Of Risks Is Irreconcilable With The Object And Purposes Of The RER Promotion Law And The Conduct Of The Parties 20

2. Peru's Current Interpretation Of The Risk-Allocation Structure Under The RER Contract Contradicts Its Historical Positions And Statements On This Key Issue 30

a. In 2015, MINEM Determined That CHM Should Be Held Harmless From Permitting Delays Attributed To The Government 32

b. In 2016 - 2017, MINEM Approved Extensions To The COS Deadline Beyond The Contractual Parameters In Clause 8.4 37

c. In 2018, MINEM Confirmed, Through Its Outside Counsel, That Extensions To The Term Date And COS Deadline Were Necessary Because The Delays Were Attributable To Peru 39

B. Peru Has Failed To Prove Its False Narratives About The RGA Lawsuit 47

1. Peru's Efforts To Downplay The Effect Of The RGA Lawsuit Are Unsupported And Contradicted By The Record 48

2. Peru Has Not Demonstrated That The RGA Acted Reasonably When It Filed The RGA Lawsuit 55

a. The RGA's Environmental Allegations Are Baseless And Have Been Debunked 58

b. The RGA Lawsuit's Allegations Of Procedural Irregularities With Respect To The Project's Permits Are Debunked By Peru's Own Exhibit 63

3. Peru's Allegations About The Dismissal Of The Lawsuit Are Contradicted By The Record 68

C. Peru Mischaracterizes The Nature And Impact Of The Suspensions Authorized By Addenda 3-6 75

1. The Suspensions Stopped The Clock On The Project, Including CHM's Obligation To Achieve Commercial Operation By The COS Deadline 76

2. Peru's Contention That The Suspension Agreements Did Not Extend The COS Date Is At Odds With MINEM's Position At The Time As Well As MINEM's Acknowledgement As Recently As December 2019 85

D. Peru's Defense Of The Criminal Proceeding Misses The Mark 88

1. The Criminal Proceeding Impaired The Investment 90

2. Peru's "Willful Collaboration" Charge Is Baseless 93

3. The Criminal Proceeding Violates Due Process 98

E. Peru Has Failed To Justify Its Delays To The Civil Works Authorization 101

1. Peru Is Exclusively Responsible For The Delays 101

2. The Delays To The Civil Works Authorization Were Material 107

F. Peru's Explanations For Its December 2018 Measures Strain Credulity 109

1. MINEM's Denial Of The Third Extension Request Represented A Complete Reversal Of Peru's Long-Standing Positions 111

2. MINEM's Pursuit Of The Lima Arbitration Was Without CHM's Consent, As Confirmed By The Lima Arbitration Panel 113

3. Peru's Explanation For Abandoning The Proposed Supreme Decree Does Not Hold Up 120

G. Peru's Assertion That It Always Dealt With Claimants In "Good Faith" Is Contradicted By Evidence Originating From The Government Itself 126

H. Peru Has Failed To Sustain Its Attempts To Deflect Blame For The Impact Of Its Measures 130

1. Claimants' Financing Strategy Was Conventional, Sound, And Would Have Been Successful 130

a. Peru Mischaracterizes Claimants' Financing Strategy 131

b. Claimants' Pursuit Of A Non-Recourse, Project Finance Loan Constituted A Prudent Business Strategy 136

2. Claimants Earned The Local Communities' Support 141

3. Claimants Would Have Finished Construction On Time Had Peru Not Interfered With The Project 145

4. Peru's Efforts To Weaponize The Amparo Action Must Be Rejected 150

a. The Amparo Action Had No Discernible Effect On The Mamacocha Project 150

b. The Recent Decisions In The Amparo Action Underscore The Arbitrary Nature Of The Political Opposition To The Project In Arequipa 152

I. The Tribunal Should Infer That Peru Failed To Produce Documents Because Those Documents Would Have Been Adverse To Its Interests 155

III. PERU'S JURISDICTIONAL OBJECTIONS ARE NONMERITORIOUS AND MUST BE REJECTED 162

A. Respondent's Focus On Burden Of Proof Is An Improper Approach To Jurisdictional Objections 163

B. Claimants Have Complied With The Waiver Requirement Under Article 10.18.2(b) Of The TPA 165

1. The Waiver Requirement Under Article 10.18.2(b) Of The TPA 165

2. Peru's Interpretation Of The Waiver Requirement Does Not Withstand Scrutiny Under Article 31 Of The VCLT 167

C. Claimants Have Complied With The Notice And Wait Requirement Of Article 10.16(2) Of The TPA With Respect To All Of Its Claims 175

1. The Notice And Wait Requirement Has A Procedural And Non-Jurisdictional Character 176

2. Claims Additional To Those Listed In The Notice Of Intent Are Allowed Provided They Are A Factual Extension Of The Case And Are Related To The Same Dispute 177

3. Contrary To Respondent's Unsubstantiated Allegation, The Facts Show That Claimants Complied With The Notice And Wait Requirement Of Article 10.16(2) 179

4. Both the TPA And The ICSID Convention Anticipate New Claims Being Raised After A Notice Of Arbitration 180

D. The RER Contract Qualifies As An "Investment Agreement" And Thus, The Tribunal Has Jurisdiction *Ratione Materiae* 182

1. The RER Contract Qualifies As An "Investment Agreement" Under Article 10.28 Of The TPA 184

2. The RER Contract Is An Investment Agreement Because Claimants Have Relied On The RER Contract To Acquire A Covered Investment 186

E. The Tribunal Has Jurisdiction *Ratione Personae* Because Peru Agreed To Treat CH Mamacocha As A National Of Another Contracting State For Purposes Of Article 25(2) Of The ICSID Convention 189

1. Article 25(b)(2) Provides An Exception To The Nationality Requirement Of Article 25(b)(1) 190

2. The Agreement To Treat A Company As A Foreign National Because Of Foreign Control Does Not Require Any Specific Form 191

3. The Presence Of The ICSID Clause In The RER Contract Constitutes An Implied Agreement By Peru To Treat CHM As A Foreign Investor 195

4. The Parties' Course Of Dealing Reinforces The Fact That MINEM Implicitly Agreed To Treat CHM As A National Of Another Contracting State 199

F. The Tribunal Has Jurisdiction *Ratione Materiae* Over The Upstream Projects 201

IV. PERU IS LIABLE TO CLAIMANTS FOR ITS BREACHES OF THE TPA 204

A. Peru Breached Its Obligations To Accord Latam Hydro And Its Investments Fair And Equitable Treatment In Accordance With Article 10.5 Of The TPA 206

1. Customary International Law Has Evolved Such That Fair And Equitable Treatment Under The Minimum Standard Of Treatment Contains The Same Substantive Protections As Are Provided Under An Autonomous Fair And Equitable Treatment Standard 206

a. Peru's Standard Is Only Supported By Controversial And Outdated Precedent Based On *Neer v. Mexico* 208

b. Peru Raises A Fruitless Argument Concerning Claimants' Alleged Burden Of Proving Customary International Law 212

c. Peru's Attempt To Distinguish FET And MST Is Unavailing 214

2. Peru's Arguments Concerning The Legal Standards For The Elements Of Legitimate Expectations, Arbitrariness, Transparency, Discrimination, And Good Faith Are Unsupported And Unpersuasive 216

a. Legitimate Expectations Play A Central Role Under FET 220

b. Arbitrariness Is Prohibited Under FET And Does Not Carry A Heightened Threshold 224

c. Transparency Is A Fundamental Component of FET 226

d. Discriminatory Measures Violate FET And Do Not Require A Heightened Threshold 230

e. Good Faith Is Inextricably Linked With FET 234

f. Peru's "Margin Of Appreciation" Defense Is Irrelevant To This Tribunal's Considerations 237

3. Through At Least Seven Measures, Peru Breached Its FET Obligation To Claimants Under The TPA 238

a. RGA Lawsuit Violated Claimants' Legitimate Expectations And Was Also Initiated Arbitrarily, Discriminatorily, Inconsistently, And Without Good Faith 239

b. The AEP's Criminal Investigation And Prosecution Is Based Wholly Upon The Since-Dismissed RGA Lawsuit And Constitutes A Further Breach Of FET 253

c. After An Inexplicable And Unreasonable Delay, AAA Wrongfully Denied And Later Issued A Materially Defective CWA In Violation Of FET 257

d. The Lima Arbitration Violated Several Elements Of FET 261

e. MINEM's Denial Of The Third Extension Request Violated Claimants' Legitimate Expectations, Was Arbitrary, And Lacked Transparency And Good Faith 264

B. Peru Indirectly Expropriated The Mamacocha Project In Violation Of Article 10.7 Of The TPA 270

1. Peru Effected An Indirect Expropriation When It Commenced The RGA Lawsuit And Crystallized The Expropriation When Peru Failed To Grant An Extension To The RER Contract To Account For The Delays Caused By The RGA Lawsuit And Commenced The Lima Arbitration 273

a. A Substantial Deprivation Of Value Is The Proper Standard For An Indirect Expropriation 275

b. Peru Was Not Acting Merely As A Contracting Party When It Indirectly Expropriated The Mamacocha Project 281

c. Peru's Measures Resulted In An Indirect Expropriation Regardless Of Whether The Final Concession Remained In Effect 283

2. In The Alternative, Peru's Wrongful Measures Cumulatively Amounted To A "Creeping Expropriation" That Destroyed The Mamacocha Project 287

a. The Standard For A "Creeping" Expropriation 288

b. Peru's Measures Resulted In A "Creeping" Expropriation 289

3. Peru Has Failed To Meet Its Burden Of Showing That Its Indirect Expropriation Of The Mamacocha Project Was Lawful 291

C. Peru Breached The Most-Favored-Nation Provision Of The TPA When It Accorded More Favorable Treatment To Other Foreign Investors 292

1. Peru's Arguments That An MFN Clause Cannot Import Substantive Protections Or An Umbrella Clause Are Misguided 293

2. Peru Breached Article 3(2) Of The Paraguay-Peru BIT 296

3. Peru's Breaches Of The RER Contract Triggered Liability Under The Treaty As A Result Of The Umbrella Clauses Imported Through The TPA's MFN Clause 298

D. Peru Is Estopped From Claiming That Addenda 1 And 2 To The RER Contract Were Improperly Granted 300

1. The Customary International Law Standard For Estoppel 300

2. The Principle Of Estoppel Prevents Peru From Now Alleging That Addenda 1 And 2 Are Invalid 303

E. The Amparo Action Is A Red Herring And Not A Valid Basis For Peru's Causation Defense As A Matter Of International Law 304

V. PERU'S DEFENSES TO CHM'S RER CONTRACT CLAIMS ARE GROUNDLESS ON THE EVIDENCE AND UNDER PERUVIAN LAW 307

A. Peru Misrepresents The Legal Principles That Apply To The Interpretation Of The RER Contract 307

1. Peru's Contention That Peru's Internal Laws Do Not Apply Is Unsupported, Internally Inconsistent, And Contradicted By Applicable Peruvian Law Principles 307

B. Peru Misrepresents The Nature Of The RER Contract 315

1. The RER Contract Is Not A "*Contrato Normado*" That Can Impose One-Sided Terms And Conditions 315

2. Peru, Not MINEM, Is The Grantor Under The RER Contract 318

a. Applicable Canons Of Contract Interpretation Under Peruvian Law Confirm The State Is The Grantor Under The RER Contract 319

b. Peru's Standing Defense Is Groundless And Unsupported 331

3. Peru's Description Of How Risks Allegedly Were Allocated Under The RER Contract Is Debunked By The Express Terms Of The RER Contract And Applicable Canons Of Contract Interpretation 336

a. Clauses 1.4.22 And 8.4 Of The RER Contract Did Not Absolve Peru Of Its Contractual Breaches 338

b. Clauses 1.3, 3.2, And 4.3 Of The RER Contract Did Not Allocate All Permitting-Related Risks To CHM 347

c. Clauses 3.3 And 6.4.2 Of The RER Contract Did Not Allocate All Risks Related To Financial Close To CHM 351

4. Peru's Reliance On Unrelated Awards Issued In Domestic Arbitrations Is Misplaced 355

a. The Santa Lorenza Award 356

b. The Electro Zaña Award 358

C. Peru Has Not Articulated A Meritorious Defense To Its Material Breaches Of The RER Contract 361

1. By Rejecting The Third Extension Request, Peru Failed To Comply With Its Quintessential Obligation Under The RER Contract To Confer To CHM The Economic Benefits Of A 20-Year Guaranteed Revenue 361

2. By Rejecting The Third Extension Request, Peru Breached Its Duty Under Addenda 3-6 To Suspend Its Obligations Under The Execution Works Schedule 369

3. By Commencing The Lima Arbitration, Peru Breached Clause 11.3(A) Of The RER Contract 379

4. By Disavowing Addenda 1-2, Peru Breached Clause 2.2.1 Of The RER Contract 383

5. By Failing To Protect The Project's Permits, MINEM Breached Its Obligation Under Clause 4.3 Of The RER Contract To *Coadyuvar* CHM In The Permitting Process 385

D. Peru Misinterprets And Misapplies Peruvian Legal Principles Incorporated Under The RER Contract 391

1. Peru Fails To Demonstrate That Any Of The Measures In Dispute Conform With The Principle Of Good Faith 393

a. The RGA Lawsuit Violated The Principle Of Good Faith 394

b. The Criminal Proceeding Violated The Principle Of Good Faith 397

c. MINEM's Rejection Of The Third Extension Request Violated The Principle Of Good Faith 399

d. The Lima Arbitration Violated The Principle Of Good Faith 401

e. AAA's Measures Violated The Principle Of Good Faith 403

2. Peru's "Legally Valid Reason" Defense To The Doctrine Of *Actos Propios* Must Be Rejected On The Law And Facts 404

a. Peru Has Not Demonstrated It Had A Legally Valid Reason To File The RGA Lawsuit 406

b. Peru Has Not Proven It Had A Legally Valid Reason To File The Lima Arbitration 408

c. Peru Has Not Proven It Had A Legally Valid Reason To Reject The Third Extension Request In Its Entirety 410

3. Peru Fails To Demonstrate How Its Contradictory Positions Under The RER Contract Conform With Its Binding Obligation Under The *Confianza Legítima* Doctrine To Protect CHM's Legitimate Expectations 411

a. The RGA Lawsuit Breached The *Confianza Legítima* Doctrine 414

b. The Criminal Proceeding Breached The *Confianza Legítima* Doctrine 415

c. The CWA Delays Breached The *Confianza Legítima* Doctrine 417

d. The Lima Arbitration Breached The *Confianza Legítima* Doctrine 418

e. The Denial Of The Third Extension Request Breached The *Confianza Legítima* Doctrine 419

4. Peru Has Not Raised Or Proven A Meritorious Defense To Its Admitted Violations Of The GLAP And TUPA Review Periods 420

E. The Evidentiary Record Confirms Peru Made CHM's Performance Under The RER Contract Impossible 421

VI. CLAIMANTS ARE NO LONGER BOUND BY THE CONFIDENTIALITY AGREEMENT 425

A. Peru Materially Breached The Confidentiality Agreement When It Submitted Testimony Concerning The Contents Of The Parties' Settlement Discussions 425

B. Peru Has Waived Any Protections Or Rights Under The Confidentiality Agreement Through Its Affirmative Use Of Confidential Information 430

C. In Any Event, The Confidentiality Agreement Has Terminated As A Matter Of Law 431

VII. CLAIMANTS ARE ENTITLED TO THE DAMAGES THEY SEEK 434

A. Claimants Apply The Appropriate Standards For Assessing Damages 436

1. Claimants Apply The Correct Standard Of Damages For Breaches Of The TPA 437

2. Peruvian Law Supports Claimants' Damages Claims For Breach Of Contract 440

B. Peru's Defenses Concerning Causation Are Baseless And Must Be Rejected 442

1. CHM's Inability To Obtain Financing Was Directly Caused By The Measures 444

a. The Financing Structure Chosen By Claimants Was Neither Unusual Nor Risky 444

b. Claimants Would Have Been Able to Achieve Financial Close Absent the Measures 446

2. Absent The Measures, Claimants Would Have Timely Begun Construction, And Achieved The COS Date Set Forth In Addendum No. 2 448

a. Peru Offers No Evidence That The Ayo Community Would Have Stopped Achievement Of The Actual COS Date 449

3. Peru's Interferences Regarding The RER Contract Frustrated The Mamacocha Project 450

C. BRG's Calculation Of The FMV Of The Mamacocha Project Is Accurate and Reasonable 451

1. Peru's "First Correction" Is Premised On A Fundamental Error And Should Be Ignored 452

2. Peru's "Second Correction" Comprises Three Adjustments To BRG's DCF Analysis, Of Which Only One Has Any Merit 455

3. Peru's "Third Correction" Correctly Identifies A Formula Error Which BRG Corrects In Its Second Report 457

4. Peru's "Fourth Correction" Excluding Cash Flows Pertaining To The Performance Bond Ignores The Demonstrated Economic Impact Of The Performance Bond 457

5. Peru's "Fifth Correction" Which Seeks To Exclude From BRG's DCF Model Offsets For Actual Costs Incurred By Claimants Between The Valuation Date Until December 2018 Would

Unfairly Penalize Claimants For Continuing To Invest In The Mamacocha Project 460

6. Peru's "Sixth Correction" Is Based On A Fundamental Economic Error That Led Versant To Overstate The Appropriate Amount Of Risk For The Mamacocha Project 462

7. Peru's Argument That The Implied Value Of The Innergex Offer Supports Its "Corrections" To BRG's DCF Analysis Is Fundamentally Flawed 466

D. Peru's Claim That BRG's Investment Value Methodology Suffers From Fundamental Deficiencies Is Unfounded 468

1. The Update Rate Used By Claimants For The Investment Value Analysis Is Reasonable And Appropriate 471

E. Claimants Are Entitled To The Additional Costs 472

F. Claimants Are Entitled To Pre-Award Interest On The FMV Valuation At The Commercially Reasonable Rate Proposed By Claimants 474

G. Claimants' Award Should Not Be Subject To Additional Taxation 476

H. Claimants Are Entitled To The Costs Of These Proceedings 477

I. Claimants Are Entitled To Compound Post-Judgment Interest 477

VIII. REQUEST FOR RELIEF 478

GLOSSARY AND ABBREVIATIONS

AAA	Autoridad Administrativa del Agua I Caplina - Ocoña: Branch of ANA with jurisdiction over water-related matters in the Arequipa region, where the Mamacocha Project was located.
AEP	Fiscalía Especializada en Materia Ambiental de Arequipa: The office of the Arequipa prosecutor who specializes in enforcing Arequipa's environmental criminal laws.
ANA	Autoridad Nacional del Agua: Governing body of Peru's water resource management that is tasked with the oversight of the different water authority administrative offices in Peru (*e.g.*, AAA).
ARMA	Autoridad Regional del Medio Ambiente: Regional environmental authority with jurisdiction over environmental matters in the Arequipa region, where the Mamacocha Project was located.
CHM	CH Mamacocha S.R.L.
Confidentiality Agreement	The agreement executed between Claimants and the Special Commission on December 5, 2017 to facilitate settlement discussions between Claimants and Peru.
COS	Commercial Operation Start-Up.
CWA	Civil Works Authorization.
DCF	Discounted Cash Flow.
DEG	Deutsche Investitions-und Entwicklungsgesellschaft: German development finance institution that was interested in providing a US $60 million non-recourse, project finance loan to the Project.
Echecopar Reports	Legal reports sent by Estudio Echecopar to MINEM, dated April 5, 2018 and April 17, 2018: These reports conclude that MINEM had a legal obligation to extend the Term Date and COS deadline when the project delays are attributable to the government and that any interpretation to the contrary would be unconstitutional.
EPC	Engineering, Procurement and Construction.
FET	Fair and Equitable Treatment.
Financial Close	The first milestone under the Works Schedule that is defined under Clause 1.4.9 of the RER Contract.
FMV	Fair Market Value.
GCZ	GCZ Ingenieros S.A.C.

GLAP	General Law of Administrative Procedure.
Innergex	Innergex Renewable Energy Inc.: Canadian hydropower company that was in negotiations with Claimants to acquire a 70% equity share in the Mamacocha Project.
IRR	Internal Rate of Return.
Latam Hydro	Latam Hydro LLC.
Legislative Decree No. 1002 or RER Law	Legislative Decree for the Promotion of Investment for the Generation of Electricity from Renewable Energies.
Lima Arbitration	Arbitration No. 0669-2018-CCL filed by MINEM on December 27, 2018 in front of the Lima Chamber of Commerce: The three-arbitrator panel unanimously dismissed this arbitration for lack of subject matter jurisdiction on December 24, 2020.
MFN	Most-Favored Nation.
MINEM	Ministerio de Energía y Minas del Perú: Entity of the Peruvian government responsible for managing the energy and mining sectors and overseeing the distribution of energy throughout Peru.
Morón Report	Legal Report issued by Dr. Juan Carlos Morón Urbina, from Estudio Echecopar, to the Special Commission on December 5, 2017.
MR 320	Ministerial Resolution No. 320-2015-MEM/DM: MINEM issued this resolution on July 3, 2015 in order to approve CHM's first extension request.
MR 559	Ministerial Resolution No. 559-2016-MEM/DM: MINEM issued this resolution on December 29, 2016 in order to approve CHM's second extension request.
OSINERGMIN	Organismo Supervisor de la Inversión en Energía y Minería: Entity of the Peruvian government responsible for regulating Peru's energy and mining industries, including renewable energy resources projects like the Mamacocha Project.
Peru	The Republic of Peru.
RER	Renewable Energy Resources.
RER Contract	Contrato de Concesión para el Suministro de Energía Renovable al Sistema Eléctrico Interconectado Nacional: Investment agreement executed between CHM and MINEM (on behalf of Peru) on February 18, 2014.

RER Regulations	The regulations that MINEM promulgated in order to implement the RER Law.
RGA	Gobierno Regional de Arequipa: Regional government responsible for the department of Arequipa, where the Mamacocha Project was located.
SD 24	Supreme Decree No. 024-2013-EM: MINEM issued this Supreme Decree in July 2013 to amend the RER Regulations ahead of the Third Auction under the RER Promotion.
Sosa Report	Legal Report No. 166-2016-EM-DGE: MINEM's legal office sent this Report on October 6, 2016 to MINEM's Director General of Electricity, Ms. Carla Sosa Vela, in approval of CHM's second extensions request.
Special Commission	Comisión Especial Que Representa a la República del Perú en Controversias Internacionales de Inversión: Agency within Peru's Ministerio de Economía y Finanzas that is responsible for resolving international investment disputes in which Peru is a party.
Term Date	The term date for the RER Contract as contained in Clause 1.4.22 thereunder.
Third Auction	The public auction held between October to December 2013 under the RER Promotion.
Third Extension Request	CHM's request to MINEM for extensions to the Term Date and Works Schedule, dated February 1, 2018.
TPA	U.S.-Peru Trade Promotion Agreement: Free trade agreement between the U.S. and Peru, entered into force on February 1, 2009.
TUPA	Texto Único de Procedimientos Administrativos: Code that contains all regulations and procedures governing the Peru's administrative agencies, including the length of time within which an agency can review a permit or concession application.
Works Schedule	Works Execution Schedule contained in Annex I of the RER Contract.

I. EXECUTIVE SUMMARY

1. Claimants, Latam Hydro LLC ("**Latam Hydro**") and CH Mamacocha S.R.L. ("**CHM**"), hereby respond to the allegations and argumentation in the Counter-Memorial, and its enclosed Witness Statements and Expert Reports, that Respondent, the Republic of Peru ("**Peru**" and, together with Claimants, the "**Parties**") filed on February 9, 2021.

2. The Parties agree that, in 2008, Peru created a promotional campaign (the "**RER Promotion**") to attract foreign investment in Peru's renewable energy sector in order to provide sustainable, clean energy to Peruvian people and facilitate the implementation of the U.S.-Peru Trade Promotion ("**TPA**").[1] The Parties also agree that Claimants answered Peru's call when they invested more than US $20 million in developing a hydropower project in the mountains of Southern Peru ("**Mamacocha Project**" or "**Project**") and five related hydropower projects (the "**Upstream Projects**"). And the Parties agree that CHM and Peru, through its Ministry of Energy and Mines ("**MINEM**"), executed a contract in February 2014 that promised, *inter alia*, to pay CHM "Guaranteed Revenue" for up to twenty (20) years (about US $160 million) if CHM advanced the Mamacocha Project into commercial operation in accordance with the applicable laws and procedures (the "**RER Contract**").[2] Beyond these undisputed facts, even a quick review of Claimants' Memorial and Peru's Counter-Memorial reveals the Parties are telling two (2) fundamentally different and inconsistent stories.

3. Claimants' story can be told in three (3) chapters. In the first chapter—from February 2014 to March 2017—the Parties worked together in a public-private partnership to overcome typical obstacles that crop up in large-scale construction projects, such as permitting

[1] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).
[2] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.26 (C-0002).

delays and regional governmental opposition. The central government, in compliance with its duties under the RER Contract and Peruvian law, assisted Claimants in overcoming these obstacles, by, among other things, granting compensatory time extensions when the Project was delayed by unjustified actions or omissions from regional government agencies.

4. In this first chapter, CHM received two (2) extensions to CHM's deadlines under the Works Execution Schedule contained in Annex I to the RER Contract ("**Works Schedule**").[3] The first contract extension, formalized in an executed contract amendment in July 2015 ("**Addendum 1**"), extended CHM's deadlines by 705 calendar days to account for government-caused delays.[4] The second contract extension, formalized in an executed contract amendment in January 2017 ("**Addendum 2**"), further extended these deadlines by 462 calendar days to account for similar delays.[5] When it granted these extensions, MINEM publicly acknowledged on the face of Addenda 1-2 and their corresponding Ministerial Resolutions and Reports that: (i) Claimants had at all times acted with the requisite diligence; (ii) all of the 1,167-day delays to the Project were exclusively attributable to government authorities; and (iii) Peru had a legal obligation under the TPA, RER Contract, and Peruvian law to hold Claimants harmless from unjustified measures that interfered with CHM's efforts to advance the Project.

5. At the tail end of the first chapter, the Project flourished. Claimants were moving fast to finalize their negotiations with: (i) Deutsche Investitions- und Entwicklungsgesellschaft ("**DEG**"), a prominent German development finance institution that was interested in loaning the Project up to US $60 million; (ii) Innergex Renewable Energy Inc. ("**Innergex**"), a world-class Canadian hydropower company that wanted to take a 70% equity investment position in the

[3] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Annex I (C-0002).
[4] Addendum 1 to the RER Contract, July 22, 2015 (C-0008).
[5] Addendum 2 to the RER Contract, January 3, 2017 (C-0009).

Project; and (iii) GCZ Ingenieros S.A.C. ("**GCZ**"), a Peruvian contractor that had significant experience building hydropower projects in the mountains of Southern Peru. By March 2017, Claimants were weeks away from executing contracts with DEG, Innergex, and GCZ and were poised to have shovels in the ground no later than July 1, 2017.

6. The second chapter of Claimants' story began unexpectedly on March 14, 2017, just as Claimants, DEG, and Innergex were putting the finishing touches on legal documents that would have memorialized the terms for a US $60 million non-recourse, project loan to finance most of the Project's construction and operation. On that fateful day, the Regional Government of Arequipa ("**RGA**") filed a lawsuit in Arequipa—a city located more than eight (8) hours away from where the Project was located—that sought to revoke the environmental permits for the Project that the same government had issued three (3) years earlier (the "**RGA Lawsuit**").[6]

7. This Lawsuit was baseless. It stemmed from a clandestine, *ex parte* investigation by a committee made up of members of the RGA's Regional Council, a supervisory branch of the RGA whose members had publicly opposed the Mamacocha Project for years due to their supposed concerns about its expected impact on the neighboring village of Ayo. Those concerns were unsubstantiated and had been debunked during the relevant period, including by Autoridad Regional del Medio Ambiente ("**ARMA**")—the regional environmental agency—and every independent environmental expert or consultant who had studied the Project's designs. Notably, the Regional Council's concerns were not shared by the majority of the *Ayeños* who lived less than an hour away from the Project because they recognized the Project would be a sustainable and low-impact facility that would create jobs, reliably provide clean energy, and better their lives.

[6] Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087).

8. But the sheer fact the RGA, which presided over the entire region where the Project was located, was seeking to annul these permits (which would have destroyed the Project) sent immediate shockwaves throughout the region. Days later, on March 24, 2017, the Arequipa Environmental Prosecutor ("**AEP**") opened a criminal investigation based only on the RGA Lawsuit's untested and unsubstantiated allegations.[7] Regional permitting agencies like the Autoridad Administrativa del Agua Caplina – Ocoña's ("**AAA**") and ARMA thereafter denied or delayed key permits due to the RGA's political opposition to the Project.[8] As a direct result of these regional government measures, Claimants' negotiations with DEG, Innergex, and GCZ were indefinitely put on hold.

9. The second chapter continues from June 2017 through December 2017. In June 2017, Claimants noticed their intent to bring an international arbitration against Peru to redress the significant harm caused by the RGA Lawsuit.[9] In July 2017, the commission that represents Peru in international disputes ("**Special Commission**") formally opened settlement discussions with Claimants and MINEM suspended the RER Contract to facilitate these discussions.[10] In November 2017, the Special Commission retained an outside lawyer (Dr. Juan Carlos Morón Urbina from the prestigious Peruvian law firm, Estudio Echecopar) to assess the RGA Lawsuit's "soundness and validity."[11] In December 2017, Dr. Morón concluded the Lawsuit misapplied applicable laws, relied on factual allegations that were unfounded or refuted by the evidentiary record, was filed outside of the statute of limitations and, thus, was highly unlikely to succeed

[7] Criminal Proceeding Order No. 01-2017-0-FPEMA-MP-AR, March 24, 2017 (C-0188).
[8] Email from A. Bartrina to S. Sillen, March 14, 2017 (C-0214); Directorial Resolution No. 1480-2017-ANA/AAA I C-O, May 16, 2017 (C-0121); Directorial Resolution No. 1928-2017-ANA/AAA I C-O, July 5, 2017 (C-0122).
[9] Latam Hydro LLC and CH Mamacocha S.R.L.'s First Notice of Intent, June 19, 2017 (C-0252).
[10] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).
[11] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).

(the "**Morón Report**").[12] Days later, the Special Commission agreed to "warn" the RGA that its Lawsuit exposed Peru to "reputational risks" and that the RGA, itself, would be required to pay for Peru's legal defense as well as for any arbitral award that Claimants might win arising from damages caused by the RGA Lawsuit.[13]

10. Before the end of December 2017: (i) the RGA's Attorney General issued a report admitting that the RGA Lawsuit never had merit and disclosing the remarkable fact that she had privately recommended against filing the Lawsuit because she believed its claims and allegations were unsubstantiated;[14] (ii) the RGA Governor issued an executive resolution ordering that the RGA Lawsuit be withdrawn as soon as possible because it was unlikely to succeed and exposed Peru to significant financial liability;[15] and (iii) the RGA Governor gave a press interview that affirmed the RGA Lawsuit was a "time bomb" that had to be defused to prevent the RGA from being exposed to significant civil penalties and its officials to potential criminal exposure.[16]

11. At the end of chapter two, from January 2018 to November 2018, MINEM and the Special Commission continued to acknowledge Peru's responsibility to protect CHM from delays and interferences caused by government entities. In February 2018, CHM submitted an extension request to recover the time lost during the pendency of the RGA Lawsuit, including the seventeen (17) months the Project had been in suspension (the "**Third Extension Request**").[17] In March 2018, Claimants noticed Peru a second time of their intention to bring an ICSID

[12] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).
[13] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230); Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[14] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[15] Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).
[16] Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017 (C-0011).
[17] Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).

arbitration if MINEM did not grant the Third Extension Request.[18] In late March, 2018, MINEM again hired Estudio Echecopar to confirm that Peru had a legal obligation to grant extensions to the Works Schedule and the RER Contract's term date where, as was the case here, government authorities were responsible for the delays to the Project.[19] In April 2018, Estudio Echecopar issued two (2) reports that confirmed that Peru had a legal obligation to grant these extensions and that any interpretation to the contrary was unconstitutional, prohibited by the RER Contract, and contrary to the express goals of the RER Promotion (the "**Echecopar Reports**").[20]

12. From June to July 2018, MINEM offered CHM extensions to the RER Contract that would have mostly, but not fully, compensated Claimants for the government-caused delays to the Project. In July 2018, Claimants declined MINEM's proposal because they believed Peru had an obligation to compensate CHM for all of the government-caused delays. From August to November 2018, MINEM changed tack and opted to resolve Claimants' noticed dispute through a "supreme decree" that would have reaffirmed its obligation to issue compensatory extensions for projects where, as here, the concessionaire had acted diligently but had been interfered with and delayed by government-caused measures. Although the proposed supreme decree would have had general applicability, the only RER project that would have qualified for full extensions of both the COS and Term Date deadlines, thereunder, was the Mamacocha Project. Chapter two ends on November 11, 2018, when MINEM pre-published its proposed supreme decree and, with it, a "Statement of Reasons" memorandum that expressly states that Peru had a legal obligation under international and Peruvian law to protect concessionaires from "unjustified actions or

[18] Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).
[19] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[20] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).

omissions attributable to an entity belonging to the State."[21] The Statement of Reason's findings were directly applicable to the Mamacocha Project.

13. Chapter three began in late November 2018, when MINEM received comments from the politically powerful natural gas lobby advocating against the proposed supreme decree and from Peru's electricity regulator, Organismo Supervisor de la Inversión en Energía y Minería ("**OSINERGMIN**"), which suggested it would be more politically and economically expedient to let the renewable energy projects die than to keep them alive.[22] OSINERGMIN also remarked that, if MINEM chose to let those renewable energy projects die, Peru would recover around US $55 million from the performance bonds from those projects.[23]

14. In December 2018, MINEM opted to let the renewable projects die. That month, MINEM executed a multi-prong litigation strategy to unwind the RER projects, including the Mamacocha Project. As part of this strategy, MINEM announced it had: (i) rescinded the proposed supreme decree;[24] (ii) denied CHM's Third Extension Request;[25] and (iii) filed an arbitration before the Lima Chamber of Commerce, without notice, forewarning, or CHM's consent, that sought to annul or modify Addenda 1-2 so that MINEM could terminate the RER Contract and collect CHM's US $5 million performance bond (the "**Lima Arbitration**").[26]

15. This multi-prong exit strategy was significant for three reasons. **First**, it marked the first time that MINEM ever took the position that CHM had assumed ***all risks*** related to the

[21] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-0018).
[22] Email from S. Buenalaya to TEMP_dge72 et al. attaching OSINERGMIN Comments to Proposed Supreme Decree, November 23, 2018 (C-0174); Comments from Kallpa Generación S.A. (R-0108); Comments from Inland Energy, File No. 2874802, November 23, 2018 (R-0133).
[23] Email from S. Buenalaya to TEMP_dge72 et al. attaching OSINERGMIN Comments to Proposed Supreme Decree, November 23, 2018 (C-0174).
[24] MINEM Report No. 505-2018-MEM/DGE, December 27, 2018 (C-0175); MINEM's Official Letter No. 2300-2018-MEM/DGE, December 31, 2018.
[25] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).
[26] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).

Project, including the risk of government interference. **Second**, it required MINEM to disavow positions it had consistently held and repeatedly reaffirmed under the RER Contract. **Third**, it definitively destroyed the Project and, with it, the related Upstream Projects. Without a third set of extensions to compensate for all the government-caused delays and the 17-month suspension period—and with the newly filed Lima Arbitration serving as an existential threat—Claimants could not construct the Project by the contract deadline, much less obtain the approximately US $50 million required to finance the Project's construction. Just like that, in December 2018, the Project—and Claimants' story—came to a tragic end caused by Peru's complete reversal of its legal positions and support throughout the first two chapters of this story.

16. Peru's Counter-Memorial clarifies that this case is about Peru's complete reversals of its prior legal positions, policies, and decisions regarding the Mamacocha Project. Unlike during the events of the first two chapters, but consistent with the litigation strategy it adopted in the third chapter of this story, Peru argues in this arbitration that: (i) Peru is not a party to RER Contract, only MINEM is; (ii) the concessionaire assumed all risks relating to the Project, even the risk that its counterparty would breach its commitments under the contract, Peruvian law, and the TPA; (iii) MINEM never had authority to grant Addenda 1-2, nor provide any compensatory extensions that exceeded the specific deadlines set forth in the RER Contract; (iv) the suspensions granted under the RER Contract were not actually suspensions of CHM's obligations and the suspended time should count against CHM; (v) neither Peru nor MINEM had any responsibility to assist CHM acquire its permits or overcome regional government opposition to the Project; (v) Peru never committed to submit disputes to an ICSID tribunal in Washington, D.C., if they could be rephrased as requests for declaratory relief, in which case they could be submitted to a panel of the Lima Chamber of Commerce; and (vi) the proposed

supreme decree that MINEM believed to be legally necessary in November 2018 was actually legally prohibited.

17. In its Counter-Memorial, Peru does not deny its December 2018 measures marked a complete reversal of the way in which Peru had interpreted the RER Contract over the course of the Project. Nor does Peru explain the reasons for this reversal other than to say that MINEM had "erred" in its interpretation of the RER Contract from February 2014 to December 2018, but this "err[or]" was inconsequential because the Parties "indisputably knew" at all relevant times that Claimants had assumed all risks related to the Project.[27]

18. As Claimants prove in this Reply, Peru has not met its burden of establishing this defense because it is unfounded, legally untenable, and completely illogical. **First**, Peru's defense is prohibited under the TPA, RER Contract, and Peruvian law. **Second**, there is nothing in the RER Contract or any of the laws it incorporates that in any way would put Claimants on notice that they had ever assumed the unforeseeable and unquantifiable risk of government interference. **Third**, Peru's defense is entirely inconsistent with the investor-friendly objectives of the RER Promotion and the RER Contract, which sought to incentivize investment in these projects. **Fourth**, Peru's defense is also entirely inconsistent with how the Parties interpreted the RER Contract and Peruvian law over the six-year course of their dealings. **Fifth**, Peru has not produced ***any*** evidence that supports its defense and instead relies on theoretical after-the-fact arguments by its lawyers and experts.

19. In stark contrast, Claimants have met their burden of demonstrating that Peru's measures were arbitrary, discriminatory, and the proximate cause of Claimants' damages under the TPA, RER Contract, and Peruvian law. As Claimants stated in their Memorial, this case is

[27] Counter-Memorial, ¶ 142.

unique because Claimants have proven their claims through unimpeachable admissions made by Peruvian government officials. These admissions include, but are not limited to, the following (in chronological order):

a. **January 31, 2012**: MINEM issued Legal Report No. 0026-2012-MEM-AAE-NAE/MEM, which admitted that hydroelectric projects with an installed capacity of twenty (20) megawatts or less that are located in the mountains on unprotected lands (*e.g.*, the Mamacocha Project) should be classified as Category I projects because their environmental impact was expected to be minimal;[28]

b. **October 28, 2014**: MINEM issued Legal Report No. 026-2014-EM-DGE, which admitted that: (i) the Grantor under the RER Contract is the Peruvian State and not MINEM in its individual capacity; (ii) a concessionaire cannot be penalized under the RER Contract when it acts with ordinary diligence and the reason for its noncompliance is attributable to government authorities; and (iii) any interpretation of the RER Contract to the contrary would amount to an "abuse of rights" that is prohibited under Article 103 of the Peruvian Political Constitution;[29]

c. **July 22, 2015**: MINEM, after careful technical and legal reviews, issued Addendum 1, which admitted that: (i) the Project suffered 705-day delays "that could be attributed to the State"; (ii) "the conclusion must be reached that" CHM was not responsible for these delays under "Article 1314 of the Civil Code"; and (iii) Peru had an obligation to grant extensions to the Works Schedule to account for these delays;[30]

d. **October 6, 2016**: MINEM issued Legal Report No. 166-2016-EM-DGE (the "**Sosa Report**"), which admitted that: (i) it would be "an unreasonable allocation of risk" to allocate to CHM the risk of its counterparty's breaches and that any such allocation would require "a clear and unambiguous definition in the [RER Contract], which has not occurred in this case"; (ii) the "for any reason" restriction in Clause 8.4 of the RER Contract "must be interpreted as excluding the delay[s] attributable to" CHM's counterparty; and (iii) not granting extensions to CHM when the delays are attributable to its counterparty would rise to "unreasonable treatment" under international law (citing *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7);[31]

[28] MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).
[29] MINEM's Report No. 026-2014-EM-DGE, October 28, 2014 (C-0212).
[30] Addendum 1 to the RER Contract, July 22, 2015 (C-0008).
[31] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

e. **January 2, 2017**: MINEM, after careful internal technical and legal reviews, issued Addendum 2, which admitted that: (i) the Project suffered 465-day delays "attributable to the Public Administration"; (ii) CHM was not responsible for these delays; and (iii) Peru had an obligation to grant extensions to the Works Schedule to account for these delays;[32]

f. **April 11, 2017**: RGA politicians who supported the RGA Lawsuit held a press conference during which they admitted that the RGA Lawsuit's legal arguments: (i) were completely unprecedented; and (ii) would only be pursued against the Project, despite their acknowledgement that the same ARMA officials had approved 109 other like-kind projects without challenge;[33]

g. **July 13, 2017**: MINEM sends CHM a letter that transmits Legal Report No. 122-2017-MEM/DGE, dated June 28, 2017, which admitted that: (i) when the RER Contract is under suspension the concessionaire's deadlines under the Works Schedule are suspended; (ii) the suspended time will be "in due course, added to the current works schedule" through a formalized contract addendum; and (iii) the extensions under Addendum 2 are binding on the Parties and remain good law;[34]

h. **July 19, 2017**: The head of ARMA, Mr. Benigno Sanz, held a press interview where he admitted that: (i) CHM "has satisfied all requirements" related to its environmental permits; (ii) the RGA had failed to "produce [an] expert report" that supports the RGA Lawsuit; and (iii) ARMA did not "see a reason to oppose the project";[35]

i. **December 5, 2017**: The Special Commission's distinguished outside counsel issued the Morón Report, which admitted that: (i) contrary to the RGA Lawsuit's allegations, "the decision to reclassify the project as Category I was indeed duly grounded"; (ii) the unfounded nature of the RGA Lawsuit's allegations makes it "unlikely that the Court will admit" them; (iii) any irregularities related to the Project's environmental permits "should not be" held against CHM; (iv) the RGA Lawsuit was filed outside the applicable statute of limitations; and (v) the RGA Lawsuit was highly unlikely to succeed;[36]

j. **December 13, 2017**: The Special Commission issues minutes from a special meeting to discuss the Morón Report during which the Special Commission admitted that the Special Commission had agreed to: (i) "warn" the RGA

[32] Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[33] Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).
[34] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[35] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[36] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).

about the Morón Report's conclusions; and (ii) recommend to the RGA that it "reconsider[]" its approach with respect to the RGA Lawsuit;[37]

k. **December 14, 2017**: The Special Commission sends a letter to the RGA, which admitted that the RGA Lawsuit: (i) could "harm . . . [the] State's reputation"; (ii) cause Peru to pay Claimants an award of at least US $15 million, if not "substantial[ly]" more, in an international arbitration; and (iii) "if the Peruvian State loses this investment arbitration, these amounts would have to be borne by the RG of Arequipa";[38]

l. **December 18, 2017**: The RGA Governor sends a letter to the Regional Council (Official Notice No. 1135-2017-GRA/GR), which admitted that: (i) the RGA Lawsuit "was highly unlikely to succeed"; (ii) if Claimants go forward with their noticed claims against Peru, the RGA could face the prospect of paying tens of millions of dollars in arbitration costs and awards; and (iii) for these reasons, it was necessary to withdraw the RGA Lawsuit "in order to safeguard the interests of the [RGA] and the State";[39]

m. **December 21, 2017**: The RGA's Attorney General issued Report No. 278-2017-GRA/PPR, in which the Attorney General admitted that: (i) she "had already pointed out" to the RGA Governor that the RGA Lawsuit's likelihood of success "would be minimal" but her concerns had been ignored; (ii) it was "highly likely that the [RGA] will be made to pay millions to [CHM]" because of the RGA Lawsuit; (iii) the RGA Lawsuit was "harmful to the public interest"; (iv) the RGA politicians who supported the Lawsuit had failed to "provide support for and defend the validity" of the allegations and claims in that Lawsuit; and (v) the RGA Governor should investigate these politicians for their "EVASIVE CONDUCT";[40]

n. **December 27 and 30, 2017**: The RGA Governor ordered the RGA's lawyers to withdraw the RGA Lawsuit and then held a press interview where she admitted that: (i) the RGA Lawsuit was a "time bomb" that, if not withdrawn, could require the RGA "to pay up to S/80 million" and "could also carry criminal charges for causing economic damage to the State"; and (ii) the Special Commission "suggest[ed]" the RGA withdraw the Lawsuit because of the "protections" in the TPA;[41]

o. **April 5 and 17, 2018**: MINEM's distinguished outside counsel issued the Echecopar Reports, which admitted that: (i) it would be unconstitutional to interpret the RER Contract as allocating risks of government interference to

[37] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230).
[38] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[39] Official Notice No. 1135-2017-GRA/GR from Y. Osorio (Regional Governor of Arequipa) to A. Roncalla (Chairman of the Regional Council), December 18, 2017 (C-0232).
[40] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[41] Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010); Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017 (C-0011).

the concessionaire; (ii) such an interpretation would run counter to the objectives of the RER Promotion because "it would undoubtedly discourage investment in RER Projects" and "infringe[] the public interest"; and (iii) in the event of government-caused delays, MINEM must grant corresponding extensions to the Works Schedule and term date;[42] and

p. **November 11, 2018**: MINEM published its proposed supreme decree for comment and, with it, a Statement of Reasons, which admitted that: (i) extending RER projects would promote the interests and objectives of the RER Promotion; and (ii) refusing to hold concessionaires harmless from government-caused delays would expose Peru to liability under international and Peruvian law.[43]

20. In its Counter-Memorial, Peru failed to address most of this documentary evidence. Instead, Peru presents a theoretical legal defense that is unmoored from the evidentiary record and largely pretends that these public admissions never occurred. In the rare instances where it addresses these documents, Peru insists these documents do not say what they expressly say, going as far as making *ad hominem* attacks on Claimants for suggesting these documents say what they expressly say. Rather than respond to these attacks, Claimants submit that the documents speak for themselves. Peru has failed to reconcile these documents or present countervailing evidence that in any way lessens their significant evidentiary weight with respect to the claims and defenses in this case.

21. Claimants obtained almost all of these illuminating documents either through their course of dealing with government agencies during the relevant period or through "Transparency Law" requests that allow Peruvian citizens to obtain public government records.[44] Notably, Peru failed to produce most of these documents during the Disclosure phase of this arbitration even

[42] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[43] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-0018).
[44] Of the twenty (20) documents highlighted in paragraph 19, *supra*: (i) eleven (11) documents come from Transparency Law requests and/or other public sources; (ii) seven (7) documents come from the Parties' course of dealing in the relevant period; and (iii) only two (2) documents come from Peru's document production in this arbitration.

though these documents were carefully described and are public government records that have been produced to third-parties outside of this arbitration under Peru's Transparency Law. In fact, even after the Tribunal ordered production, Peru failed to produce responsive documents to several of Claimants' document requests during the Disclosure phase without justification. For these reasons, as detailed in **Section II.I**, *infra*, Claimants respectfully request that the Tribunal makes reasonable negative inferences from Peru's failure to produce responsive documents.

22. In addition to submitting hundreds of additional exhibits with this Reply, Claimants present witness testimony from seven (7) fact witnesses: (i) the second witness statement of Mr. Michael Jacobson ("**Jacobson II**"), Claimants' founder, co-owner, and co-Sponsor; (ii) the second witness statement of Mr. Goran Stefan Sillen ("**Sillen II**"), Latam Hydro's former CEO and President; (iii) the second witness statement of Mr. Andrés Bartrina ("**Bartrina II**"), Latam Hydro's former Project Manager and Technical Consultant; (iv) the second witness statement of Dr. Licy Benzaquén ("**Benzaquén II**"), CHM's legal representative; (v) the second witness statement of Dr. Roberto Santiváñez ("**Santiváñez II**"), Claimants' lead energy lawyer; (vi) the second witness statement of Mr. Carlos Diez Canseco ("**Diez Canseco II**"), CHM's former Manager; and (vii) the first witness statement of Mr. Jorge Chávez Blancas ("**Chávez I**"), Claimants' former environmental consultant.

23. With this Reply, Claimants also submit independent expert opinions by:

a. Professor Christoph H. Schreuer, a pre-eminent international law and treaty expert and distinguished professor of investor-state arbitration at the University of Vienna, who rebuts Peru's jurisdictional and merits defenses under the TPA and public international law ("**Schreuer I**");

b. Dr. Michael Whalen, a renowned project financing expert with Berkeley Research Group, who previously served as the head of the structured and project finance sections of the Overseas Private Investment Corporation and the Export-Import Bank of the United States, who rebuts Peru's defenses regarding Claimants' financing strategy and the effect Peru's measures had on the Mamacocha Project ("**Whalen I**");

c. Dr. Maria Teresa Quiñones, a prominent Peruvian administrative law expert, who analyzes and rebuts Peru's defenses under Peruvian administrative law ("**Quiñones II**");

d. Dr. Eduardo Benavides, a prominent Peruvian civil law expert, who analyzes and rebuts Peru's defenses under Peruvian civil law ("**Benavides II**");

e. Mr. John H. McTyre, Partner at HKA Global Ltd., an internationally respected construction and delay claim expert, who rebuts Peru's delay-related defenses and confirms Peru was responsible for 1742 days of delays to the Project ("**HKA Report II**");

f. Messrs. Santiago Dellepiane and Andrea Cardani, Managing Director and Director, respectively, at Berkeley Research Group, who rebut Peru's damages-related defenses and stand by their conclusion that Claimants suffered damages exceeding US $45 million as a direct result of the measures inflicted by Peru ("**BRG Report II**").

24. Together, Claimants' documentary evidence, witness testimony, and expert reports demonstrate that Peru was responsible for the destruction of the Mamacocha Project and Upstream Projects and that the measures Peru undertook constitute actionable claims under Articles 10.4, 10.5, and 10.7 of the TPA, Clauses 1.4.26, 2.2.1, 4.3, 11.3, and Addenda 3-6 of the RER Contract, as well as under binding legal obligations embodied in public international law and Peruvian civil and administrative laws.

25. As a direct result of these violations and breaches, Claimants seek the following relief: (i) damages in a quantum required to fully compensate Claimants for their lost investments; (ii) return of the US $5 million performance bond under the RER Contract and the US $71,500 performance bond for the transmission line, (iii) a declaration that the RER Contract is terminated and CHM has no further obligations arising thereunder; (iv) a declaration that the Confidentiality Agreement, dated December 2017 (the "**Confidentiality Agreement**"), which the Parties executed during their settlement negotiations, is terminated and CHM has no further obligations arising thereunder; (v) issuance of a recommendation for Peru to terminate the

criminal proceedings against Claimants' legal representative, [redacted]; and (vi) such other relief requested in this Reply or that the Tribunal determines to be just and proper.

26. This Reply is structured as follows: **Section II** rebuts Peru's false narratives about the factual background of this case; **Section III** rebuts Peru's jurisdictional objections under the TPA and public international law; **Section IV** rebuts Peru's merits-based defenses under the TPA and public international law; **Section V** rebuts Peru's defenses under the RER Contract and Peruvian law; **Section VI** establishes that Claimants are no longer bound by the Confidentiality Agreement because Peru materially breached that Agreement when it unilaterally introduced evidence about the Parties' settlement discussions and thereby, waived its right to raise defenses under that Agreement; **Section VII** rebuts Peru's damages-related defenses; and **Section VIII** sets out Claimants' updated Request for Relief.

II. PERU'S FACTUAL NARRATIVE IS MISLEADING, INCOMPLETE, AND CONTRADICTED BY THE FACTUAL RECORD

27. As Claimants demonstrate throughout this Reply, including in their accompanying witness statements and expert reports, the Counter-Memorial contains a litany of misstatements, incomplete statements, inaccuracies, and gaps that form an attempt to reconstruct a new fictional narrative that in material ways is contradicted by the actual events that occurred before Peru's pirouette in perspective toward the Project in December 2018. Peru presents its fictional narrative with scant contemporaneous evidentiary support and in almost complete reliance on after-the-fact argumentation and opinions from its lawyers and experts.

28. Peru's failure to present sufficient and contemporaneous evidentiary support is dispositive. It is well-settled in investor-State jurisprudence that, "[i]n accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts"[45] as well as the burden of proving its defenses.[46] As fully demonstrated in this Section, Peru has not come close to meeting these burdens here.

29. Peru's misstatements and misleading assertions are far too numerous to rebut each one. Claimants will address only those that are material to Claimants' claims and Peru's defenses in this arbitration.

A. Peru's Mischaracterization Of The RER Contract Contradicts The Overall Purpose Of The RER Promotion

30. Claimants proved in their Memorial that the RER Contract was the product of the RER Promotion, which was a years-long promotional campaign created in 2008 by Peru to

[45] *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No ARB/02/7, Award, July 7, 2004, ¶ 58 (RL-0067).
[46] *See, e.g.*, *Vito G Gallo v. Government of Canada*, UNCITRAL, PCA Case No 55798, Award, September 15, 2011, ¶ 277 (RL-0069) ("[T]he principle *actori incumbit probatio* is a coin with two sides: the Claimant has to prove its case, and without evidence it will fail; but if the Respondent raises defences, of fraud or otherwise, the burden shifts, and the defences can only succeed if supported by evidence marshalled by the Respondent").

attract foreign investment in its renewable energy sector. Peru wanted to meet increasing demand for clean energy through the development of its abundant renewable energy resources ("**RER**").[47] That market had remained largely untapped due to significant economic and political risks that had traditionally disincentivized developers and financial institutions from financing RER projects in Peru.[48] The RER Promotion sought to "eliminat[e] these barriers" by offering private foreign investors myriad "incentives" that made these projects "bankable"—*i.e.*, attractive to financial institutions—and eliminated or reduced the traditional risks that had previously made RER projects infeasible.[49]

31. These incentives included, *inter alia*: (i) a "Guaranteed Revenue" concession that ensured RER developers they could receive fixed-revenue streams for up to twenty (20) years if they produced a baseline amount of electricity on an annual basis;[50] (ii) a stable "legal framework" that "encourage[d]" investments in RER projects by "amend[ing] existing rules and regulations that ha[d] not been effective due to the fact that they lack minimum incentives provided for in comparative law";[51] and (iii) the promise that government agencies would "promote" and protect these projects because they were "of national interest and public necessity."[52] Claimants relied on these sovereign guarantees when they answered Peru's call for private foreign investment and invested millions of dollars under the RER Contract.

32. In its Counter-Memorial, Peru does not dispute this backdrop. Instead, Peru contends that regulatory amendments in July 2013 had the dramatic effect of shifting the RER Promotion from an investor-friendly regime, where development risks are reduced and barriers

[47] Whalen I, ¶¶ 4.2.1-4.2.3.
[48] Whalen I, ¶ 4.2.4.
[49] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).
[50] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.26 (C-0002).
[51] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).
[52] Legislative Decree No. 1002, May 1, 2008, Art. 2 (C-0007).

to investment are eliminated, to a draconian regime where Peru could terminate the RER Contract and call the performance bond if the concessionaire did not meet its contractual deadlines "for any reason."[53] And, according to Peru, "for any reason" includes instances where, as here, government authorities arbitrarily interfered with the RER project by pursuing politically charged lawsuits to nullify key permits, opening baseless criminal investigations against the project's legal representative, and delaying or denying critical permits and approvals without justification.[54] This cynical interpretation is part of Peru's defense that, under the RER Contract, the concessionaire and its sponsors assumed all risks, including the risk that government agencies would interfere with their project even if such interference would otherwise constitute a breach of the government's contractual obligations under the RER Contract or its obligations of protection under the TPA**.**

33. In **Section V.A.3**, *infra*, Claimants refute Peru's legal arguments about the risk-allocation paradigm under the RER Contract. In the Section immediately below, Claimants demonstrate that Peru has not met its burden of demonstrating the regulatory amendments in July 2013 caused the seismic shift in risk-allocation that Peru espouses here. Peru's interpretation of these amendments is irreconcilable with the text of those amendments as well as the investor-friendly objectives under the RER Promotion. And although Peru claims that this shift in risk-allocation was "indisputabl[e]" in July 2013,[55] it has failed to produce any documentary evidence from 2013 through December 2018 where either party acknowledged that such a seismic shift in risk-allocation had occurred. Quite to the contrary, the evidentiary record is replete with admissions from Peru that Claimants must be held harmless from government interference and

[53] Counter-Memorial, ¶¶ 96-98.
[54] *See, e.g.*, Counter-Memorial, ¶ 898 (stating that "for any reason" includes "*causes attributable to agencies of the State of Peru*" (emphasis in original).
[55] Counter-Memorial, ¶ 142.

that it would be illegal for Peru to interpret the RER Contract in a manner that would immunize its breaches. It was not until December 2018, when it became politically and economically expedient for Peru to turn its back on the Project, that Peru ***for the first time*** adopted the position that Claimants assumed the unforeseeable and unquantifiable risks of government delays, interferences, or misconduct.

1. Peru's Interpretation Of The RER Contract's Allocation Of Risks Is Irreconcilable With The Object And Purposes Of The RER Promotion Law And The Conduct Of The Parties

34. According to Peru's revisionist view,[56] an RER concessionaire had no legal basis to expect it would receive extensions to the contract deadlines, monetary compensation, or any other form of relief even in the extreme circumstance (as happened here) where the government solely and unilaterally prevented the concessionaire from completing the project on time despite its diligent efforts. Instead, according to Peru,[57] the RER concessionaire would be expected to increase its performance bond by 20% for every contractual deadline the concessionaire missed because of government delays or interferences and, if the government delays or interferences made the concessionaire miss all the contractual deadlines, the concessionaire would be expected to suffer all consequences, including termination of the RER Contract, forfeiture of its performance bonds and loss of its investments in the RER project. As for Peru's own liability under the RER Contract for government delays or interferences, Peru alleges it has none because the RER concessionaire knowingly assumed the risk of all types of interference to their projects, "*including causes attributable to agencies of the State of Peru*" (emphasis in original).[58]

[56] Counter-Memorial, ¶¶ 422-424.
[57] Counter-Memorial, ¶¶ 427-431.
[58] Counter-Memorial, ¶ 898.

35. Peru's strained interpretation of the risk-allocation structure under the RER Contract does not square with the statute that created the RER Promotion, the "Legislative Decree for the Promotion of Investment for the Generation of Electricity from Renewable Energies" ("**Legislative Decree No. 1002**" or "**RER Law**").[59] The RER Law's mandates and objectives are unambiguously investor-friendly. The RER Law provides that its purpose is to promote RER projects by "***eliminating any barrier or obstacle for their development***" through the creation of a "legal framework" that "***encourage[s] these investments*** and amend[s] existing rules and regulations that have not been effective due to the fact that they lack minimum incentives provided for in comparative law."[60] The RER Law further provides this legal framework must "***give incentives to promote the investment***" in RER projects because "the development of new electric generation through the use of RER [is] of ***national interest and public necessity***."[61] And, to ensure that these objectives are implemented, the RER Law instructed MINEM to create a regulatory regime that allowed for their "proper application" ("**RER Regulations**").[62]

36. Nothing in the RER Law supports Peru's current positions that: (i) the legal framework governing these projects allocates all risks to the concessionaire; and (ii) the RER Contract can be terminated and the performance bond taken regardless of whether the RER concessionaire did anything wrong. Allocating all risks of government interferences and delays to the concessionaire runs counter to the express purpose of the RER Law because such a one-sided allocation of risks would create an insurmountable barrier for would-be investors interested in developing RER projects in Peru. Further, Peru's contention that RER projects can never be

[59] Legislative Decree No. 1002, May 1, 2008 (C-0007).
[60] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007) (emphasis added).
[61] Legislative Decree No. 1002, May 1, 2008, Preamble and Art. 2 (C-0007) (emphasis added).
[62] Legislative Decree No. 1002, May 1, 2008, Supplementary Provisions (C-0007).

extended and must be terminated if commercial operation is not met "for any reason,"[63] runs directly counter to the RER Law's express edict that these projects should be promoted and safeguarded because their success is "of national interest and public necessity."[64]

37. As Mr. Michael Jacobson—the Project's Sponsor, a former senior executive at eBay, Inc., and a long-time investor in renewable energy projects—explains:

> Further, as a long-time investor, I would never commit millions of dollars of my own money—as I did here—if my investments could unilaterally and "for any reason" be destroyed by my counter-party without recourse. To the contrary, I invested in the Mamacocha Project because the regulatory framework that Peru designed to incentivize and facilitate foreign investments in its renewable energy resources expressly guaranteed my investments would be protected and safeguarded under Peruvian and international law. Candidly, I think it is ridiculous that Peru would have the Tribunal believe the RER Promotion incentivized foreign investment while, at the same time, allocating all unquantifiable and unknowable risks of the government's own misconduct to the investors. This position is completely and hopelessly irreconcilable.[65]

38. Peru does not dispute that the RER Law created an investor-friendly regime aimed at promoting and protecting RER projects. Instead, Peru alleges that, in July 2013, MINEM unilaterally flipped this regime on its proverbial head by amending the RER Regulations in a way that allocated all risks to the concessionaire.[66] Specifically, Peru points to Supreme Decree No. 024-2013-EM ("**SD 24**"), which MINEM issued in July 2013 in order to amend the RER Regulations as follows: (i) Article 1.13.B was amended to state that the term date for the RER Contract ("**Term Date**") "may not be modified for any reason whatsoever" and (ii) Article 1.13.C was amended to state that the Commercial Operation Start-Up ("**COS**") deadline "may not be more than two (02) years after the Reference Date of Commercial

[63] Counter-Memorial, ¶ 898.
[64] Legislative Decree No. 1002, May 1, 2008, Art. 2 (C-0007).
[65] Jacobson II, ¶ 61.
[66] Counter-Memorial, ¶¶ 96-98; 427-431.

Operation Start-Up; otherwise, the Contract shall be automatically terminated, and the Performance Bond shall be enforced."[67] Based on these amendments, MINEM changed the RER Contract as follows: (i) Clause 1.4.22 was changed to reflect that the Term Date "cannot be modified for any reason whatsoever"; (ii) and Clause 8.4 of the RER Contract was changed to reflect that if COS was not achieved by its contractual deadline "for any reason" the RER Contract can be terminated and the performance bond can be called.[68]

39. Peru alleges these changes, on their face, evince a clear intent to shift to the RER concessionaire all risks that the project would not achieve COS in time.[69] Its rationale is that if MINEM intended to exclude causes imputable to the State, it would have done so expressly. And Peru alleges that CHM knowingly accepted these risks when it signed and executed the RER Contract in February 2014 because, by that time, these changes had already been implemented and disseminated to all concessionaires who (like CHM) participated in the third public RER auction ("**Third Auction**").[70] This allegation is unfounded for several reasons.

40. **First**, the RER Regulations cannot be interpreted in a manner that is inconsistent with the RER Law's plain language and purpose.[71] The RER Law expressly provides that the RER Regulations' sole purpose is to allow for the "proper application" of the Law's mandates and objectives.[72] This restriction is consistent with Section 118(8) of the Political Constitution of Peru, which provides that the President and the Ministers shall "[e]xercise their power to regulate laws ***without breaching or distorting them*** and, within those restrictions, issue decrees

[67] Counter-Memorial, ¶¶ 96-98; 427-431.
[68] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.22 and 8.4 (C-0002).
[69] Counter-Memorial, ¶ 898.
[70] Counter-Memorial, ¶¶ 427-445.
[71] Quiñones II, ¶ 211.
[72] Legislative Decree No. 1002, May 1, 2008, Supplementary Provisions (C-0007).

and resolutions."[73] And, as Dr. Quiñones explains, this restriction is consistent with Article 51 of the Political Constitution, which requires that "the Constitution prevails over the law and the law prevails over the legal norms of a lower hierarchy,"[74] such as regulations:

> Additionally, as I have already pointed out, it would be illegal for a regulatory norm to seek to modify the system of attribution of responsibility of higher hierarchical norms such as the Constitution, the Civil Code, the RER Promotion Law and the Administrative Procedure Law, which oblige the state to act in good faith, assume responsibility for the breach of the legal framework and its contractual obligations, prohibiting arbitrary action and the confiscation of investors' rights.[75]

41. For these reasons and those fully set out in **Section V.A.3**, *infra*, the RER Regulations must be interpreted in a manner consistent with the RER Law. An inconsistent interpretation would be subject to constitutional vulnerability. As explained above, Peru's interpretation of the RER Regulations, as amended by SD 24, does not square with the RER Law's mandates and objectives and nothing submitted by Peru proves otherwise. It is, thus, unconstitutional.

42. **Second**, Peru does not point to any support in SD 24's legislative history for its baseless position that MINEM intended to allocate risks wholly to concessionaires. To the contrary, the legislative history shows that MINEM intended ***only*** to make it harder for RER concessionaires to obtain extensions to the RER Contract when ***they*** were at fault for the delays to the project or in *force majeure* circumstances where a delay was caused by events outside the control of either contract party. It is undisputed in this arbitration that MINEM promulgated SD 24 in response to delays incurred during implementation of the first two public RER auction

[73] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, p. 6 (C-0235) (emphasis added).
[74] Quiñones II, ¶ 207.
[75] Quiñones II, ¶ 211.

projects.[76] As Peru concedes, those delays existed because "the RER project's awardee did not really intend to go through with construction, but expected to sell the RER project to third-parties with an interest in developing it."[77] According to Peru's fact witness, Mr. Jaime Mendoza, these delays resulted in many of these projects getting extensions under their RER contracts for "up to 5 years."[78] These were the delays MINEM was addressing when it issued SD 24. MINEM was not addressing delays caused by government interference, such as those at issue here.

43. Peru has not submitted any evidence to the contrary. Nor has Peru submitted any evidence supporting its contention that SD 24 authorized Peru to terminate an RER Contract or call or increase a performance bond in respect to delays caused by a Peruvian government entity. Significantly, in response to Claimants' direct discovery request on this issue, Peru failed to produce any documents from the legislative history of SD 24 supporting its unreasonable interpretation.

44. Peru's failure to produce ***any*** evidence supporting its counter-intuitive interpretation of SD 24 is telling. Had SD 24 really implemented the changes Peru claims in this arbitration, there should have been internal technical and legal reports from MINEM analyzing and supporting such a seismic shift of the risk allocation balance undergirding the legal framework of the RER Promotion. And there should have been correspondence or public reports from MINEM aimed at industry participants that expressly notified them of these drastic changes to the RER Contract and RER Regulations. But, again, Peru has not produced any such technical or legal analysis or communications (whether internal or external) supporting its litigation

[76] Counter-Memorial, ¶¶ 94-96.
[77] Counter-Memorial, ¶ 95. By contrast, Claimants had an unwavering commitment to exercise the rights granted by the auction award, including through development, construction, and operation of the Project.
[78] Witness Statement of Jaime Raúl Mendoza Gacon, ¶ 43.

position. The Tribunal, applying negative inferences, should conclude that no such contemporaneous proof exists for Peru's alleged radical departure.

45. The sole legislative history document produced by Peru—the "Statement of Reasons" that MINEM published contemporaneously with SD 24—identifies MINEM's rationale for promulgating SD 24.[79] This two-page document confirms that the changes in SD 24 were aimed at curbing the types of delays that occurred during the first two RER auctions, *i.e.*, delays caused by concessionaires who had no interest in developing their RER projects but instead were just trying to flip them for a short-term profit.[80] Further, as shown in the excerpt below, MINEM explained in the Statement of Reasons that those delays ran counter to the RER Law's mandate to promote and advance RER projects and to ***protect the interests of the projects' private investors***:

> The experience gathered from the two Auctions for Electricity Supply Using Renewable Energy Resources carried out to this date, as well as from the implementation of different projects derived from such auctions, has made it possible to identify the need to introduce certain changes to the Regulations for Legislative Decree No. 1002 in order to facilitate the implementation of projects, easing unnecessary restrictions, where possible, and reducing private-party uncertainties caused by successive requests for modification of the Works Execution Schedules, which in turn are caused by unnecessarily stringent requirements, ***the main parties interested in the timely completion of each project being the investors themselves***.[81]

46. MINEM's focus on the interests of the projects' private investors demonstrates that MINEM never intended to allocate all risks to the concessionaires, as Peru now contends. Allocating risks in that manner would have only harmed the interests of private investors, like Mr. Jacobson, whose investments would be subjected to the whim of government agencies.

[79] Email from P. Gonzalez-Orbegoso (GCZ) to R. De Batz (Innergex), April 3, 2017 (C-0211).
[80] Email from P. Gonzalez-Orbegoso (GCZ) to R. De Batz (Innergex), April 3, 2017 (C-0211).
[81] Email from P. Gonzalez-Orbegoso (GCZ) to R. De Batz (Innergex), April 3, 2017 (C-0211). (emphasis added).

Rather, as the above excerpt demonstrates,[82] MINEM's intention was to disincentivize the practice of concessionaires who failed to move the projects forward, which ran counter to the RER Law's mandate of advancing RER projects and to the interests of private investors who wanted their projects to reach commercial operation so they could realize the return on their investments.

47. Importantly, Peru in its Counter-Memorial does not even reference the Statement of Reasons as supporting its counter-intuitive interpretation of SD 24. Instead, Peru relies nearly exclusively upon its after-the-fact, theoretical legal analysis and argumentation from Peru's lawyers and experts in this arbitration. Peru fails to prove its position relying upon contemporaneous documents, reports, or analyses from MINEM or Peru's energy regulator, OSINERGMIN.

48. The lone exceptions are documents that MINEM and OSINERGMIN circulated to the participants in the Third Auction, including CHM.[83] The first document is a Sworn Statement that each participant was required to sign prior to the Third Auction.[84] The Sworn Statement provides that the participant acknowledges that the Term Date cannot be modified "for any reason, even when there are events of *force majeure*."[85] The second document contains answers from MINEM to questions submitted by the participants.[86] Peru specifically focuses on one exchange where MINEM confirms that the Term Date cannot be moved even when the delays are the result of a *force majeure* event.[87]

[82] Email from P. Gonzalez-Orbegoso (GCZ) to R. De Batz (Innergex), April 3, 2017 (C-0211).
[83] Counter-Memorial, ¶¶ 422-445.
[84] Sworn statement regarding recognition of the non-modifiable nature of the contract Term Date, even when force majeure events occur, CH Mamacocha, October 30, 2013 (R-0138).
[85] Sworn statement regarding recognition of the non-modifiable nature of the contract Term Date, even when force majeure events occur, CH Mamacocha, October 30, 2013 (R-0138).
[86] Circular No. 1, Committee for the Third Auction, September 10, 2013 (R-0101).
[87] Circular No. 1, Committee for the Third Auction, September 10, 2013 (R-0101).

49. But these documents serve no purpose here because it is undisputed that this case does not involve delays caused by *force majeure* events. As Dr. Benavides explains, Peruvian law defines *force majeure* events as events that are unforeseeable and outside the contract parties' control.[88] Because the Peruvian State (one of the contract parties) is responsible under Peruvian and international law for all Peruvian government entities, delays caused by governmental authorities are not *force majeure* events but, rather, contractual breaches. And, as Dr. Quiñones confirms, it would be entirely unreasonable to interpret those materials as indicating that CHM agreed to assume the risk of government delays or interferences and/or waive its right to compensation:

> [I]n the [Third Auction materials] there is no provision that obliges the Concessionaire to assume the consequences of the negligent and fraudulent acts of the Grantor; much less require the Concessionaire to waive compensation for the damages that the Grantor caused through its breaches.[89]

50. None of the documentary "proof" presented by Peru addresses delays, interferences, or breach by a counter-party. Significantly, when MINEM wanted to notify the concessionaire community that *force majeure* would no longer serve as a ground for delays or extensions, MINEM made it known expressly so that everyone would be put on notice of this change.[90] Under these circumstances, it would be unreasonable to conclude that MINEM intended to add *sub silentio* a new, counter-intuitive, and legally unsustainable burden on concessionaires, without even a comment in the Statement of Reasons, without any express language in the RER Regulations or the Third Auction materials, and without any express language in the RER Contract itself.

[88] Benavides II, ¶¶ 203-205.
[89] Quiñones II, ¶ 212.
[90] Circular No. 1, Committee for the Third Auction, September 10, 2013 (R-0101).

51. As Mr. Jacobson explains, if Claimants had ***any*** inkling they were being asked to assume the risks of government interference, Claimants would have never pursued this Project:

> As a good-faith investor in the Peruvian renewable energy sector, I am completely dismayed to see that Respondent falsely alleges that Latam Hydro and CHM knowingly assumed all risks arising from the Mamacocha Project, including the unknowable and unquantifiable risk that Respondent would unilaterally interfere with the Project. Respondent even goes as far as to allege that, under the RER Contract, we knowingly assumed the risk that our counterparty would breach its contractual obligations.[91] This allegation borders on the frivolous. As a trained corporate lawyer who for the last forty (40) years has counseled clients with respect to hundreds if not thousands of contracts, I have never come across a situation where a contract party has knowingly assumed such a risk. Nor, in my opinion based on my legal training and experience, would any court, tribunal, or arbitral panel ever find that a party assumed such a risk because such an interpretation would be unconscionable as a matter of law.[92]

52. In sum, there is no evidentiary support for Peru's interpretation that SD 24 upended the risk-allocation scheme under the RER Promotion and made extensions to the RER projects impossible even in instances where Peru was solely responsible for delays. Instead, the evidentiary record, contract construction principles and ordinary commercial common sense confirm that MINEM promulgated SD 24 for the specific purpose of ensuring RER Projects would not be unnecessarily delayed by concessionaires who had no intention or ability to advance them. This reasonable interpretation is consistent with the RER Law's avowed purpose of eliminating barriers to the development of RER projects. Peru has failed in its burden to prove that the introduction of new restrictions on extensions under SD 24 became a Pandora's Box to insulate the government counterparty from fault for its delays, interferences, or other breaches of the concessionaire's contractual and treaty protections.

[91] Expert Report of Claudio Lava, ¶¶ 5.35-5.38.
[92] Jacobson II, ¶ 60.

53. Respondent's counter-factual interpretation could also lead to the absurd possibility whereby the government counterparty could unilaterally sabotage a project with impunity, thereby, making it impossible for the concessionaire to comply with the RER Contract's deadlines. Under this interpretation, the RER concessionaire would lose its entire investment, but the government counterparty would be rewarded for its own bad conduct by being allowed to terminate the RER Contract and collect the performance bond. While this scenario may sound extreme, it is exactly what happened to Claimants' investment. For these reasons and those in **Section V.A.3**, *infra*, this interpretation cannot be reconciled with the RER Law and must, therefore, be rejected.

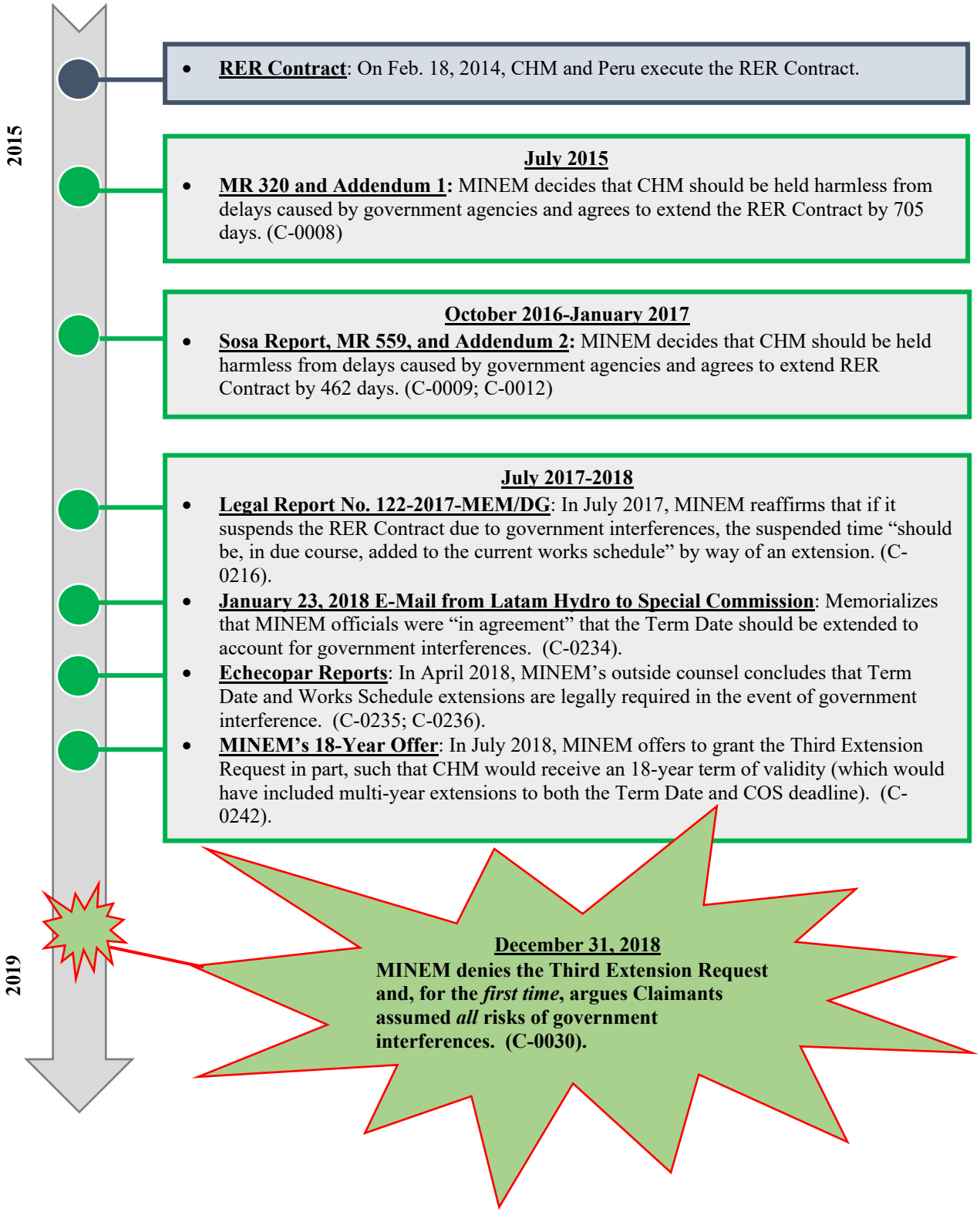
2. Peru's Current Interpretation Of The Risk-Allocation Structure Under The RER Contract Contradicts Its Historical Positions And Statements On This Key Issue

54. Peru avers that the factual record "indisputably" demonstrates that Claimants willingly assumed under the RER Contract: (i) all permitting risks, including the risk of undue delays by permitting agencies; (ii) the risk that government agencies would make it impossible for CHM to achieve COS by the deadline; and (iii) the risk that government delays or interferences would reduce the 20-year term of validity promised under the RER Contract.[93]

55. But, as shown below, the contemporaneous evidentiary record "indisputably" demonstrates the exact opposite. From 2014 through December 2018, the Parties made clear through contract modifications, ministerial resolutions, legal reports, technical memoranda, press interviews, and correspondences that Peru had a legal obligation under the RER Contract and its governing laws to grant CHM extensions to compensate for government delays or interferences.

[93] Counter-Memorial, ¶ 142.

56. As depicted below, the ***first time*** Peru posited that CHM assumed all risks of government interferences was on December 31, 2018, the same day Peru destroyed the Project:



a. In 2015, MINEM Determined That CHM Should Be Held Harmless From Permitting Delays Attributed To The Government

57. The first time Peru faced a decision on how to interpret the extension restrictions applicable to the Mamacocha Project was on July 3, 2015, when MINEM executed and published Ministerial Resolution No. 320-2015-MEM/DM ("**MR 320**") approving CHM's first request for extensions to the contractual deadlines in the Works Schedule.[94] CHM made this request in November 2014 in response to substantial permitting delays by government agencies that impeded CHM's ability to meet the milestone deadlines under the Works Schedule, including the deadline to achieve COS by the date originally contemplated date (*i.e.*, January 2, 2017).[95] CHM asked MINEM to grant extensions to each of the Works Schedule milestones, including a 705-day extension to the originally contemplated COS date.[96]

58. As stated in MR 320, MINEM evaluated CHM's request and "deemed it appropriate to grant the extension of the term requested due to delays that could be attributed to the State."[97] MR 320 acknowledges that CHM's inability to comply with the original milestones under the Works Schedule ***could not be held against CHM*** under Article 1314 of the Civil Code because CHM had acted "with ordinary due diligence" and it was evident that the government's delays had "made it impossible" for CHM to perform its milestone obligations, as shown in the excerpt below:

> Via Official Document No. 504-2015-MEM/DGE, the General Directorate of Electricity of the Ministry of Energy and Mines deemed it appropriate to grant the extension of the term requested ***due to delays that could be attributed to the State***.
>
> Inasmuch as the aforementioned delays in the administrative procedures made it impossible to achieve Financial Closing for the project, entailing the failure to comply with the terms of the

[94] Addendum 1 to the RER Contract, July 22, 2015, p. 8 (C-0008).
[95] HLA Letter to General Directorate of Electricity, Ministry of Energy and Mines, November 24, 2014 (C-0149).
[96] HLA Letter to General Directorate of Electricity, Ministry of Energy and Mines, November 24, 2014 (C-0149).
[97] Addendum 1 to the RER Contract, July 22, 2015, p. 9 (C-0008).

> Milestones of the Works Execution Schedule of the Concession Agreement—having failed to conclude with the process of financing the project—the conclusion must be reached that ***said events of non-compliance do not fall within the scope of the Concessionaire's ability***, applying article 1314 of the Civil Code which establishes that a party acting with the ordinary due diligence cannot be held responsible for failure to execute obligations or for the partial, late, or defective compliance with said obligations;
>
> In this sense, the Parties agreed to modify the Works Execution Schedule of the Concession Agreement and exend the term for the [COS] of the Laguna Azul Hydroelectric Plant by 705 calendar days, setting it for December 8, 2018[.][98]

59. On July 22, 2015, MINEM executed Addendum 1, which amends the Works Schedule in accordance with the conclusions in MR 320.[99] Consistent with MR 320, Addendum 1 affirms (i) the requested extensions were legally necessary because the delays in question had been caused by government agencies in Arequipa during the permitting phase of the Project; (ii) the record established that CHM had acted with "ordinary due diligence;" and (iii) accordingly, CHM could not be penalized for these delays under Article 1314 of the Civil Code.[100]

60. The takeaways from MR 320 and Addendum 1 are self-evident. MINEM had a legal obligation under Peruvian law to hold CHM harmless from delays that were attributable to government agencies. There is nothing in either document that supports Peru's current view that CHM assumed all risks related to delays to the Project, including the risk of permitting delays attributable to government agencies. To the contrary, these documents reached the opposite legal conclusion, finding that in the event of such delays, MINEM was required to grant extensions under the RER Contract to make CHM whole. This conclusion was not only obvious to all the participants in this contract amendment process, but it was the only reasonable

[98] Addendum 1 to the RER Contract, July 22, 2015, p. 9 (C-0008) (emphasis added).
[99] Addendum 1 to the RER Contract, July 22, 2015, pp. 3-4 (C-0008).
[100] Addendum 1 to the RER Contract, July 22, 2015, pp. 4-6 (C-0008).

interpretation that Claimants, as investors, could glean from these clear positions by MINEM. Based upon this interpretation and MINEM's execution of Addendum 1, Claimants relied upon this protection by continuing their investments and development activities.

61. Peru does not deny that MINEM granted these extensions under Addendum 1. Instead, Peru contends that MINEM was tricked into granting this request through some "ruse" by CHM.[101] According to Peru, CHM knowingly inflated the delay numbers in its request because it supposedly knew that MINEM "did not have access to the files for the permits applied for by CH Mamacocha, and it therefore based its analysis solely on the information provided by the latter."[102] This defense is completely fallacious and made up out of whole cloth.

62. **First**, Peru's defense focuses only on the accuracy of the delay tally and does nothing to refute the important fact that MINEM believed at the time that it had a legal duty to hold CHM harmless from permitting delays caused by government agencies.[103] This fact, alone, contradicts Peru's contention in this arbitration that it had always been "clear" to the Parties that the RER Contract allocated all permitting risks to CHM, including the risk that government agencies would unduly delay their issuance of the Project's permits.

63. **Second**, Peru's allegations about the so-called "ruse" are unfounded. Peru does not introduce any evidence supporting its allegations that MINEM did not have access to the permitting files or that CHM somehow knew MINEM did not have such access. To the contrary, as the testimony of Mr. Andrés Bartrina confirms, MINEM had regional prefects that coordinated closely with permitting agencies in Arequipa with respect to the Project.[104] Nor

[101] Counter-Memorial, ¶ 182.
[102] Counter-Memorial, ¶ 181.
[103] Addendum 1 to the RER Contract, July 22, 2015 (C-0008).
[104] Bartrina II, ¶ 22.

does Peru cite to any rules or procedures that mandate concessionaires to count delays in the specific manner that Peru now espouses. This appears to be after-the-fact justification, not proof.

64. **Third**, contrary to Peru's current narrative, the factual record demonstrates MINEM ***did*** have access to the permitting files and further, that MINEM independently tested the veracity of CHM's delay numbers no fewer than six (6) times over an eight-month period, as shown below. As a result of this exhaustive independent technical analysis, OSINERGMIN and MINEM came up with their own calculated delay figure, which differed from the delay request by CHM. Ironically, OSINERGMIN and MINEM concluded that CHM had ***understated*** the amount of delays caused by government agencies:

a. February 23, 2015: At MINEM's instruction, OSINERGMIN engineers, Messrs. Rigoberto Valdez Estrada and Guillermo Echeandia, issued Technical Report No. GFE-USPP-23-2015, which memorializes OSINERGMIN's independent assessment of CHM's request.[105]

b. February 24, 2015: OSINERGMIN's Manager, Mr. Eduardo Jane la Torre, submitted OSINERGMIN's approval of the Technical Report to MINEM.[106]

c. April 6, 2015: A legal advisor to MINEM's Directorate General of Electricity, Mr. Yuri Peralta Diaz, issued Legal Report No. 005-2015-EM-DGE, which memorializes MINEM's independent assessment of CHM's request and concludes that the delays imputable to government agencies totals 763 days, *i.e.*, ***58 days more than what CHM represented in its request***. The Report, however, recommends approving only

[105] Report No. GFE-USPP-23-2015, February 23, 2015 (C-0246).
[106] CH Mamacocha S.R.L.'s Jurisdictional Objection, February 21, 2020, ¶ 174 (C-0099).

705-day extensions to the Works Schedule because that was what CHM had requested.[107]

d. April 6, 2015: The Director of MINEM's Directorate General of Electricity, Mr. Luis A. Nicho Diaz, informed CHM through Official Notice No. 504-2015-MEM/DGE that MINEM had approved its extension request.

e. July 3, 2015: MINEM's Minister, Mrs. Rosa Maria Ortiz Rios, following a review by her Cabinet of Advisors, her own review, and the approval of the Vice-Minister of Energy, Mr. Raul Ricardo Perez Reyes Espejo, signed MR 320, which memorializes the fact that MINEM and OSINERGMIN assessed and approved CHM's request.[108]

f. July 22, 2015: MINEM and CHM execute Addendum 1, which also memorializes the fact that MINEM and OSINERGMIN assessed and approved CHM's request.[109]

65. These facts expose the unfounded nature of Peru's assertions about the extensions under Addendum 1. **First**, the facts establish there was no "ruse" of any kind. **Second**, the facts contradict Peru's self-serving position, made years after-the-fact, that these extensions were based on inflated numbers. **Third**, the facts reveal that OSINERGMIN and MINEM both believed CHM could legally be held harmless from delays caused by permitting agencies, contrary to Peru's current litigation contention that it was always "clear" that CHM had assumed these risks.

66. **Fourth**, apart from being unfounded, Peru's objections to the extensions under Addendum 1 are just theater. If it believed these extensions were wrongly decided, Peru had several years to overturn or modify these extensions, but never did. Indeed, Peru has ***never***

[107] Official Letter No. 504-2015-MEM-DGE, April 6, 2015 (C-0186).
[108] Addendum 1 to the RER Contract, July 22, 2015, p. 8 (C-0008).
[109] Addendum 1 to the RER Contract, July 22, 2015 (C-0008).

challenged MR 320. And although Peru did challenge Addendum 1 in the Lima Arbitration, that challenge was dismissed for lack of subject matter jurisdiction and Peru opted not to revive its challenge in this arbitration by filing a counterclaim. For these reasons, Peru's repeated assertions that these extensions are illegal should be rejected in their entirety.

b. In 2016 - 2017, MINEM Approved Extensions To The COS Deadline Beyond The Contractual Parameters In Clause 8.4

67. The second time that Peru faced a decision on how to interpret the extension restrictions applicable to the Mamacocha Project was in October 2016, when assessing CHM's second request for extensions under the RER Contract. This request was similar to the first request in that the delays to the Project had been exclusively attributable to Peru. But what made this request unique is that it asked MINEM to extend the COS deadline beyond the contractual parameter (December 31, 2018) set forth in Clause 8.4 of the RER Contract. In its Counter-Memorial, Peru insists the Parties always knew this parameter could not be breached "for any reason" including causes attributable to the government.[110]

68. But, on October 6, 2016, MINEM's legal office sent Legal Report No. 166-2016-EM-DGE to Ms. Carla Sosa Vela, MINEM's Director General of Electricity ("**Sosa Report**"),[111] which concluded that Peru had a legal duty under Peruvian and international law to extend the COS deadline where, as here, Peru was responsible for the delays to the Project. Consistent with Claimants' position in this arbitration, the Sosa Report explains that if such extensions were not granted it would lead to "***an unreasonable allocation of the risk***" that CHM's counterparty would breach the RER Contract.[112] The Sosa Report adds that for such an extraordinary

[110] Counter-Memorial, ¶ 898.
[111] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).
[112] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016, p. 11 (C-0012) (emphasis added).

allocation of risk to occur, there must be "a clear and unambiguous definition in the Agreement, which has not occurred in this case."[113]

69. The Sosa Report was not an outlier. Until Peru's reversal in December 2018, the Sosa Report conclusions had never been questioned or overturned. On December 29, 2016, MINEM's Minister and Vice-Minister adopted its conclusions through Ministerial Resolution No. 559-2016-MEM/DM ("**MR 559**").[114] On January 3, 2017, MINEM reaffirmed the Sosa Report's conclusions when it executed Addendum 2, which granted extensions to the Works Schedule that pushed the COS deadline to March 14, 2020, well beyond the original deadline of December 31, 2018.[115]

70. Peru's Counter-Memorial is noticeably devoid of ***any reference*** to the Sosa Report's conclusions regarding the COS deadline, notwithstanding that they featured prominently in Claimants' Memorial and speak to the Parties' contemporaneous understanding of whether MINEM could extend the COS deadline beyond the contractual parameters. All Peru offers in this arbitration are untethered legal arguments that MINEM "erred" when executing Addendum 2, that MINEM's extensions of the COS deadline were "incorrectly decided," and that Claimants could not have based any reasonable expectations of future COS deadline extensions based on Addendum 2 because that extension was illegal.[116]

71. But, again, Peru's baseless contentions are just theater. Peru had four (4) years to try to annul or modify MR 559 but ***never did***, choosing instead to let the statute of limitations lapse on any legal challenge to this resolution. And although Peru challenged Addendum 2 in

[113] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016, p. 11 (C-0012).
[114] Addendum 2 to the RER Contract, January 3, 2017, p. 8 (C-0009).
[115] Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[116] Counter-Memorial, ¶¶ 450-451.

the Lima Arbitration, that challenge was dismissed for lack of subject matter jurisdiction and Peru opted not to revive it here by way of counterclaim or in any other arbitration. Moreover, Peru has not cited any authority to suggest that this arbitral tribunal has jurisdiction or authority to review and revise Peruvian administrative determinations.

c. In 2018, MINEM Confirmed, Through Its Outside Counsel, That Extensions To The Term Date And COS Deadline Were Necessary Because The Delays Were Attributable To Peru

72. The third time that Peru faced a decision on how to interpret the extension restrictions applicable to the Mamacocha Project was in 2018, when Claimants submitted the Third Extension Request.[117] Peru alleges this Request was effectively dead on arrival because it violated the "principle of legality."[118] This argument, however, makes no sense because, at that time, Claimants reasonably expected the extensions to the Works Schedule to be approved because MINEM had issued similar extensions on two prior occasions.[119] As for the extensions to the Term Date, while it is true that MINEM had not granted any such extension in the past, Claimants reasonably believed MINEM would reverse course based on their discussions with MINEM in late 2017 and early 2018.[120]

73. Specifically, in late 2017, Claimants submitted a legal memorandum to MINEM explaining the reasons why MINEM should grant extensions to the Term Date.[121] The reasons

[117] Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).
[118] Witness Statement of Francisco Ismodes Mezzano, ¶ 21.
[119] Addendum 1 to the RER Contract, July 22, 2015 (C-0008) and Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[120] In addition, there is no logical or commercial reason to distinguish between extensions of the COS and Term Date deadlines. If a COS date were determined to be flexible and subject to extension upon a showing of cause, then the government could interfere with a project after the COS date, but before the Term date. It could effectively convert a 20-year Guaranteed Revenue concession to a much more limited one (even to zero), by interfering post-COS. Peru has failed in its burden to prove that the Parties intended to grant Peru the unilateral authority to diminish the expected Term of Validity either pre- or post-COS.
[121] Memorandum from R. Santiváñez to the Special Commission regarding the extension of the RER Contract Term Date, December 20, 2017 (C-0233).

set forth in that memorandum are essentially the same as Claimants have presented in this arbitration, namely: (i) CHM did not assume the risk of government interference and, hence, should be compensated for any reduction in the term of validity caused by such interference; (ii) granting Term Date extensions in the instance of government interference is consistent with the purpose of the RER Law; (iii) it would be illogical to grant extensions to the COS deadline but not the Term Date since both have similar "for any reason" restrictions and contract language must be interpreted homogeneously; (iv) the sovereign guarantee of twenty (20) years of fixed revenues would be rendered illusory if Peru were allowed to reduce it unilaterally; and (v) even if the Term Date could not be extended, Peru still had an obligation to compensate CHM for the government-caused reduction to the term of validity.[122]

74. On December 15, 2017, Claimants met with MINEM's Vice-Minister and General Director of Electricity to discuss the legal arguments Claimants had presented with respect to extending the Term Date.[123] During the meeting, these MINEM officials told Claimants they agreed they had the legal authority to grant extensions to the Term Date under the existing legal framework but that their reticence to do so was merely the appearance of creating a precedent for other RER projects.[124] Claimants memorialized these discussions in a January 23, 2018 e-mail from Mr. Goran Stefan Sillen, Latam Hydro's former President, to Mr. Ricardo Ampuero Llerena, the former President of the Special commission, as demonstrated in the excerpt below:

> I would like to have a private conversation with you with respect to moving the term of the PPA. We are making some progress with MINEM and we are seemingly in agreement that a) our request to

[122] Memorandum from R. Santiváñez to the Special Commission regarding the extension of the RER Contract Term Date, December 20, 2017 (C-0233).
[123] Sillen II, ¶ 54.
[124] Sillen II, ¶ 54.

> move the end date of the contract is legally justified and b) that there is a legal mechanism to do so.
>
> However, MINEM wants to make sure that it doesn't create a precedent for other projects and I respect that so we are willing to find ways to achieve that. That said, our case is unique in that the delays are caused by authorities and, hence, the state of Peru whereas other projects may be delayed for reasons which are under the control of the developer or not caused by the state.[125]

75. Neither Mr. Ampuero nor anyone at the Special Commission ever objected to the January 23, 2018 e-mail's characterization that MINEM believed Term Date extensions were permissible under the existing legal framework. Mr. Ampuero's silence on this point was deafening, given that he and the Special Commission spoke regularly with MINEM about the prospect of extending these dates at that time. Had MINEM disagreed with or rejected Claimants' legal research regarding extending the Term Date, Mr. Ampuero presumably would have spoken up because it was material to Claimants' efforts to resolve Claimants' noticed dispute. Based upon these discussions, CHM included with its Third Extension Request a request for MINEM to extend the Term Date.[126]

76. Shortly after receiving the Third Extension Request, MINEM asked its long-time outside counsel, Estudio Echecopar, to analyze whether MINEM could grant extensions to the COS deadline and Term Date under the existing legal framework in cases where the delays are "due to lags by the Administration."[127] In response to this request, MINEM's outside counsel issued two reports, dated April 5, 2018 and April 17, 2018, both of which ***unequivocally concluded such extensions were necessary under Peruvian law*** (the "**Echecopar Reports**").[128]

[125] Email from S. Sillen to R. Ampuero, January 23, 2018 (C-0234).
[126] Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).
[127] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § B.1.4 (C-0235).
[128] The first Report, dated April 5, 2018, provided the full analysis and the second Report, dated April 17, 2018, answered MINEM's questions about the Reports' analysis.

77. Claimants have not previously discussed or referenced the Echecopar Reports in this arbitration because they only recently gained access to them. Claimants were surprised that Peru did not produce these Reports to Claimants during the Disclosure phase of this arbitration, particularly since Claimants requested the legal analyses that MINEM obtained when assessing the Third Extension Request. Peru's failure to produce these highly pertinent responsive documents could be presumed by the Tribunal to be an effort to cover up material proof that is adverse to its position.

78. The Echecopar Reports' principal conclusion is that MINEM cannot interpret the RER Regulations, as amended by SD 24, in a manner that punishes concessionaires when the reasons for the delays are not attributable to them.[129] The Echecopar Reports explain that such an interpretation would be illegal because it is irreconcilable with the RER Law's objectives, *i.e.*, to promote and facilitate investment in RER projects.[130] This incompatibility is dispositive because the RER Law expressly requires MINEM to promulgate and interpret RER Regulations in such a manner that results in the "proper application" of the RER Law's objectives.[131]

79. With respect to extending the COS deadline beyond the contractual parameters, the Echecopar Reports reaffirm, as had the Sosa Report, that MINEM had a legal obligation to grant these extensions whenever the delays were attributable to Peru.[132] Otherwise, the Reports warn, it would lead to the absurd result where the concessionaire would have its RER Contract terminated and its performance bond called for reasons that were not imputable to the concessionaire.[133] This result would run counter to the RER Law's objectives because

[129] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C (C-0235).
[130] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.1 (C-0235).
[131] Legislative Decree No. 1002, May 1, 2008, Supplementary Provisions (C-0007).
[132] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.2 (C-0235).
[133] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.2 (C-0235).

"terminating the contract and penalizing the investor with the enforcement of their performance bond even where the COS delay is not attributable to it would undoubtedly discourage investment in RER Projects" and "infringe[] the public interest."[134]

80. The Echecopar Reports further clarified that the legislative intent and public interest also required MINEM to continue the "profitability guaranteed through the Premium" for the period of the extensions (emphasis in original):

> Thus, according to the recitals of the RER Act, the lawmaker's intent at the time of passing it was to foster renewable energies, "*eliminating any barrier or obstacle to their development*" [emphasis in original] and adopting "*a legal framework in which these energies are developed to encourage these investments."*
>
> Although after the termination of the RER Concession Contract the RER Awardee may still be able to operate the plant in the SEIN with its Final Generation Concession, it would no longer benefit from the profitability guaranteed through the Premium, which could run counter to the lawmaker's intent. Hence, inasmuch as it is the authority in charge of eliminating any barrier or obstacle to the development of ongoing RER Projects, the MEM must try to uphold the continuity of RER Concession Contracts from the 3rd and 4th Tenders in cases where the breach is not attributable to RER Awardees.[135]

81. With respect to the Term Date, the Echecopar Reports concluded that failure to extend the Term Date when the delays are imputable to Peru:

> would run counter to [the RER Law's] object, which is the promotion of investment in RER Projects. Indeed, reducing the term of the RER Concession Contract and, thus, the guaranteed profitability benefit even where the COS delays is not attributable to the RER Awardee would undoubtedly discourage investment in RER Projects.[136]

[134] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.2.2 (C-0235).
[135] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.2.3 (C-0235) (emphasis in original).
[136] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.3.2 (C-0235).

82. The Echecopar Reports also conclude that failure to grant such extensions would: (i) result in a breach of Peru's sovereign guarantee to offer a 20-year term of validity for the fixed-revenue concession; (ii) infringe the public interest, *i.e.*, the promotion and protection of investments in RER projects; and (iii) result in the impermissible interpretation that the RER Regulations, as amended by SD 24, imposed new obligations and restrictions that are not contained in the RER Law, which would breach a fundamental tenet of Peruvian constitutional law.[137]

83. The Echecopar Reports conclude with the recommendation that MINEM should consider clarifying the RER Regulations by amending them to spell out expressly that the restrictions on extensions to the Term Date and COS deadline cannot apply to instances where, as here, the project was delayed by government delays or interferences.[138] The Echecopar Reports expressly acknowledge that this amendment is by no means necessary because the RER Regulations, as written, can and must be interpreted to include this exception.[139] According to the Reports, however, an amendment would eliminate the "risk that the provisions of the RER Regulations under analysis might be ascribed an unlawful and unconstitutional interpretation in violation of the RER Act and Articles 2 and 118 of the Political Constitution of Peru."[140]

84. The Echecopar Reports demonstrate that Peru's current litigation narrative, namely, that it would have been illegal for MINEM to grant the Third Extension Request,[141] is pure fiction. These Reports conclusively show the opposite is true, *i.e.*, it was illegal for MINEM ***not*** to grant the requested extensions. The delays to the Project were exclusively

[137] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.3.2 (C-0235).
[138] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.4 (C-0235).
[139] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.4 (C-0235).
[140] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.4 (C-0235).
[141] Counter-Memorial, ¶¶ 446-458.

attributed to government agencies—the RGA, AAA, and MINEM—whose measures made it impossible for the Project to go forward. The Echecopar Reports made clear these risks were not assumed by CHM under the RER Law, the RER Regulations, or the RER Contract.

85. Shortly after receiving these Reports, MINEM told the Special Commission that it was preparing a "solution" that would extend the Term Date and COS deadline under the RER Contract in line with the requested extensions under the Third Extension Request.[142] Mr. Sillen memorialized this fact in an internal e-mail, dated June 15, 2018:

> I spoke to Ricardo Ampuero and the commission had a working meeting with the minister of energy and mines yesterday. He said it was a constructive meeting and that the minister had suggested a few changes to the solution. Without disclosing any details, Ampuero said the changes improved the solution and will benefit the project. However, in order to incorporate these changes they will need another week or so. He will contact me again Thursday next week when he should be able to provide a firmer timeline.[143]

86. This "solution" being considered was ***not*** the proposed supreme decree that MINEM pursued later that year. Mr. Francisco Ismodes Mezzano, MINEM's Minister at the time, confirms in his witness statement that MINEM did not begin working on the proposed supreme decree until "August 2018," *i.e.*, at least two (2) months later.[144] Rather, MINEM's "solution," as referenced in the June 15, 2018 e-mail,[145] would have provided direct extensions under the RER Contract, similar to those granted under Addenda 1-2,[146] pursuant to the existing legal framework at the time. In fact, MINEM presented this solution to Claimants during a July 19, 2018 in-person meeting at MINEM's offices in Lima. Mr. Sillen, one of Claimants' representatives who was present at that meeting, explains in his Second Witness Statement that

[142] Email from S. Sillen to M. Jacobson et al., June 15, 2018 (C-0238).
[143] Email from S. Sillen to M. Jacobson et al., June 15, 2018 (C-0238).
[144] Witness Statement of Francisco Ismodes Mezzano, ¶ 22.
[145] Email from S. Sillen to M. Jacobson et al., June 15, 2018 (C-0238).
[146] Addendum 1 to the RER Contract, July 22, 2015 (C-0008) and Addendum 2 to the RER Contract, January 3, 2017 (C-0009).

MINEM proposed granting further extensions to the RER Contract's COS deadline and Term Date that would have left CHM with an 18-year term of validity:

> Presumably due to the Echecopar Reports' conclusions that extensions to the Termination Date and Works Execution Schedule were entirely proper, MINEM notified us in July 2018 that it was prepared to partially grant the Third Extension Request. Specifically, senior MINEM representatives told us in an in-person July 19, 2018 meeting that, after much deliberation, MINEM was prepared to grant us extensions to the Term Date and Works Execution Schedule that would result in an 18-year term of validity under the RER Contract. My understanding was that this offer was due to MINEM's belief at the time that the RER Contract had only promised concessionaires a term of validity of up to eighteen (18) years.[147]

87. This 18-year offer is memorialized in contemporaneous documents that Claimants have submitted into the evidentiary record.[148] Claimants ultimately rejected this offer because the RER Contract guaranteed CHM a 20-year term of validity as long as CHM acted diligently and was not responsible for delays to the Project as was the case here.[149] But this offer is important because it demonstrates that MINEM believed that it had the ability to extend the Term Date and COS deadline ***under the existing legal framework***, consistent with the Echecopar Reports and contrary to Peru's litigation contentions in this arbitration. Had Claimants accepted MINEM's 18-year offer in July 2018: (i) CHM's COS deadline would have been extended from March 14, 2020 to sometime in 2021 to give CHM time to achieve the financial close milestone under the Works Schedule ("**Financial Close**") and complete the Project's construction (which was estimated to take approximately 26 months); and (ii) the Term Date under the RER Contract

[147] Sillen II, ¶ 82.
[148] Email from S. Sillen to M. Jacobson et al., August 28, 2018 (C-0242) and Email from S. Sillen to E. Powers, October 23, 2018 (C-0243).
[149] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.26 (C-0002); Articles 1314 and 1317 of the Civil Code.

would have been extended from December 31, 2036 to sometime in 2039 to provide CHM with an 18-year term of validity.

88. MINEM's subsequent behavior after CHM rejected the offer also confirms the persuasive influence of the Echecopar Reports. As recommended by the Echecopar Reports,[150] once CHM rejected MINEM's offer in July 2018, MINEM began the process of preparing an amendment to the RER Regulations to clarify to all market participants that MINEM had an obligation to extend the COS deadline and Term Date in instances of government attributable acts. Again, this proposed amendment was not necessary, as evidenced by MINEM's prior extensions under the RER Contract and its July 2018 offer to make additional extensions under the existing regulations. But, as explained by the Echecopar Reports,[151] the amendment route would ensure that MINEM officials would resist the urge of adopting an unconstitutional and bad-faith interpretation of the "for any reason" language contained in Clauses 1.4.22 and 8.4 of the RER Contract.[152]

89. Unfortunately, as explained more fully in **Section II.F**, *infra*, MINEM ultimately abandoned this proposed amendment and denied the Third Extension Request for arbitrary reasons. In so doing, MINEM interpreted the RER Contract in the unconstitutional manner that the Echecopar Reports had expressly cautioned against.

B. Peru Has Failed To Prove Its False Narratives About The RGA Lawsuit

90. The RGA Lawsuit is of seminal importance in this arbitration because it derailed the Mamacocha Project in March 2017 and started a "domino effect" of arbitrary government conduct that ultimately led to the Project's demise in December 2018. The Lawsuit spawned a

[150] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.4 (C-0235).
[151] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § C.1.4 (C-0235).
[152] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.22 and 8.4 (C-0002).

criminal investigation and repelled the Project's lender, would-be investor, and contractor at the eleventh hour of their negotiations regarding the Project. As Claimants demonstrated in their Memorial, this Lawsuit was the byproduct of a sham investigation by Regional Councilmembers who opposed the Project for political gain rather than the public good. The RGA Lawsuit was arbitrary, discriminatory, and pursued in bad faith. Unfortunately for the Project, the Lawsuit had its intended effect.

91. The arbitrary nature of the RGA Lawsuit is underscored by Peru's half-hearted defense of this measure in its Counter-Memorial. Peru does not contend the Lawsuit was meritorious or legally necessary. Rather, Peru merely contends the Lawsuit was "not meritless" based on a report that, according to Peru, supported the claims in the Lawsuit.[153] But, as proven below, Peru completely mischaracterizes this report, which actually refutes each of the Lawsuit's claims and concludes the Lawsuit lacked factual foundation, misapplied the governing laws, and was highly unlikely to succeed. Perhaps for this reason, Peru devotes most of its defense of this measure arguing that it had no impact on the Project. In this Section, Claimants refute these defenses.

1. Peru's Efforts To Downplay The Effect Of The RGA Lawsuit Are Unsupported And Contradicted By The Record

92. In their Memorial, Claimants demonstrated through documentary, testimonial, and expert evidence that when the RGA filed the Lawsuit on March 14, 2017, the Project was brought to a halt and could not proceed to Financial Close.[154] Prior to the RGA Lawsuit, the development efforts were advancing rapidly on the heels of MINEM having granted a second set of extensions in early January 2017. These extensions allowed Claimants to advance their

[153] Counter-Memorial, ¶¶ 366-377.
[154] Memorial, ¶ 100.

negotiations with DEG, Innergex, and GCZ. The timelines circulated by the Parties during these negotiations confirmed their shared understanding that CHM would achieve Financial Close in May 2017 and construction would begin no later than July 1, 2017.[155]

93. But, when news broke about the filing of the RGA Lawsuit, DEG, Innergex, and GCZ stepped away from the negotiating table indefinitely and, days later, regional criminal authorities began a groundless criminal investigation based on the Lawsuit's allegations. After months of rapid progress, the Project came to a screeching halt as a direct consequence of the RGA Lawsuit.[156]

94. In its Counter-Memorial, Peru does not refute this timeline. Peru instead tries to downplay the RGA Lawsuit's significance by contending that the Lawsuit "did not prevent or hinder in any way the progress and execution of the Mamacocha Project" because it did not immediately suspend or annul the environmental permits themselves.[157] Peru supports this proposition by citing administrative law expert, Dr. Monteza, who opines that the environmental permits were still operative and valid notwithstanding the legal challenge.[158] But this legal defense completely misses the real-world point.

95. Claimants do not contend that the RGA Lawsuit impeded the Project because it immediately suspended or invalidated the environmental permits. Rather, Claimants' contention, which Peru does not dispute, is that the RGA Lawsuit put the Project into an indefinite freeze pending resolution of the dispute. This freeze was potentially fatal because, under the RER Contract, time was of the essence. The RER Contract had make or break time limits that, if

[155] Email from S. Sillen to M. Jacobson et al. attaching C.H. Mamacocha Timeline v.1, January 24, 2017 (C-0163).
[156] Sillen II, ¶ 13.
[157] Counter-Memorial, ¶ 359.
[158] Counter-Memorial, ¶ 360.

missed, could lead to millions of dollars in penalties or the outright termination of the RER Contract and forfeiture of the performance bond.[159]

96. Mr. Jacobson memorialized this concern in an e-mail to the Project's co-sponsor, Mr. Gary Bengier, dated March 26, 2017.[160] Specifically, Mr. Jacobson stated the concerns about the Lawsuit had less to do with its chances to succeed—given that its allegations and claims were "procedurally inadequate and substantively bogus"—and more to do with the fact that the RGA "is opposing the project, which could easily mean unending delays" thus creating "the need for a political solution" with the RGA:

> Thanks Gary. The problem isn't so much the lawsuit, which will likely be as procedurally inadequate and substantively bogus as the private lawsuit that is still on appeal (it is not clear that it will even be accepted by the court as it should have been filed in Lima, rather than Arriquiepa [*sic*]), but rather that the regional government is opposing the project, ***which could easily mean unending delays*** (we already have had the regional ARMA people refuse to grant us the permit to change the inlet location, even though they had already cleared it informally). Thus the need for a political solution and/or enough outside pressure from the national authorities to force a political solution (we are going to have to pursue both avenues I believe). Mike.[161]

97. Mr. Jacobson's March 26, 2017 e-mail also is proof that the RGA Lawsuit had foreseeable incidental impacts on the Project.[162] CHM was in the final stages of securing a modification to a permit from the regional environmental authority, ARMA, that would have authorized the relocation of the intake for the hydropower plant. CHM proposed to change its schematic location plan for the intake in response to Ayo community input. As noted by Mr. Jacobson, ARMA had already approved the modification informally and issuance of the

[159] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.22, 8.3, and 8.4 (C-0002).
[160] Email from M. Jacobson to G. Bengier, March 26, 2017 (C-0051).
[161] Email from M. Jacobson to G. Bengier, March 26, 2017 (C-0051) (emphasis added).
[162] Email from M. Jacobson to G. Bengier, March 26, 2017 (C-0051).

modified permit was expected imminently.[163] But when ARMA learned the RGA Lawsuit had been filed, it informed CHM that the modified permit would be indefinitely delayed because the Project was "*judicializado*," *i.e.*, it was under judicial challenge by the RGA.[164] In other words, contrary to Peru's attempt to diminish the impact of the commencement of the RGA Lawsuit on the Project through its unsubstantiated assertion that the RGA Lawsuit had no adverse effect,[165] Claimants' evidence shows that the mere commencement of the RGA lawsuit directly impacted both the financing and permitting of the Project.

98. Peru has no answer for these facts. Instead, Peru argues that CHM is to blame because it assumed all risks related to financing the Project.[166] In Peru's own words: "Any reservations that third-parties may have had about the possible financing of the Mamacocha Project cannot be considered a reason for releasing CH Mamacocha from its contractual obligation to meet the COS deadline under the RER Contract."[167]

99. But this contention is unfounded. As Claimants prove in **Section V.A.3**, *infra*, CHM never assumed the unforeseeable and unquantifiable risk that Peru – its counterparty – would take measures that would make it impossible for CHM to perform its obligations, including its obligation to "design [and] finance" the Project and achieve Financial Close by a deadline date on its Works Schedule.[168] And nothing in the RER Contract supports this commercially unreasonable interpretation.

[163] Email from M. Jacobson to G. Bengier, March 26, 2017 (C-0051).
[164] Email from A. Bartrina to S. Sillen, March 14, 2017 (C-0214).
[165] Counter-Memorial, ¶ 359.
[166] Counter-Memorial, ¶ 363.
[167] Counter-Memorial, ¶ 363.
[168] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 4.6 (C-0002).

100. The RER Contract only required CHM to pursue its financing obligations with ordinary diligence.[169] If, despite its diligent efforts, CHM failed to comply with these obligations because of government interferences, Peru had a legal obligation to hold CHM harmless from those interferences, in accordance with Article 1314 of the Civil Code.[170] This interpretation is consistent with the legal conclusions reached by MINEM in Addendum 1, Addendum 2, MR 559, MR 320, the Sosa Report, and the Echecopar Reports.[171]

101. This analysis applies here. CHM's diligent efforts put it on pace to achieve Financial Close ahead of the contractual deadline. The only reason CHM was unable to meet this obligation was because of the RGA Lawsuit and the measures this Lawsuit "triggered."[172] Further, Peru's suggestion that CHM should have simply chosen a different financing path once DEG backed out of the negotiations is unfounded.[173] No reasonable lender would have agreed to loan the Project tens of millions of dollars while the Project was in the midst of an onslaught of government challenges, including by its permitting agencies and the regional government. This conclusion is confirmed by Claimants' financing expert, Dr. Michael Whalen:

> [These challenges] represent[ed] fundamental barriers to any external lender that relied upon the project's performance.
>
> *******
>
> It would be unreasonable for CHM or DEG (or indeed any reasonable party) to proceed with the financing of the Mamacocha Project if there were fundamental uncertainty as to whether the

[169] Peruvian Civil Code of 1984, Articles 1314 and 1317, (CL-0149).
[170] Peruvian Civil Code of 1984, Articles 1314 and 1317, (CL-0149).
[171] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009); Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012); First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[172] Counter-Memorial, ¶ 386.
[173] Counter-Memorial, ¶ 300.

> Mamacocha Project would be able to secure the effectiveness and durability of its foundational permits and authorizations.[174]

102. Peru offers no evidence or expert analysis to the contrary. Instead, Peru contends that if a lawsuit challenging the environmental permits was enough to derail the Project then the Project should have been derailed on September 13, 2016, when a private citizen commenced a constitutional *amparo* action that sought to nullify the Mamacocha Project's environmental permits (the "**Amparo Action**").[175] But this is a false equivalency. What made the RGA Lawsuit particularly impactful and distinguishable from the Amparo Action was that it was a legal challenge by the ***same government*** that had issued those permits and that would continue to oversee the Project's operations into the future. As demonstrated by Claimants through contemporaneous documents and witness testimony, this distinction elevated the RGA Lawsuit from a mere legal challenge to an existential political threat.[176] This distinction is also evident from ARMA's decision in March 2017 to stop its permitting efforts once it learned of the RGA Lawsuit, something it did not do in September 2016 when the Amparo Action was filed.[177]

103. Peru would like the Tribunal to believe that the RGA Lawsuit was a common occurrence. But the reality is that it is extremely rare in Peru for the same government that issued permits to argue in court, years later, that the same permits were illegal. Ms. Licy Benzaquén, CHM's legal representative in this arbitration and someone who has extensive experience with construction and energy projects in Peru, emphasizes the fact that the RGA had brought this legal proceeding was extraordinary and sent the message that the Project could not proceed:

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[174] Whalen I, ¶¶ 6.4.2 and 6.4.3.
[175] Counter-Memorial, ¶¶ 364-365.
[176] Email from M. Jacobson to G. Bengier, March 26, 2017 (C-0051).
[177] Email from M. Jacobson to G. Bengier, March 26, 2017 (C-0051).

> No concessionaire in such a situation of legal uncertainty could have been able to execute the Project, with a Complaint of this nature pending resolution. This affirmative action by the Regional Government created a total disruption, including several months of uncertainty, during which the Project was halted. Without the contested environmental permits, the concessions would be reversed by MINEM. Under these circumstances, no lender would have accepted to finance a project while those important permits were under judicial scrutiny and potential nullification, particularly when the party trying to annul the permits was the regional government itself.
>
> It was not usual then, nor is it nowadays, for the Government itself to challenge its own resolutions and seek their annulment within the framework of the Renewable Energy Projects in RER Projects in Peru, or of any other investment projects under promotion regimes such as these ones.[178]

104. Finally, while the RGA Lawsuit threatened the very existence of the Project and thus, immediately captured the attention of all participants (including MINEM and the Special Commission who authorized a suspension until the lawsuit was withdrawn), the Amparo Action, by contrast, did not raise a stir because it was considered by all relevant actors to be a nuisance suit that would not impact the Project schedule. As Peru concedes, the Amparo Action was rejected on September 26, 2016, thirteen (13) days after it was filed.[179] After a round of appeals, the Amparo Action was rejected ***a second time*** on April 28, 2017, leading to another round of appeals that kept this matter in procedural limbo through January 2020, well after the Mamacocha Project ended. [180] This procedural posture, coupled with the meritless allegations in the Amparo Action (demonstrated by Claimants in **Section II.H**, *infra*), relegated this proceeding to nothing more than background noise during the relevant period for Claimants.[181]

[178] Benzaquén II, ¶¶ 21, 22.
[179] Counter-Memorial, ¶ 232.
[180] Counter-Memorial, ¶¶ 233-236.
[181] The same is true for the Administrative Lawsuit filed by David Gerónimo Miranda Soto, on February 17, 2017, to challenge the Project's permits. As Peru concedes, there has been no ruling on that proceeding and Peru has presented no evidence that it had any discernible impact on the Project. Counter-Memorial, ¶¶ 207 and 1133.

2. Peru Has Not Demonstrated That The RGA Acted Reasonably When It Filed The RGA Lawsuit

105. Because the RGA Lawsuit had such a devastating impact on the Project, a key issue in this arbitration is whether the RGA acted reasonably when it launched this extraordinary measure on the Project. In their Memorial, Claimants exposed the unreasonableness of this measure through contemporaneous documentary evidence demonstrating: (i) the RGA's decision to file this Lawsuit stemmed entirely from a sham "investigation" conducted by Regional Councilmembers who had long opposed the Project for political reasons; (ii) the allegations in the Lawsuit about the Project's environmental impact and procedural irregularities relating to the Project's environmental permits were unfounded; and (iii) Peru has publicly admitted, on several occasions, that the Lawsuit lacked merit.

106. In its Counter-Memorial, Peru rhetorically defends the reasonableness of RGA's decision to file the Lawsuit, but noticeably fails to offer any documentary evidence that would support a conclusion that commencement of the lawsuit was merited or constituted a reasonable administrative determination. Peru submits two (2) documents in support of its assertions about the reasonability of the RGA Lawsuit. First, Peru introduces the Regional Council's investigative report, dated October 21, 2017, that was issued when it closed its "investigation" into the Project's permits (the "**Regional Council's Report**").[182] Second, Peru introduces a legal report from a distinguished Estudio Echecopar administrative law expert, Dr. Juan Carlos Morón Urbina, dated December 5, 2017, that analyzes the viability of the Lawsuit (the "**Morón Report**").[183] As shown below, the Regional Council Report has been thoroughly debunked by

[182] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).
[183] Peru submitted the Morón Report with Exhibit R-0131. Claimants submit the Morón Report and its English-language translation with C-0229.

several studies, including, ironically, by the Morón Report, itself, even though Peru submits the Morón Report as "proof" of the reasonableness of the RGA Lawsuit.

107. Noticeably missing from the Counter-Memorial is any response to the detailed allegations in Claimants' Memorial concerning contemporaneous documents that demonstrate that, at all relevant times, Peru believed the Lawsuit lacked merit. Peru's silence with respect to these documents further demonstrates that Peru has no valid defense to Claimant's contention that the RGA's decision to file the Lawsuit was political, arbitrary, unreasonable, discriminatory, and undertaken in bad faith. In particular, Peru entirely fails to address Claimants' allegations concerning the following documents:

a. The report from the RGA's Attorney General, dated December 21, 2017, containing the admission that her office had ***recommended against the filing of the Lawsuit on the account that it lacked merit,*** but the Regional Council had overruled her recommendation without explanation. The Regional Attorney General also recommended in this report that the Regional Council's decision to file the RGA Lawsuit should be investigated (the "**Regional AG Report**");[184] and

b. Press interviews of two Regional Councilmembers who authored the Regional Council Report, dated April 11, 2017, containing the remarkable admission that the RGA was aware of 109 other permits that had the same supposed "irregularities" as the Project's permits, but nonetheless, the RGA inexplicably was only challenging the permits for the Project.[185] This admission demonstrates that the alleged "irregularities" were merely a pretext to oppose the Project. And this admission also demonstrates that the Project was singled out for discriminatory treatment.

108. The Regional Council's Report has an outsized importance in Peru's defense because it is the only documentary evidence presented to support its claim that the RGA Lawsuit was not commenced for arbitrary and political reasons. In fact, it is the ***only document*** that Peru produced to Claimants when asked for all documents upon which the RGA relied when it filed the Lawsuit. But as shown below, the Report's findings were unsubstantiated political rhetoric

[184] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[185] Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).

and counter-factual conspiracy narratives, divorced from the actual background and plans for the Project.

109. Before analyzing the lack of support for the Report's findings, it is important to identify certain facts that are not in dispute:

a. It is undisputed that the Regional Council Report memorialized the findings of a three-month "investigation" conducted by four Regional Councilmembers who are politicians by trade and have no known expertise in environmental, engineering, construction, or legal matters.[186]

b. It is undisputed that the report's findings were not subjected to objective or independent review by environmental, engineering, construction, or legal experts.[187]

c. It is undisputed that the four Regional Councilmembers who authored the Report had publicly voiced their strong opposition to the Mamacocha Project prior to, during, and after this investigation.[188]

d. Finally, it is undisputed that Claimants were never informed that this investigation was taking place and importantly, were not given an opportunity to respond to its baseless allegations.[189]

110. The Regional Council Report arrives at two key conclusions. **First**, the Report concludes that ARMA should not have reclassified the Project from Category III (the classification for projects expected to have a significant environmental impact) to Category I (the classification for projects expected to have a minimal environmental impact) because, according to the Regional Council, the Project was expected to have a significant environmental impact.[190] **Second,** the Report concludes there were several "irregularities" in how ARMA issued the

[186] Counter-Memorial, ¶¶ 208-209; R-0137.
[187] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).
[188] The Regional Council's Report was authored by Messrs. Edy Medina Collado, James Posso Sánchez, Mauricio Chang Obezo, and Carlos Dongo Castillo; *See*, Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).
[189] Memorial, ¶ 101.
[190] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).

permits in question.[191] Based on these findings, the Regional Council recommended that the RGA's Attorney General bring a lawsuit to annul the ARMA resolutions granting ARMA's classification reconsideration and approving the Project's environmental permits.[192]

a. The RGA's Environmental Allegations Are Baseless And Have Been Debunked

111. The Regional Council Report's environmental findings were not based on any scientific or environmental studies and the reasoning and logic of the Report have been discredited for several reasons.

112. **First**, the principal basis put forward for concluding that the Project would have a significant environmental impact was the mere fact that ARMA initially classified the Project as a Category III project.[193] In other words, the Report assumed this classification was proper because it was the first classification. This is a classic case of "begging the question" or "assuming the conclusion." The Report assumes the truth of the conclusion, rather than evaluating through scientific analysis whether the Category III classification was warranted in the first place. The Report does not even attempt to evaluate ARMA's analysis or the factual basis for its original classification. The Report also does not analyze the rationale ARMA used when it later decided to reclassify the Project in Category I.

113. **Second,** had the Report looked into the reasons that ARMA initially classified the Project under Category III, it would have immediately learned the ARMA officials who made the original classification determination had no prior experience classifying small hydro projects.

[191] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).
[192] Regional Council of Arequipa's Ordinary Session Minute, October 21, 2016 (C-0049).
[193] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).

As Claimants explained in their Memorial,[194] RER projects had traditionally been classified by MINEM until late 2012, when this task was delegated to regional authorities as part of Peru's implementation of a decentralization initiative. When CHM asked ARMA to classify this Project in 2013, it was the first time that those ARMA officials had ever classified a small hydro project.[195] Moreover, the ARMA officials failed to visit the Project site or undertake any scientific or environmental studies before reaching the unsupportable determination that the Project should be classified under Category III.[196]

114. **Third,** CHM was shocked by this classification because all the environmental studies it had commissioned confirmed that the Project's environmental impact was expected to be minimal, given the desolate, arid nature of the Project site and the fact that the power plant would be located inside a mountain. As Claimants proved in their Memorial, CHM also had based its expectations on a legal report from MINEM, dated January 2012, that expressly stated that small hydro projects located in the mountains should receive a Category I classification.[197] CHM had every reason to expect ARMA to follow this recent guidance by MINEM.

115. When CHM met with ARMA to discuss the factual basis for its Category III classification, CHM learned that ARMA had acted under the mistaken assumption that the highest classification should be given to the largest projects within the scope of its authority. And because ARMA was only given authority to review hydro projects between zero (0) and twenty (20) megawatts of installed capacity – the larger projects remained with MINEM and were not delegated to the region – it assumed the Mamacocha Project should receive the highest

[194] Memorial, ¶¶ 76-77.
[195] Bartrina I, ¶¶ 31-35.
[196] Bartrina I, ¶ 34.
[197] MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).

classification (Category III) since it was a 20-megawatt project. Mr. Carlos Diez Canseco, who participated in these meetings with ARMA, confirms this account:

> Faced with this situation, we sought to meet with ARMA officials to find out why the project had been given such classification, since it seemed excessive to us. The person in charge of classifying the Project explained to us that they were responsible for classifying projects between 0 and 20 megawatts in capacity (if a project exceeded 20 megawatts in capacity, the responsibility for classifying such project rested with the MINEM). Therefore, given that this project was a 20-megawatt project, *i.e.* the largest project they were allowed to classify, they gave the Project the highest category (Category III). In the opinion of such technical staff member, 20 megawatts was the highest level, and, therefore, it was appropriate to classify the Project as a Category III project. The classification was done quite simplistically.[198]

116. **Fourth,** the Regional Council Report also based its conclusion about the Project's expected environmental impact on a widespread false narrative (spread by the RGA since 2015) that the Project would eradicate or displace an otter species that had been spotted near the Mamacocha Lagoon.[199] The Regional Council Report does not provide ***any*** technical or scientific support for its conclusion that the Project would endanger this species or that its impact on the otter would be severe. The RGA's baseless narrative was tested and debunked in November 2017, when leading global otter experts from the IUCN/SSC Otter Specialist Group visited the site, conducted a multi-day, scientific study of the otter species in question and the Project's designs, and concluded that the Project would not adversely affect this species in any material way.[200]

117. As far as Claimants know, no scientific or technical studies have ever concluded that the Mamacocha Project would have a significant environmental impact. It is noteworthy

[198] Diez Canseco II, ¶ 14.
[199] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).
[200] IUCN / SSC Otter Specialist Group Opinion Letter, November 17, 2017 (C-0227).

that the Regional Council Report did not present or refer to any such study. And, according to Peru, none existed as of July 2017. That is the date when the acting head of ARMA, Mr. Benigno Sanz, was asked during a newspaper interview about the RGA Lawsuit's allegations regarding the Project's expected environmental impact.[201] According to the newspaper article describing this interview, "Sanz said he would like to see an expert report evidencing such ecological damage."[202] And when asked if he believed the RGA's opposition to the Project was reasonable, Mr. Sanz was quoted as follows:

> This a project that promotes development, it fosters electricity; moreover, they will be getting the energy free at the town of Ayo, I don't see a reason to oppose the project. (Those claiming the [resolution approving the permits] is illegal) should ask to see the document but should also produce the expert report and submit it for review, to see why it does not conform to law; otherwise, I could very well claim anything at all, but the relevant authority should tell me that my assessment is wrong.[203]

118. In stark contrast, Claimants commissioned numerous studies from world-renowned environmental and technical experts, all of whom concluded that the Project was not a Category III project because its expected environmental impact was not significant.[204] These studies include the above-mentioned otter report, pre-feasibility reports from CESEL Ingenieros, feasibility reports from Pöyry, environmental reports from ACON/INERCO and EnvPhys SAC ("**EnvPhys**"), and a technical review from Hatch Engineering. Mr. Jorge Chávez Blancas, the EnvPhys representative who studied the Mamacocha Project and has significant experience advising renewable energy projects in Peru, confirms that the RGA's allegations about the Project's expected environmental impact are completely unfounded:

[201] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[202] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[203] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[204] Bartrina I, ¶¶ 6, 8, 12.

> I can state with certainty based upon my experience in the environmental sector for over twenty years that the Mamacocha Project is not a Category III project.[205]

119. **Fifth**, Claimant's technical reports also contradict the Regional Report's theory that Claimants sought to reclassify the Project to Category I in order to avoid community scrutiny of the Project's impact on the environment. To the contrary, Claimants tried at every opportunity to share its analyses and expert findings with the local villages, ARMA, and the Special Commission.[206] Claimants would have also undertaken even further analysis if the Regional Council had notified CHM about its *ex parte* investigation, which it did not do.[207]

120. When Claimants were asked by Peru to conduct additional environmental analyses to clear up any questions, even when the studies were not required by Peruvian law, Claimants immediately agreed. For example, on October 31, 2017, the Special Commission told Claimants that one possible way of resolving their dispute with the RGA would be if Claimants conducted a semi-detailed environmental impact statement—the type of statement reserved for Category II projects—undertake public consultations with neighboring communities, and pledge the project would not have an adverse effect on the Lagoon's hydrology, the existing ecosystem (including the aforementioned otter species), and archaeological relics.[208] On November 20, 2017, Claimants confirmed that they were willing to undertake each of these tasks even though they were not required. Claimants submitted a detailed memorandum explaining that most of these tasks—particularly those concerning additional environmental studies—had already been completed or were in the process of being completed.[209]

[205] Chávez I, ¶ 13.
[206] Diez Canseco II, ¶ 24.
[207] Memorial, ¶ 101.
[208] Email from S. Sillen to M. Jacobson et al., November 1, 2017 (C-0225).
[209] Letter from CH Mamacocha S.R.L. to R. Ampuero, November 16, 2017 (C-0226).

121. **Sixth**, Peru's environmental contentions are also completely off-base because Claimants had designed and pledged to build the Project in compliance with the stringent environmental and social engagement standards set out in the *Equator Principles*, *i.e.*, the international risk management framework for determining, assessing, and managing environmental and social risk in project finance.[210] These standards were required by DEG, Claimants' lender, and required Claimants to undertake detailed environmental studies ***that were not required under Peruvian law***, even for Category III projects.[211] The *Equator Principles*, as applied by DEG, also required Claimants to implement a citizen participation plan that gave local communities access to the Project's environmental studies and a platform for these communities to air their grievances.[212] Claimants contractual commitment to DEG to live up to the *Equator Principles* eviscerates Peru's current argument that Claimants purportedly asked for a reclassification to Category I to avoid community scrutiny and to lessen its commitment to environmental standards. Claimants communicated this commitment to the Special Commission on several occasions, but this dispositive fact is curiously missing from the Counter-Memorial.[213]

b. <u>The RGA Lawsuit's Allegations Of Procedural Irregularities With Respect To The Project's Permits Are Debunked By Peru's Own Exhibit</u>

122. Peru contends the RGA acted reasonably when it pursued its Lawsuit because the ARMA resolutions at issue contained "procedural irregularities" that should have been tested in court.[214] In Peru's view, the RGA's concerns were not arbitrary because they were later ratified by the Morón Report.[215] But, as shown below, Peru's contentions are completely off-base.

[210] Chávez I, ¶¶ 25-30.
[211] Chávez I, ¶¶ 25-30.
[212] Chávez I, ¶¶ 25-30.
[213] Letter from CH Mamacocha S.R.L. to R. Ampuero, November 16, 2017 (C-0226).
[214] Counter-Memorial, ¶¶ 209-212.
[215] Counter-Memorial, ¶¶ 368-372.

123. **First**, Peru's attempt to shore up the reasonableness of the RGA decision to commence the RGA Lawsuit by citing the Morón Report falls flat. The Morón Report reached a simple but powerful conclusion: the Lawsuit "is estimated to have little likelihood of success."[216] Peru contends this conclusion was not an indictment on the substantive merits of the Lawsuit.[217] Rather, in Peru's retelling, the sole issue addressed in the report was whether the claims in the Lawsuit had been filed outside of the applicable statute of limitations. To the extent it addressed the merits, Peru contends the Morón Report found the Lawsuit's substantive allegations were well-founded.[218]

124. Peru's attempt to spin the Morón Report into irrelevancy is not supported by the plain language of the Report. As shown below, the Morón Report addresses each of the allegations contained in the Lawsuit and the Regional Council Report. And far from ratifying those allegations, the Report time and time again concludes that the RGA's allegations were either unfounded or wrong as a matter of law. Read together, instead of in cherry-picked fashion as Peru misleadingly attempts to do, the Morón Report constitutes a full-throated rejection of the factual and legal theories underpinning the RGA Lawsuit.

125. With respect to its scope and purpose, the Morón Report clarifies that its "purpose . . . is to assess the soundness and validity of the remarks and recommendations included in the [Regional Council Report]" since the RGA based its decision to file the Lawsuit entirely on that Report.[219] Contrary to Peru's submission, the Morón Report confirms that the scope of Dr. Morón's review included a detailed review of the merits of the RGA Lawsuit allegations:

> In addition to reviewing the background of the environmental certification for both projects and the events that have transpired to

[216] Counter-Memorial, ¶ 370.
[217] Counter-Memorial, ¶ 373.
[218] Counter-Memorial, ¶ 371.
[219] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 2 (C-0229).

> date, in this report we will assess, among other aspects, (i) which criteria the ARMA should have taken into account for the project's environmental qualification and certification; (ii) whether the ARMA's decisions are well grounded; (iii) whether the respective procedures evince any irregularities; (iv) whether the administrative decisions have any defects affecting their validity; and (v) whether the court claim by the RGA is admissible.[220]

126. **Second,** Peru also errs when it contends the Morón Report ratified the RGA's suspicion that ARMA's decision to reconsider its original classification of the Project was unfounded and subject to annulment.[221] That is not what the Morón Report determined. The Report merely notes that the bases for reconsideration were "unclear" from the face of the December 2013 resolution through which ARMA agreed to reconsider its prior decision.[222] A few paragraphs later, however, the Report concludes this supposed "irregularity" is meaningless because the file demonstrates that ARMA's ultimate decision, in February 2014, to reclassify the Project under Category I was well-founded, as shown in the excerpt below (emphasis in original):

> According to the Final Report of the [Regional Council], "once the petition for reconsideration was deemed well-founded, the project's classification changed to Category I, which requires the submission of an Environmental Impact Statement," insinuating that the reclassification was automatic and implied.
>
> In this respect, the [Regional Council] did not take into account that the project's reclassification as Category I did not take effect automatically under Deputy Manager's Office Resolution No. 124-2013-GRA/ARMA-SG but, rather, it was adopted by the ARMA and notified to Mamacocha by means of Official Notice No. 139-2014-GRA/ARMA/SG after a technical assessment and review process where Mamacocha had to provide additional information and rectify certain issues. In this respect, **we believe that the decision to reclassify the project as Category I was indeed duly grounded, at least in appearance.** What is more, the proposal to classify the hydroelectric plant project as Category I was

[220] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 2 (C-0229).
[221] Counter-Memorial, ¶ 371.
[222] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.3 (C-0229).

> subsequently ratified in Report No. 060-2014-GRA/ARMA-SG-EA-E, which supported the approval of the Environmental Impact Statement.[223]

127. **Third,** Peru also falsely contends that the Morón Report concluded the RGA had a duty to challenge the Project's permits and their underlying resolutions if it believed, through proper technical assessments, that the Project had been improperly classified.[224] But it is undisputed that the RGA never even undertook a technical assessment. Instead, the RGA relied exclusively on the baseless Regional Council Report which was written by politicians who publicly opposed the Project.[225] The Morón Report similarly questioned the utility of the Regional Council Report, expressly noting that its allegations about the Project's environmental impact had "not been elaborated upon," making it "unlikely that the Court will admit this argument."[226]

128. **Fourth**, the Morón Report also debunked the balance of the RGA Lawsuit's allegations about perceived "irregularities" concerning the permits. For example, the Report rejected the RGA's contention that the Project should have pursued one set of permits rather than two sets (one for the plant and one for the transmission line).[227] The Report also rejected the RGA's contention that the Project site was located in a protected area, because there was no such proof.[228] And it rejected the RGA's unsupported allegations regarding supposed abnormalities in the functional competency of the ARMA office that had signed certain of the resolutions in

[223] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.4 (C-0229) (emphasis in original).
[224] Counter-Memorial, ¶ 372.
[225] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).
[226] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.5 (C-0229).
[227] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.5 (C-0229).
[228] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.6 (C-0229).

question.[229] Significantly, Dr. Morón determined that these abnormalities, even if true, do not "constitute sufficient grounds to declare the resolutions void."[230] On this point, the Morón Report emphasizes that any such abnormalities or defects with these permits would be attributable to ARMA ***and not CHM***, thus making it illegal under the *Actos Propios* and *Confianza Legítima* principles under Peruvian administrative law for the RGA to effectively punish CHM by taking away the permits (emphasis in original):

> In our opinion, the fact that Deputy Manager's Office Resolutions Nos. 110-2014-GRA/ARMA-SG and 158-2014-GRA/ARMA-SG were signed by an official who was apparently exercising his powers irregularly and even by a Deputy Manager's Office that did not formally exist within the ARMA's structure does not constitute by itself sufficient grounds to declare the resolutions void. In accordance with the good faith, *[actos propios]*, and legitimate trust principles, **Mamacocha, as a private party, should not be affected by circumstances originating in the public Administration's own failures, particularly if the company duly commenced the respective procedures before the entity which, according to the law, had jurisdiction on the projects' classification and environmental assessment (that is, the ARMA of the RGA)**.[231]

129. **Fifth**, as Peru concedes,[232] the Morón Report also found that the RGA Lawsuit was unlikely to succeed because its claims were filed outside of the applicable statute of limitations.[233] Peru tries to downplay this finding as a mere formality and even suggests that it was reasonable for the RGA to believe its claims were timely. But Peru's attempt to cauterize its wound should not distract from the importance of this devastating finding by Dr. Morón. The Morón Report, in detailed and exhaustive fashion, demonstrated that the latest possible date the RGA could have lawfully challenged these resolutions was on December 17, 2016, *i.e.*, three (3)

[229] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.8 (C-0229).
[230] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.8 (C-0229).
[231] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.8 (C-0229). (emphasis in original).
[232] Counter-Memorial, ¶ 370.
[233] Counter-Memorial, ¶ 371.

months before the RGA filed its Lawsuit against the Project.[234] Dr. Morón's conclusion bolsters Claimants' contention that the RGA Lawsuit was commenced as an arbitrary and capricious political measure designed to destroy the Project.

3. Peru's Allegations About The Dismissal Of The Lawsuit Are Contradicted By The Record

130. The Parties dispute what happened after the Special Commission received the Morón Report on December 5, 2017. Claimants have proven that:

a. The Special Commission notified the RGA that its Lawsuit lacked merit and Claimants had noticed their intention to bring a claim for damages before ICSID as a result of this measure.[235]

b. The Special Commission warned the RGA that the noticed arbitration would cause reputational harm to Peru and could result in Peru paying Claimants tens of millions of dollars in damages that would, in turn, be deducted from the RGA's economic budget.[236]

c. The Regional Attorney General revealed that she had always known the lawsuit was non-meritorious and had notified the Governor about this weakness even before the RGA Lawsuit was filed.[237]

d. The RGA promptly dismissed the Lawsuit after receiving the Special Commission's warning.[238]

131. The takeaway is that Peru knew the RGA Lawsuit lacked merit and exposed Peru to significant liability. This takeaway is consistent with the Regional AG Report's admissions that even the RGA's Attorney General always believed the Lawsuit lacked merit and that it was clear that Peru would be found liable if Claimants pursued their international claims arising from the Lawsuit.[239]

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[234] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.1 (C-0229).
[235] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[236] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[237] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[238] Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).
[239] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

132. Peru tries to tell a completely different story in this arbitration. According to Peru, the Special Commission never insinuated the RGA Lawsuit lacked merit nor warned the RGA about the financial implications the RGA would face if the Lawsuit was not dismissed.[240] Peru instead alleges the Special Commission merely sent the RGA a copy of the Morón Report and the RGA subsequently agreed to dismiss the Lawsuit entirely for "good faith" reasons.[241] But the evidentiary record completely contradicts Peru's revisionist retelling.

133. **First**, on December 13, 2017, the Special Commission convened to discuss the findings of the Morón Report.[242] The minutes from that meeting show that Dr. Morón, himself, attended to present his Report and his overall assessment that the RGA Lawsuit was highly unlikely to succeed.[243] After his presentation, the minutes confirm that the Special Commission:

> unanimously agreed to send an official notice to the RGA forwarding the Legal Report containing the Administrative Law expert's opinion that the claim filed by the RGA is unlikely to succeed ***and, thus, warn the RGA of the Report's contents and recommend that the next steps be reconsidered in light of these conclusions***.[244]

134. In other words, the Special Commission's own account of this meeting confirms that—contrary to Peru's allegations in this arbitration—the Commission sought to "warn" the RGA about these findings and "recommend" to the RGA to "reconsider[]" its approach vis-à-vis the RGA Lawsuit.[245]

135. **Second**, the next day, on December 14, 2017, Mr. Ampuero, acting on behalf of the Special Commission, sent a copy of the Morón Report to the RGA Governor, Ms. Yamila

[240] Counter-Memorial, ¶ 367.
[241] Counter-Memorial, ¶ 375.
[242] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230).
[243] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230).
[244] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230) (emphasis added).
[245] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230).

Osorio Delgado.[246] The transmittal letter explains that the Report found the RGA Lawsuit "is unlikely to succeed" and identifies the six (6) principal conclusions from that Report; namely: (i) the Lawsuit was filed outside of the statute of limitations; (ii) the lack of evidentiary support for the RGA Lawsuit's allegations means that "it is expected that the claim will be declared unfounded;" (iii) the RGA's allegations about ARMA's decision to reconsider its classification of the Project was "groundless[]" and "appears to be legally untenable;" (iv) certain of the abnormalities with respect to the permits were curable and not grounds for the annulment of the permits; (v) the Project is not located in a protected area; and (vi) the RGA cannot punish CHM for perceived procedural irregularities for which ARMA is responsible.[247]

136. After detailing all these deficiencies with the RGA Lawsuit, Mr. Ampuero tells Governor Osorio that the RGA Lawsuit has caused Claimants to file a notice of their intention to bring ICSID claims and that such claims could "harm . . . [the] State's reputation" and cause the State to incur significant costs and, potentially, require Peru to pay Claimants an award of at least US $15 million, if not "substantial[ly]" more.[248] Mr. Ampuero then warned Governor Osorio that the Region would be responsible for the losses, saying:

> In this respect, it must be noted that, in general, in this type of disputes, investors claim for three categories of damages: consequential damages, lost profits, and emotional distress. Although it is true that it is impossible to know exactly how much a potential claim for damages could total in an international arbitration, in this case, the Companies have stated that the consequential damages amount to at least fifteen (15) million United States Dollars. As regards alleged lost profits, the Companies have not stated the total amount of their claim but any amount in this category would be on top of consequential damages, so it would be a significant sum.[249]

[246] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[247] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[248] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[249] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).

137. Mr. Ampuero then issues the "warn[ing]" to Governor Osorio that the Special Commission had unanimously instructed him to send.[250] He explains to Governor Osorio that, under Peruvian law, the RGA would be financially responsible for "all costs and payments necessary to comply with the respective arbitration award, conciliation memorandum, or direct negotiation agreement[,]" as shown in the excerpt below:

> In addition, the Special Commission also believes the RG of Arequipa should know that, in accordance with the third paragraph of Article 14 of Law No. 28933, ***the entity responsible for the action or omission that resulted in the investor claim must assume all costs and payments necessary to comply with the respective arbitration award, conciliation memorandum, or direct negotiation agreement***.
>
> . . . .
>
> ***As already pointed out, if the Peruvian State loses this investment arbitration, these amounts would have to be borne by the RG of Arequipa***.[251]

138. **Third,** in this arbitration, Peru disingenuously insists that this letter does not establish that the Special Commission warned the RGA to withdraw the Lawsuit. But that is not how Governor Osorio perceived the letter. On December 18, 2017, Governor Osorio wrote to the Regional Council to tell them that the Special Commission had warned her that the Lawsuit "was highly unlikely to succeed" and that if Claimants go forward with their noticed claims against Peru, the RGA could face the prospect of paying millions of dollars arising from arbitration costs or an arbitral award.[252] Based on the foregoing, Governor Osorio directed the

[250] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230).
[251] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).
[252] Official Notice No. 1135-2017-GRA/GR from Y. Osorio (Regional Governor of Arequipa) to A. Roncalla (Chairman of the Regional Council), December 18, 2017 (C-0232).

Regional Council to sign a resolution immediately that would give her the power to withdraw the Lawsuit by executive resolution.[253]

139. For avoidance of doubt, Governor Osorio did not order this act be done in the interest of "good faith," as Peru now contends.[254] Rather, she ordered this resolution be signed "***in order to safeguard the interests of the [RGA] and the State***, based on the recommendations provided by the Special Commission representing the State in International Investment Disputes, created by Law No. 28933."[255] The following day, the Regional Council gave Governor Osorio the power to dismiss the RGA Lawsuit by executive resolution.[256]

140. **Fourth**, Peru's contention that this dismissal was a "good-faith" gesture undertaken during settlement negotiations with Claimants, but without admission of liability, is also controverted by the Regional AG Report sent on December 21, 2017, after receiving the Special Commission's warning. As explained in the Memorial, the Regional AG Report could only be interpreted as an on-the-record "finger-pointing" exercise from the same office that filed the Lawsuit in the first place. In this Report, the Regional Attorney General notes for the record that she "had already pointed out" to Governor Osorio, presumably prior to the Lawsuit's filing, that the Lawsuit's likelihood of success "would be minimal," but her concerns had been ignored.[257] The Regional Attorney General then admitted that she agreed with the Morón Report's conclusions and believed it was "highly likely that the [RGA] will be made to pay millions to [CHM]" and, thus, the Lawsuit had to be dismissed because it was "harmful to the

[253] Official Notice No. 1135-2017-GRA/GR from Y. Osorio (Regional Governor of Arequipa) to A. Roncalla (Chairman of the Regional Council), December 18, 2017 (C-0232).
[254] Counter-Memorial, ¶ 375.
[255] Official Notice No. 1135-2017-GRA/GR from Y. Osorio (Regional Governor of Arequipa) to A. Roncalla (Chairman of the Regional Council), December 18, 2017 (C-0232) (emphasis added).
[256] Oficio No. 1630-2017-GRA_CR, December 19, 2017 (C-0191).
[257] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

public interest."[258] The Report then recommends that Governor Osorio force the Regional Council to "provide support for and defend the validity" of the findings in the Regional Council Report, "which it has not done thus far."[259] The Regional Attorney General also recommends the Governor's office investigate the Councilmembers responsible for the Lawsuit, as seen in the below excerpt (emphasis in original):

> It should also be mentioned that this Office is aware that the complaint in question is based on the Final Report issued by the Regional Council's Special Investigation Commission in charge of scrutinizing the issue of Regional Sub-Management Resolutions No. 0110-2014-GRA/ARMA-SG, No. 158/2014/ARMA-SG and others issued by the Regional Environmental Authority – ARMA; because a complaint was filed based on such recommendations, it is our view that it is the Regional Council that should provide support for and defend the validity of its Report, which it has no done thus far and, as is evident from previous documents (Official Notice No. 1630-2017-GRA/CR), such Council has merely stated that it is a duty of the Regional Executive to take any necessary measures; SUCH EVASIVE POSITION SHOULD BE ASSESSED BY YOUR OFFICE IN DUE COURSE.[260]

141. **Fifth,** on December 30, 2017, Governor Osorio withdrew the Lawsuit by executive resolution and then gave a public interview about her decision.[261] These documents show that Governor Osorio did not dismiss the Lawsuit for "good faith" reasons, as Peru contends.[262] Rather, the transcript of her press interview confirms that Governor Osorio withdrew the Lawsuit because she understood the RGA Lawsuit exposed the RGA and the State to significant liability:

[258] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[259] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[260] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095) (emphasis in original).
[261] Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010); Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017 (C-0011).
[262] Counter-Memorial, ¶ 375.

Question: The Mamacocha (Ayo) Hydroelectric Power Plant-Laguna Azul, is looking to file an international arbitration. What are you going to do?

Answer: It is worrisome because it would generate a lot of economic losses to the RGA, because just the fact of participating in an international arbitration would generate US$3 million for installing and monitoring the proceeding, which the Ministry of Economy and Finance (MEG) would charge us for immediately. The regional council has been informed of this.

Question: If we lose the arbitration, how much would we pay?

Answer: We could be required to pay up to S/80 million, and we would be leaving a time bomb behind.

Question: What will be done?

Answer: A comprehensive legal and financial evaluation, but also to the extent that there are requests from two groups, one that wants a roundtable to be installed and another one that does not want anything, the Dialogue Office was charged with trying to arrive at an agreement.

Question: Is it a fact that the company will go to arbitration?

Answer: Yes, there is a warning from the MEF that was issued last week. That's why any decisions that we make must be made responsibly, because they could also carry criminal charges for causing economic damage to the State.

Question: Would you cancel the legal action brought by the Attorney General?

Answer: Yes, that is what the MEF suggests we do, even though I disagree, but there are protections thanks to the FTA with the U.S. The company has American capital.[263]

142. Again, Peru has no answer for these documents other than a false revisionist story that does not comport with the contemporaneous documentation. The Counter-Memorial does not even mention the highly illuminating Regional AG Report, much less respond to Claimants'

[263] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

contention that this document contains admissions that the RGA knew its Lawsuit lacked merit and pursued it for discriminatory and arbitrary reasons.

143. The Counter-Memorial attempts to dismiss Governor Osorio's press interview as "irrelevant" without addressing its contents.[264] And Peru resorts to *ad hominem* attacks against Claimants, accusing them of outright lies and bad faith, for alleging these documents say what they expressly say.[265] Claimants reject these attacks and note that these documents speak for themselves, which is why Claimants extensively quote from them in this Reply.

C. Peru Mischaracterizes The Nature And Impact Of The Suspensions Authorized By Addenda 3-6

144. One of the measures at issue in this arbitration is MINEM's decision on December 31, 2018, to deny CHM's Third Extension Request in its entirety.[266] Among the most egregious aspects of this measure was its arbitrary and capricious denial of extensions of the COS deadline and Term Date to compensate for the seventeen (17) month period that the Project was suspended by agreement of the Parties to allow Peru to resolve the inter-governmental dispute created by the RGA Lawsuit. While the RGA finally relented and withdrew the unlawful RGA Lawsuit, MINEM later denied CHM's attempt to extend the COS and Term Date deadlines to account for this unanticipated period of suspension. Although MINEM expressly agreed to extend the milestone dates in each of these Addenda, as will be explained below, Peru reversed its commitment by denying CHM's Third Extension Request, which encompassed the seventeen (17) month period of the mutually agreed suspension of the Project.

145. In its Counter-Memorial, Peru mischaracterizes the nature and impact of the suspensions chronicled in Addenda 3-6. As fully demonstrated below, Peru manufactures

[264] Counter-Memorial, ¶ 374.
[265] Counter-Memorial, ¶ 366.
[266] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).

arguments out of whole cloth and takes positions that are unfounded, nonsensical, and that have been ***previously rejected by MINEM, itself,*** on more than one occasion.

1. The Suspensions Stopped The Clock On The Project, Including CHM's Obligation To Achieve Commercial Operation By The COS Deadline

146. Peru contends the suspensions under Addenda 3-6 did not stop the clock on CHM's obligations under the Works Schedule.[267] According to Peru, these suspensions merely suspended MINEM's "supervision of the Works Schedule" and expressly carved out from the suspensions any toll on the COS deadline.[268] Based on this contention, Peru argues CHM's obligation to achieve COS remained in place throughout the 17-month suspension period.[269] This contention is wrong. The evidentiary record conclusively demonstrates the suspensions formalized under Addenda 3-6 stopped the clock on all of CHM's obligations, including CHM's obligation to achieve COS by the March 14, 2020 deadline under the amended Works Schedule. That was the entire point of the suspensions, as shown below.

147. **First**, the documents CHM submitted to request this suspension demonstrate that the entire point of the suspensions was to stop the clock on the Project's deadlines, including the COS deadline. As Claimants have proven, the RGA Lawsuit indefinitely delayed CHM's ability to achieve Financial Close, *i.e.*, the first milestone obligation under the Schedule. Because the RGA Lawsuit could have dragged on for months, if not years, it was all but a certainty that CHM would be unable to achieve any of the milestone obligations by their fast-approaching deadlines. Missing these deadlines meant CHM could be forced to pay millions of dollars (via increases to

[267] Counter-Memorial, ¶¶ 254-259.
[268] Counter-Memorial, ¶ 255.
[269] Counter-Memorial ¶¶ 256-259.

the performance bond)[270] or that CHM could lose the RER Contract altogether (if it missed the COS deadline).[271]

148. As Mr. Jacobson explains, these dire circumstances caused Claimants to consider shutting the Project down and bringing claims against Peru under the TPA and the RER Contract arising from the RGA's unlawful interferences with the Project.[272] Indeed, Claimants even served a notice of their intention to bring these claims in June 2017 ("**First Notice of Intent**").[273] But, in the interest of keeping the Project alive, Claimants instead decided to request a suspension from MINEM that suspended the Works Schedule in its entirety, giving Claimants time to obtain a "political solution" with the RGA and thereby save the Project:

> We faced two options at the time. We could have shut down the Project and initiated an international arbitration to redress the harm caused by the RGA Lawsuit. Or, we could have tried to obtain a suspension from MINEM that would effectively stop the clock on the Works Execution Schedule deadlines until we were able to get the RGA Lawsuit dismissed. We preferred the second option because it gave us the opportunity to resolve this matter amicably and keep the Project alive. Our sole interest was trying to complete the Project.[274]

149. In early April 2017 – a few weeks after the RGA filed its lawsuit against the Project – MINEM confirmed to CHM that it had the ability under the RER Contract to suspend CHM's obligations under the Works Schedule, including CHM's obligation to achieve

[270] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 8.3 (C-0002).
[271] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 8.4 (C-0002).
[272] Jacobson II, ¶ 38.
[273] Latam Hydro LLC and CH Mamacocha S.R.L.'s First Notice of Intent, June 19, 2017 (C-0252).
[274] Jacobson II, ¶ 38.

commercial operation by March 14, 2020 (*i.e.*, the COS deadline).[275] Latam Hydro memorialized this fact in an internal e-mail, dated April 4, 2017, as shown in the excerpt below:

> We also have confirmed that MINEM has the power to "suspend the calendar" on our [COS deadline] and all intermediate deadlines, and we have started the process of requesting that it so, retroactive to the March 14 [date]. The first step was to send the letter requesting its assistance in resolving the problem with ARMA.[276]

150. On April 21, 2017, CHM formally requested MINEM to suspend the Works Schedule obligations.[277] This request expressly asked for the immediate suspension "of the execution of the RER Contract and ***all rights and obligations*** that derive from the same" until the dispute between Claimants and RGA could be resolved (emphasis in original):

> For the above reasons, and in view of the uncertainty regarding the Contract, generated by the [RGA's] questioning of the validity of [ARMA] resolutions No. 110-2014-GRA / ARMA-SG and No. 158-2014-GRA / ARMA-SG, **we request the suspension of the execution of the Contract and of all the rights and obligations that derive from the same**, until the moment in which the case presented before the Judicial Power is resolved. [278]

151. The broad language used in the request confirms that it was always CHM's intention for MINEM to suspend ***all*** of CHM's obligations, including the all-important obligation to achieve COS by the contractual deadline.[279] This intent is further demonstrated by CHM's explanation, in its suspension request, that the RGA Lawsuit had made it impossible for CHM to advance the Project, thereby signaling to MINEM that CHM would be entirely unable to perform its Works Schedule obligations.[280]

[275] Email from J. Lepon to M. Jacobson et al., April 4, 2017 (C-0259).
[276] Email from J. Lepon to M. Jacobson et al., April 4, 2017 (C-0259).
[277] Letter from C.H. Mamacocha to Ministry of Energy and Mines, April 21, 2017 (C-0092).
[278] Letter from C.H. Mamacocha to Ministry of Energy and Mines, April 21, 2017 (C-0092) (emphasis in original).
[279] Letter from C.H. Mamacocha to Ministry of Energy and Mines, April 21, 2017 (C-0092).
[280] Letter from C.H. Mamacocha to Ministry of Energy and Mines, April 21, 2017 (C-0092).

152. **Second**, the Parties' suspension agreement also confirms the entire point of the suspensions was to stop the clock on the Project's deadlines. MINEM initially rejected CHM's request for an extension on July 13, 2017.[281] Shortly thereafter, presumably once it became aware that Claimants had exercised their rights to notice an ICSID dispute under Clause 11.3(a) of the RER Contract, MINEM agreed to grant CHM's suspension request on July 21, 2017.[282] The document that memorializes this mutual agreement (the "**Suspension Agreement**") confirms that the suspension would be retroactive to April 21, 2017 – the date it was requested by CHM – and would remain in effect through December 31, 2017.[283] The Suspension Agreement also expressly confirms the suspension would apply to the RER Contract in its entirety, "including the ***obligations, rights and the [Works Schedule]*** contained in Annex I of the RER Contract as previously amended by Addendum 1 and Addendum 2."[284] The Works Schedule listed all the deadlines to be suspended, including the deadline for "Commencement of Commercial Operations," (the COS deadline), as shown below:[285]

[281] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[282] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).
[283] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).
[284] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094) (emphasis added).
[285] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Annex I (C-0002).

ANNEX No. 1

New Works Execution Schedule

Updated detailed schedule	Duration	Start	Finish
Laguna Azul Hydroelectric	1104	3/7/2017	03/14/2020
Milestones	860	11/6/2017	3/14/2020
Financial Closing	0	8/29/2017	3/14/2020
Commencement Civil Works	0	11/10/2017	11/10/2017
Arrival Bridge Crane	0	5/27/2019	5/27/2019
Commencement Assembly of Bridge Crane	0	6/11/2019	6/11/2019
Arrival Main Equipment	0	10/3/2019	10/3/2019
Commencement electromechanical assembly	0	10/18/2019	10/18/2019
Commencement of Commercial Operations	0	3/14/2020	3/14/2020

153. Per its terms, the Suspension Agreement did not go into effect until formally approved by ministerial resolution.[286] This approval occurred on August 28, 2017, when MINEM issued resolution No. 356-2017-MED/DM, which formally approved the Suspension Agreement and authorized MINEM.[287] The text of MINEM's resolution confirms the Suspension Agreement was necessary to "prevent the negative consequences against assets of the CH Mamacocha S.R.L. from becoming worse" given that CHM was facing some fast-approaching deadlines under the Works Schedule, as evidenced by the below excerpt from that resolution:

> [MINEM] upholds the suspension of the RER Concession Agreement between April 21 and December 31, 2017, indicating that (i) the agreements of the Proceeding have been issued in the framework of the RER Concession Agreement, the main representative of the Ministry of Economy and Finance of the Special Committee created through Law No. 28933 being previously informed, which establishes the State's coordination and response system in international investment disputes for information centralization and coordination purposes established in that regulation, (ii) ***the agreements contained in the Record prevent the negative consequences against assets of the CH Mamacocha S.R.L. from becoming worse, taking into consideration the future achievement of the milestones***

[286] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).
[287] Addendum 3 to the RER Contract, September 8, 2017, p. 8 (C-0014).

"Financial Closing" on August 29, 2017, and "Commencement of Civil Works" on November 10, 2017, contained in the RER Concession Agreement.[288]

154. The only way to interpret this unambiguous language is that the Parties intended to stop the clock on all of CHM's obligations under the Works Schedule in order to prevent a bad situation from worsening and to give Claimants enough breathing room to enter into meaningful negotiations with the Special Commission. On September 8, 2017, the Parties executed Addendum 3 to the RER Contract ("**Addendum 3**"), which incorporated this resolution and the Suspension Agreement as contractual terms.[289] The Parties also renewed these terms on three (3) separate occasions in 2018 through Addenda 4-6 to the RER Contract ("**Addenda 4-6**").[290] Thus, there is no reasonable doubt that the Suspension Agreement expressly and intentionally extended the COS deadline, just as it extended the other milestones listed in the Works Schedule.

155. **Third**, Peru has failed to introduce any evidentiary support for its contention that Addenda 3-6 merely "suspended any actions intended to supervise or monitor the performance."[291] Indeed, there is nothing in the Suspension Agreement, or the approving Ministerial Resolution, that mentions MINEM's "actions intended to supervise or monitor" CHM's performance of its obligations. Peru noticeably does not cite to any source for this contention. And its allegation, in any event, is indecipherable under the circumstances. By contrast, the record demonstrates the Parties meant to suspend CHM's obligations in their entirety.

156. **Fourth**, the evidentiary record similarly does not support Peru's allegation that Addenda 3-6 expressly carved out CHM's obligation to achieve COS by March 2020 from the

[288] Addendum 3 to the RER Contract, September 8, 2017, p. 8 (C-0014) (emphasis added).
[289] Addendum 3 to the RER Contract, September 8, 2017 (C-0014).
[290] Addendum 4 to the RER Contract, January 17, 2018 (C-0015); Addendum 5 to the RER Contract, March 26, 2018 (C-0016); Addendum 6 to the RER Contract, July 23, 2018 (C-0017).
[291] Counter-Memorial, ¶ 265.

scope of the Suspension Agreements.[292] Peru does not cite to any language in the Suspension Agreement or Addendum 3 for this proposition, but instead relies exclusively on Paragraphs 3.2 and 3.3 of Addenda 4-6.[293] Paragraph 3.2 of Addenda 4-6 provides, in relevant part, that the "clauses and points of the [RER Contract], which have not been modified or invalidated through this Addendum, remain unchanged, and are effective and enforceable in accordance with the terms of the Agreement."[294] And Paragraph 3.3 of Addenda 4-6 provides, in relevant part, that "[s]pecifically and not exhaustively, the provisions of the Eighth Clause of the RER Concession Agreement maintain their full validity and effectiveness."[295]

157. Peru's reliance on Paragraph 3.2 is unavailing because, as explained above, the Suspension Agreement expressly suspended the deadlines set forth in the Works Schedule in Annex II, including the deadline for "Commencement of Commercial Operations."[296] Therefore, the COS deadline was "modified" by the Suspension Agreement and therefore, was expressly exempted from the "status quo" provision in Paragraph 3.2.[297]

158. Peru's reliance on Paragraph 3.3 is similarly erroneous. The obligation requiring CHM to satisfy operational start-up by March 14, 2020 is not contained in Clause 8 of the RER Contract, as Peru mistakenly alleges. Rather, as proven above, this obligation arises from the Works Schedule, which is contained in Annex I of the RER Contract.[298] Clause 8 merely identifies the ***consequences*** for failing to satisfy the obligations established in the Works

[292] Counter-Memorial, ¶¶ 261-264.
[293] Counter-Memorial, ¶¶ 261-264.
[294] Addendum 4 to the RER Contract, January 17, 2018, ¶ 3.2 (C-0015); Addendum 5 to the RER Contract, March 26, 2018, ¶ 3.2 (C-0016); Addendum 6 to the RER Contract, July 23, 2018, ¶ 3.2 (C-0017).
[295] Addendum 4 to the RER Contract, January 17, 2018, ¶ 3.3 (C-0015); Addendum 5 to the RER Contract, March 26, 2018, ¶ 3.3 (C-0016); Addendum 6 to the RER Contract, July 23, 2018, ¶ 3.3 (C-0017).
[296] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).
[297] Addendum 4 to the RER Contract, January 17, 2018, ¶ 3.2 (C-0015); Addendum 5 to the RER Contract, March 26, 2018, ¶ 3.2 (C-0016); Addendum 6 to the RER Contract, July 23, 2018, ¶ 3.2 (C-0017).
[298] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Annex I (C-0002).

Schedule.[299] If the COS deadline is postponed in the Works Schedule, as happened here, then the deadline date set forth in Clause 8.4 is similarly postponed. The suspension of the COS deadline authorized in Addenda 3-6 had no effect on the "validity and effectiveness" of Clause 8, including Clause 8.4. It remained valid as a statement of MINEM's powers to enforce the RER Contract milestones, although Paragraph 3.3 was not intended to, and did not, displace the authority of the Parties to mutually agree to postpone those deadlines.

159. Any other interpretation would lead to an absurd inference that the Parties meant to suspend all deadlines of the Parties for seventeen (17) months, but the only deadline that mattered as it was tied to potential termination of the Project, was exempted, without any express statement by the Parties that they knew, understood and agreed with this hollow suspension. As Mr. Sillen writes, Peru's interpretation makes no commercial sense and is contrary to how the Parties interpreted these provisions in real time:

> No reasonable party would agree to a suspension of CHM's obligations under the Works Schedule while at the same time carving out from that suspension CHM's obligation to achieve commercial operation by a deadline date. Such a carveout would render the entire suspension meaningless because, as explained above, each of the milestones under the Works Schedule is sequential in nature, *i.e.*, one milestone must be achieved before advancing to the next milestone. Accordingly, suspending the Financial Close and Civil Works milestones while keeping the Commercial Operation milestone intact would be completely illogical and ineffective.
>
> Significantly, Respondent does not produce any proof of its illogical interpretation of the "continuation of obligations" clauses. Nor did anyone at MINEM or the Special Commission ever inform us during the four extensive rounds of negotiations that Peru would insist that the suspensions did not affect the COS deadline.[300]

[299] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 8 (C-0002).
[300] Sillen II, ¶¶ 43-44.

160. **Fifth**, Peru's contention that Addenda 3-6 did not suspend CHM's COS obligation is also nonsensical because Claimants would have had nothing to gain (and everything to lose) from a "suspension" that did not suspend the COS deadline. As demonstrated above, CHM explained in its initial suspension request to MINEM that the RGA lawsuit had made it impossible for CHM to complete the Works Schedule obligations and that a complete suspension of these obligations was necessary to give Claimants breathing room to negotiate a political resolution with the RGA.[301] But a "suspension" that did not suspend CHM's obligation to meet the very time-sensitive COS deadline (with its potentially draconian sanctions) would not have given CHM any breathing room nor helped facilitate settlement discussions. CHM would have been wasting its time if the COS deadline was not similarly put into suspension. As Mr. Sillen confirms, if Claimants had any inkling the suspension carved out the COS deadline, they would have simply pursued the ICSID arbitration claims they had noticed in the First Notice of Intent rather than waste their time and money on meaningless negotiations:

> At the risk of stating what should already be obvious, we would never have wasted precious time and resources to engage in protracted 17-month-long negotiations with Respondent if it had not already been crystal clear – to all parties – that the suspensions provided by Addenda 3-6 stopped the clock on CHM's COS obligation. Had this not been the case, we would have simply pursued our legal claims that we noticed under the notice of intent that we served upon Respondent in June 2017 ("**First Notice of Intent**"). The only reason we did not pursue those claims at that time was ***because*** Respondent agreed to stop the clock on the Project by relieving CHM of all its obligations under the Works Execution Schedule, including the all-important obligation to achieve COS.[302]

[301] Letter from C.H. Mamacocha to Ministry of Energy and Mines, April 21, 2017 (C-0092).
[302] Sillen II, ¶ 46 (emphasis in original).

161. Peru's current interpretation of the Suspension Agreement, Addenda 3-6, and Clause 8.4 is not supported by any of the contemporaneous documentation and in the commercial context, makes no sense.

2. Peru's Contention That The Suspension Agreements Did Not Extend The COS Date Is At Odds With MINEM's Position At The Time As Well As MINEM's Acknowledgement As Recently As December 2019

162. Peru argues, "[i]t was clear that the RER Contract suspensions did not extend the COS period or change the Term Date of the Contract."[303] But this is yet another example of Peru's revisionist history. In actuality, as shown below, MINEM knew and informed Claimants that approval of suspensions under the RER Contract would ***always*** be followed by corresponding extensions of the RER Contract to restore the suspended time. In fact, it was precisely because of this linkage that MINEM originally denied CHM's request for an extension of time to account for the RGA Lawsuit delays.[304] It knew that it could not grant a suspension without a corresponding extension.

163. On June 28, 2017, MINEM's lawyers sent Legal Report No. 122-2017-MEM/DGE, dated June 28, 2017, to the General Director of Electricity, Mr. Victor Carlos Estrella.[305] MINEM then forwarded this legal analysis to CHM on July 13, 2017 via Official Letter No. 121-2017-MEM/VME.[306] In this Legal Report, MINEM's lawyers explained the self-evident linkage between a suspension and an extension of the contract deadlines as follows:

> **2.3. Analysis by the MINEM's General Directorate of Electricity**
>
> It is appropriate to liken the request for suspension of the Contract to a request for postponement of the milestones in the Contract, to the extent that, in the event that the request for suspension is

[303] Counter-Memorial, ¶ 262.
[304] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[305] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[306] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).

> accepted and, therefore, that an order is given not to compute the term for performance of the contract obligations for an indefinite time period (as spelled out in the request for suspension), the non-computed term for performance (during which the contract obligations will be unenforceable) ***should be, in due course, added to the current works schedule, and a new COS date should be scheduled beyond March 2020***. In this scenario, consideration should be given to Clause 8.4 of the RER Supply Contract, the scope of which has been defined by Ministerial Resolution No. 559-2016-MEM/DM, dated December 29, 2016 (See above).[307]

164. This excerpt demonstrates that Peru's argument in this arbitration with respect to the suspensions is completely inconsistent with Peru's contemporaneous understanding, as well as common sense. MINEM's Legal Report, which was sent to CHM by MINEM, also establishes a reasonable basis for CHM's expectation that there was a direct linkage between a suspension and a later extension of the contract deadlines. MINEM's Legal Report confirmed to CHM that:[308]

a. A suspension of the RER Contract would "in due course" require the addition of days to the current Works Schedule;

b. Such a suspension would also require a "new COS date," which "should be scheduled beyond March 2020."

c. Consideration of Clause 8.4 should be given, but it would not prevent the extension beyond March 2020, as described in MR 559, dated December 29, 2016.[309]

165. When MINEM forwarded this Legal Report to CHM in July 2017, it gave Claimants the reasonable expectation that a suspension under the RER Contract would, in due course, result in a corresponding extension of time for the COS and Term Dates provided the cause for the suspensions were attributable to the State.[310]

[307] Official Letter No. 121-2017-MEM/VME, July 13, 2017, § 2.3 (C-0216) (emphasis added).
[308] Official Letter No. 121-2017-MEM/VME, July 13, 2017, § 2.3 (C-0216).
[309] As Claimants explain in **Section II.A**, MR 559 adopts the findings of the Sosa Report, including its conclusion that extensions to the Works Schedule are legally required under the RER Contract where there are government interferences, even if the extensions go beyond the original COS deadline of December 31, 2018.
[310] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).

166. Once MINEM granted the requested suspension through Addendum 3 for reasons attributable to the RGA, Claimants agreed to expend significant time and resources to 17-month-long negotiations with the Special Commission. Claimants believed that if successful, the suspended time would be restored via contract amendment.[311] Had this not been the working assumption by all Parties, Claimants would have just pursued the international arbitration claims they had already noticed via the First Notice of Intent.

167. MINEM recently reaffirmed its belief that there is a direct linkage between the time of a suspension and an entitlement to an extension of the milestone deadlines in the RER Contract. On December 6, 2019, MINEM submitted its Statement of Claims in the Lima Arbitration.[312] In the SOC, MINEM admitted that it was "pertinent" to grant an extension of time to the COS date for the period of "528 calendar days" (*i.e.*, just over seventeen (17) months) that the Project had been in suspension under Addenda 3-6.[313] MINEM's delay expert, Metacontrol Ingenieros SAC, testified in the Lima Arbitration that it was proper and uncontroversial for MINEM to grant extensions of time to the COS date corresponding to the suspension period under Addenda 3-6.[314]

168. Claimants' delay expert, Mr. John McTyre, concurs with Metacontrol's opinion that it would be proper and uncontroversial to grant extensions of time to the RER Contract that correspond with the suspension period:

> From a basic scheduling perspective to 'suspend the performance of the Contract' or to 'suspend the enforceability of the obligations of the Parties to the RER Contract' means that the Contract Milestone obligations must be extended consistent with the term of

[311] Jacobson II, ¶¶ 43-45; Sillen II, ¶ 46.
[312] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).
[313] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019, ¶ 9.1.3 (C-0097).
[314] Excerpt of Technical Expert Report (Metacontrol Report) submitted by MINEM in the Lima Chamber of Commerce Arbitration No. 669-2018-CCL, December 1, 2019, ¶ 9.2.3 (C-0251).

> the suspension. It would require an extremely convoluted interpretation to view it otherwise. Such an interpretation would be highly uncommon among construction and development professionals. And if such an intention were indeed agreed between the parties, one would expect that it would have been done expressly given that the reasonable presumption in the industry would be that a suspension suspends all milestone dates under the contract.[315]

169. For the above reasons, Peru's litigation contention that there is "no room for doubt" the suspensions did not trigger an obligation for MINEM to grant corresponding extensions, in due course, is a distortion of what the Parties – including MINEM – actually believed at the time.[316] And Peru's position in this arbitration is completely at odds with the exact opposition position MINEM recently adopted in the Lima Arbitration.[317]

D. Peru's Defense Of The Criminal Proceeding Misses The Mark

170. The AEP's criminal proceeding against [redacted] has left an indelible scar on a well-respected Peruvian professional, despite that fact that Peru has not at any time during the past [four] years identified even a scintilla of proof that he did anything wrong, other than submit a successful administrative request for reconsideration in the course of his representation for Claimants. Claimants demonstrated in their Memorial that the criminal proceeding also would have impeded Claimants' ability to move the Project forward even if their Third Extension Request had been granted. Specifically, Claimants demonstrated that the AEP's decision to "formalize and continue" its criminal investigation in 2018 created significant reputational, political, and social risks that jeopardized Claimants' relationship with their lender, DEG.[318] Claimants also demonstrated that these risks markedly depreciated the Project's

[315] HKA II, ¶ 76.
[316] Counter-Memorial, ¶ 263.
[317] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).
[318] Memorial, ¶¶ 132-139.

financial value and made it more difficult for Claimants to attract a majority partner.[319] Further, Claimants demonstrated that the AEP's decision deprived Claimants of their ability to use [redacted] in their continuing dealings with government agencies and international financial institutions.[320] Claimants suffered these concrete injuries as a direct result of the AEP commencing and continuing an unjustified criminal investigation that unlawfully swept into its net CHM's legal representative on the Project.

171. Peru has not met its burden of demonstrating that it was reasonable for the AEP to pursue this criminal proceeding against [redacted]. The AEP's theory is that certain ARMA officials committed a crime when they reclassified the Mamacocha Project under Category I in 2014 and that [redacted] "fraudulently collaborated" with these officials in reaching that decision.[321] But Peru has not submitted any proof that these officials' decision to reclassify the Project was wrong, let alone criminal. As Peru concedes, its sole "support" for that proposition is contained in the unsubstantiated allegations of the RGA Lawsuit and Regional Council Report. But those contentions have been debunked and discredited, including by Peru's own exhibit (the Morón Report).[322] And although Peru insists there is evidence of "fraudulent collaboration,"[323] Peru has failed to produce any such evidence in this arbitration (or in the criminal proceeding). The only evidence in the record tying [redacted] to these ARMA officials is a motion for reconsideration that he signed, in his capacity as CHM's legal representative. Peru admits that a lawyer submitting a legal petition to an administrative agency is a constitutionally protected act that cannot serve as the basis for a crime, much less "fraudulent collaboration."[324]

[319] Memorial, ¶¶ 132-139.
[320] Memorial, ¶¶ 132-139.
[321] Counter-Memorial, ¶ 401.
[322] Counter-Memorial, ¶ 386.
[323] Counter-Memorial, ¶¶ 385-390; 405-407.
[324] Counter-Memorial, ¶¶ 405-407.

172. Despite the baseless and unsubstantiated nature of the AEP's allegations, in its Counter-Memorial Peru engages in a tedious point-by-point rebuttal of legal arguments that are beside the point.[325] In this Reply, Claimants will establish, again, that the AEP had no substantive basis to pursue its investigation, particularly after MINEM and its outside lawyers determined that the RGA Lawsuit was without merit and must be withdrawn. Claimants will also show that the AEP never had a factual basis or legal authority to charge [redacted] with "willful collaboration," an essential part of its continued investigation that hangs over [redacted] even to this day. Claimants will start by refuting Peru's attempt to undermine Claimants' proof of causation and harm.

1. The Criminal Proceeding Impaired The Investment

173. Peru attempts to undermine Claimants' proof of causation and harm through misdirection and misleading allegations, but not the introduction of an evidentiary foundation. For example, Peru contends that the criminal proceeding had no impact on the Project because it did not "affect the validity of any operating permit of the Mamacocha Project."[326] But this contention misses the point. These permits, even if they remained valid, were rendered effectively useless because the criminal proceeding (even after the RGA Lawsuit was withdrawn) prevented Claimants from reaching Financial Close.

174. On January 29, 2019, internal counsel for DEG, Ms. Holstein, sent Mr. Sillen an email addressing lingering questions after DEG's outside counsel, Estudio Grau, had completed its legal due diligence, including its assessment of four Peruvian proceedings against the Project.[327] Estudio Grau's diligence report had satisfied DEG regarding three of the four

[325] Counter-Memorial, ¶¶ 385-421.
[326] Counter-Memorial, ¶ 416.
[327] Email from A. Holstein (DEG) to S. Sillen et al., January 29, 2019 (C-0244).

proceedings.[328] But the ongoing criminal proceeding raised continuing concerns. As Ms. Holstein informed CHM, "[a]s you will understand, allegations of this kind pose a (potentially serious) reputational risk for DEG."[329] Ms. Holstein thus raised three additional questions to help DEG "understand" this risk, including "why [Claimants] believe that said [criminal] allegations should not stop DEG from continuing to consider financing the project."[330] In other words, DEG threatened to stop its financing activities solely due to the ongoing criminal proceeding.

175. Claimants did not respond to this worrisome request because by the time it was received in late January 2019, Peru had already destroyed any hope for the Project moving forward. But DEG's e-mail provides contemporaneous proof, consistent with Mr. Jacobson's testimony,[331] that the continuation of the AEP criminal proceeding "pose[d] a (potentially serious) reputational risk for DEG" that presumptively would "stop DEG from continuing to consider financing the project."[332] DEG's e-mail shows that, even if the other causes for destruction of the Project in 2018 had not occurred, the pendency of criminal proceeding might have prevented Financial Close, or, at the very least, delayed its indefinitely. Given that the criminal proceeding continues as of the date of this submission, its serious impact on the viability of the Project is manifest.

176. In the Counter-Memorial, Peru responds by alleging that Claimants should have chosen a different financial institution that would have been less concerned about the ongoing criminal proceeding.[333] But legitimate concerns about reputational risks and financial viability

[328] Report from CMS Grau Law Firm to DEG setting forth analysis of certain legal proceedings related to the Mamacocha project, December 21, 2018 (C-0247).
[329] Email from A. Holstein (DEG) to S. Sillen et al., January 29, 2019 (C-0244).
[330] Email from A. Holstein (DEG) to S. Sillen et al., January 29, 2019 (C-0244).
[331] Jacobson I, ¶ 75.
[332] Email from A. Holstein (DEG) to S. Sillen et al., January 29, 2019 (C-0244).
[333] Counter-Memorial, ¶¶ 416-419.

arising from an ongoing criminal proceeding are not unique to DEG. Claimants' project finance expert, Dr. Whalen, confirms that allegations of criminal activity, no matter how baseless, pose significant roadblocks for development finance institutions like DEG "as well as any other financial institution" that is considering lending millions of dollars to a project:

> Although DEG's local legal counsel CMS Grau considered that the complaint against [redacted] might have limited consequences to the Mamacocha Project's permits, DEG's internal legal counsel expressed concerns about these allegations posing "a (potentially serious) reputational risk for DEG."
>
> This is entirely consistent with my experience, both with DFIs as well as any other financial institution. Such allegations, even when proved to be baseless, ***raise significant institutional concerns about broader political uncertainty associated with any project, as well as the likelihood of criticism from interest groups*** seeking to apply pressure via media attention to lurid claims of illegal conduct of public officials or other malfeasance.[334]

177. Peru has failed to submit any evidence to support its theory that Claimants could have found an alternative financing source notwithstanding the continuation of the criminal proceeding. To the extent Peru argues that Claimants could have achieved Financial Close by other means, such as by self-financing the Project, those arguments fail for the reasons provided in **Section II.H**, *infra*.

178. Nor does Peru address the significant impact the criminal proceeding had on Claimants' ability to employ the services of its lead Peruvian lawyer, [redacted]. Claimants explained in their Memorial that the criminal proceeding had the unfortunate effect of sidelining [redacted] from the Project's ongoing dealings with the Special Commission, MINEM, and other government agencies.[335] The impact of this loss cannot be overstated given the unique

[334] Whalen I, ¶¶ 6.3.3, 6.3.4. (emphasis added)
[335] Memorial, ¶ 139.

experience and skillset that [redacted] brings to the table and the fact that Claimants had exclusively relied on his services since commencement of the Project.[336]

179. Peru speculates that Claimants' failure to include this measure in their settlement discussions must mean the criminal proceeding did not have an adverse impact on the Project.[337] But this argument is misleading. The criminal proceeding was in its preliminary stages for most of the relevant period and only gained steam in 2018, after the AEP decided to "formalize and continue" the investigation and name [redacted] as a formal suspect.[338] Further, Claimants did not appreciate the full magnitude of the impact of this measure until early 2019, when DEG told Claimants that the reputational risks associated with the criminal proceeding may be too serious to overcome.[339]

180. In sum, Peru's unsubstantiated, rhetorical attempt to dismiss Claimants' evidence of causation and harm should be rejected.

2. Peru's "Willful Collaboration" Charge Is Baseless

181. Claimants have demonstrated that the AEP is pursuing criminal charges against [redacted] based on nothing more ***the mere fact that he signed a motion for reconsideration*** in his capacity as outside counsel to CHM. [redacted] signed CHM's motion, dated October 30, 2013, to have ARMA reconsider an earlier decision that incorrectly classified the Project under Category III (the classification reserved for projects that are expected to have a significant environmental impact).[340] CHM directed [redacted] to file this routine motion because the original classification was wrong, as evidenced by the numerous studies

[336] Jacobson II, ¶ 30.
[337] Counter-Memorial, ¶ 419.
[338] Arequipa Environmental Prosecutor Order No. 04-2018-O-FPEMA-MP-AR, February 2, 2018 (C-0193).
[339] Email from A. Holstein (DEG) to S. Sillen et al., January 29, 2019 (C-0244).
[340] Request for Reconsideration submitted by Hidroelectrica Laguna Azul S.R.L. (Mamacocha's predecessor), October 30, 2013 (C-0254).

conducted by independent environmental and engineering companies that confirmed the Project was expected to have a minimal impact on the environment. In November 2013, ARMA agreed to reconsider its decision and undertake technical analyses and on-site visits that it had previously failed to undertake.[341] In February 2014, after conducting these analyses and visits, ARMA agreed to reclassify the Project under Category I (the classification reserved for projects that are expected to have a minimal environmental impact).[342]

182. Years later, the RGA announced for political and arbitrary reasons that ARMA's re-classification of the Project had been illegal,[343] which, in turn, "triggered" the AEP to commence an investigation into the individuals responsible for this reclassification.[344] On February 2, 2018, the AEP announced that it was investigating [redacted] as a suspect[345] and, on October 18, 2019, it formally charged [redacted] of having committed a "crime" for nothing more than signing the motion for reconsideration.[346]

183. Peru insists the AEP's charges against [redacted] are not based on this fact alone but are informed by other facts that supposedly demonstrate "fraudulent collaboration" between him and the ARMA officials responsible for re-classifying the Project. ***But Peru does not identify any such facts***. Instead, Peru parrots the AEP's unspecific and unsupported conclusion that there is evidence of fraudulent collaboration without providing any details about what this supposed evidence entails.

184. Specifically, in a footnote, Peru cites to the AEP's Criminal Information, dated October 18, 2019, to support its contention that the charges against [redacted] are based on

[341] Report No. 009-2014-GRA/ARMA-SG-EA-E, February 17, 2014 (C-0185).
[342] Report No. 009-2014-GRA/ARMA-SG-EA-E, February 17, 2014 (C-0185).
[343] Regional Council of Arequipa's Ordinary Session Minute, October 21, 2016 (C-0049).
[344] Counter-Memorial, ¶ 386.
[345] Arequipa Environmental Prosecutor Order No. 04-2018-O-FPEMA-MP-AR, February 2, 2018 (C-0193).
[346] Prosecution Indictment, Arequipa's Environmental Prosecutor's Office, October 18, 2019 (R-0069).

more than the mere signing of the reconsideration motion.[347] But that document is similarly bereft of specificity or evidence and is replete with conclusory statements of wrongdoing.[348] Indeed, the Criminal Information states that [redacted] is being charged with a crime for having "submitted documents in clear violation of the laws in force, collaborating with the public servants and officials at the ARMA in the issuance of their decisions and authorizations, which were favorable to the project, in clear violation of the laws and in serious breach of their functional duties."[349] Missing entirely from the Criminal Information and the Counter-Memorial are ***specific*** allegations and proof demonstrating that [redacted] had ***any*** communications with the accused ARMA officials beyond merely filing the public application that he signed in his capacity as CHM's counsel.

185. The reality is no such evidence exists. [redacted] he has "never known or been in contact" with the ARMA officials with whom he supposedly collaborated and has never even traveled to Arequipa, where ARMA's offices are located.[350] The ***only*** touchpoints that connect [redacted] to the ARMA officials are the routine public filings he signed as part of CHM's permitting efforts and attendance in a virtual hearing last year in the criminal proceeding during which he met his supposed "collaborators" for the first time.[351]

186. Neither Peru in this arbitration nor the AEP in its investigation produced any evidence that [redacted], or anyone at CHM, did anything fraudulent or illegal with respect to the motion for reconsideration that CHM filed with ARMA on October 30, 2013. It is

[347] Counter-Memorial, ¶ 405, n. 709; (R-0069).
[348] Prosecution Indictment, Arequipa's Environmental Prosecutor's Office, October 18, 2019 (R-0069).
[349] Prosecution Indictment, Arequipa's Environmental Prosecutor's Office, October 18, 2019 (R-0069).
[350] [redacted]
[351] [redacted]

undisputed that Section 20.2 of the Political Constitution Peru guarantees that the mere signing of an application as counsel and representative of a project company is entirely proper and cannot be criminalized. And asking a government agency to reconsider an earlier decision, without more, cannot and does not rise to the level of criminal or fraudulent behavior, particularly where, as here, all the relevant technical and scientific studies submitted confirmed that ARMA's original classification of the Project as a Category III project was objectively wrong and should have been reclassified.[352]

187. The reality is the undocumented and unspecified criminal allegations against [redacted], just like the allegations in the RGA Lawsuit, originate entirely from the discredited findings in the Regional Council Report.[353] As demonstrated in **Section II.B**, *supra*, this Report was written by politicians who publicly opposed the Project and is replete with assertions and conspiracy theories that have since been debunked. One such conspiracy theory is that CHM illegally sought the reclassification of the Project to avoid public scrutiny into the Project's environmental impact.[354] That theory was specifically debunked by the Special Commission's own legal expert, Dr. Morón, who closely studied the relevant file and came to the conclusion that there is ***no evidence*** to support this theory.[355] Dr. Morón found that CHM's reclassification efforts "followed the normal administrative assessment procedure," as shown in the excerpt below from the Morón Report (emphasis in original):

> It is also worth noting that we have not seen any documents manifestly evincing that Mamacocha sought to circumvent the law in order to obtain a less stringent environmental classification and, thus, conceal its project from the general public. In our opinion, **the classification procedure seems to have followed the normal**

[352] Report No. 009-2014-GRA/ARMA-SG-EA-E, February 17, 2014 (C-0185).
[353] Counter-Memorial, ¶ 386.
[354] Final report of the Special Investigative Commission in charge of investigating the issuance of Sub-Managerial Resolutions No. 110-2014-GRA/ARMA-SG and No. 158-2014-GRA/ARMA-SG and others, issued by the Regional Environmental Authority-ARMA (undated) (R-0137).
[355] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).

> **administrative assessment procedure**. In this regard, although the Commission includes this argument in its Final Report and the RGA itself mentions this in the resolution declaring a detriment to the public interest, it is unlikely that these statements will be admitted by the Court.[356]

188. Based on the findings of the Morón Report, the RGA's Attorney General and Governor agreed to dismiss the RGA Lawsuit because its allegations had not been substantiated and lacked merit.[357] The AEP should have followed suit and dropped its investigation into this matter. But, on February 2, 2018, the AEP inexplicably announced that it was moving forward with the investigation and that it would be specifically targeting [redacted] for seemingly no reason other than the bare fact that he signed the motion for reconsideration that led to the reclassification of the Project.[358] This link between the AEP investigation and the withdrawn RGA Lawsuit is particularly material to this Tribunal's consideration because Peru concedes that the criminal proceeding was "triggered" by the RGA Lawsuit and was informed exclusively by the discredited findings in the Regional Council Report.[359] This linkage underscores the arbitrary nature of the criminal proceeding and supports the reasonable inference that Peru initiated and is pursuing the criminal investigation for the sole purpose of retaliating against Claimants for their role in exposing the arbitrary nature of the Regional Council's contentions against the Project.

189. The AEP's evasive behavior since its February 2, 2018 announcement similarly supports the inference that the criminal proceeding is being pursued against [redacted] for purely political and retaliatory purposes. As [redacted] explains, he attempted on numerous

[356] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229) (emphasis in original).
[357] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[358] Arequipa Environmental Prosecutor Order No. 04-2018-O-FPEMA-MP-AR, February 2, 2018 (C-0193).
[359] Counter-Memorial, ¶ 386.

occasions to have the AEP explain the "facts" that made him a criminal suspect but the AEP has, to date, refused to provide them while simultaneously insisting there is so-called "evidence" of fraudulent collaboration.[360]

190. Peru attempts to bolster the reasonableness of the AEP's investigation by claiming that a Peruvian court recently sided with the AEP, concluding that there is sufficient evidence to support criminal charges against [redacted].[361] But that court only ruled that the AEP's charges could not be dismissed as a matter of law. The court did not test the AEP's "facts" or "evidence" underlying the charges.[362] Unfortunately for [redacted], the allegations will only be tested at an upcoming trial on the merits, a harrowing experience for a well-respected lawyer who filed a simple administrative reconsideration motion for a client.

191. In sum, it has been more than three (3) years since the AEP announced that it was investigating [redacted] for suspected criminal activity, and nearly two (2) years since the AEP charged him with "fraudulently collaborating" with supposed criminals. And, to date, Peru has failed to identify any documentary evidence that suggests he did anything wrong. By contrast, all the evidence in the public record, including the findings in Peru's own exhibit – the Morón Report – have concluded that [redacted] did not engage in wrongful conduct.

3. The Criminal Proceeding Violates Due Process

192. In addition to being unsubstantiated and arbitrary on the merits, the criminal proceeding also violates Claimants' and [redacted] fundamental protections of due process. Claimants showed in the Memorial both that the AEP is pursuing criminal charges against [redacted] arising from a criminal statute that ***did not exist at the time of the alleged***

[360] [redacted]
[361] Counter-Memorial, ¶¶ 405-407.
[362] [redacted]

wrongdoing and that this retroactive application of criminal law violates fundamental protections afforded under the Peruvian Constitution. Claimants also established that the AEP refused to obtain [redacted] side of the story before closing its investigation on May 2, 2019, further demonstrating the arbitrary nature of the investigation.

193. In the Counter-Memorial, Peru concedes that the criminal statute the AEP is pursuing, contained in Paragraph 3 of Article 25 of the Peruvian Criminal Code, was enacted in 2017, almost four (4) years ***after*** the alleged wrongdoing occurred.[363] Peru argues, however, this retroactive application of the criminal statute is legal because the principles underlying the new statute were supposedly recognized in a 2011 decision from the Peruvian Supreme Court of Justice.[364] Peru's argument is premised on a flagrant mischaracterization of that decision. [redacted], the excerpt of the opinion quoted by Peru is *dicta* and does not constitute binding authority.[365] Specifically, the language to which Peru cites is contained in paragraphs 10-11 of the decision, but elsewhere in the same decision the Peruvian Supreme Court of Justice makes clear that only the principles included in paragraphs 16-19 would be considered mandatory jurisprudence.[366]

194. Peru attempts to deflect from this unconstitutional retroactive application of a criminal statute by suggesting that, even if [redacted] is convicted, the AEP will ask that the corresponding 3-year prison sentence be suspended.[367] But, unfortunately, the damage has already been done, as [redacted] explains:

> I would ask the counsel of RoP if he or she will be happy to be subjected to a malicious criminal investigation and accused for a 3 year conviction, just for having signed applications for permits

[363] Counter-Memorial, ¶¶ 409-412.
[364] Counter-Memorial, ¶¶ 409-412.
[365] [redacted]
[366] [redacted]
[367] Counter-Memorial, ¶ 408.

> filed with an administrative governmental office; would he or she be happy to inaugurate a criminal record, to have to request a court approval to travel for work or family vacation, to have to present himself or herself every month to the court clerk to sign a book of compliance, etc. All of that in addition to the damage already caused to my impeccable reputation built over 25 years of practice, in which I have filed hundreds of petitions to administrative agencies on behalf of clients, never have asked for a favor or anything that is not fully compliant with the law.
>
> ***
>
> The damage to the Project can be calculated mathematically, but I cannot measure the damage to my reputation, I only hope there will be an honest and diligent court that will see the absurdity of the case (not only of my accusation, the whole case is baseless and is constructed in pure speculation by the AEP) and put an end to this bizarre episode of malicious misuse of authority and of the legal system to carry an agenda. I expect to be vindicated then.[368]

195. The AEP also deprived [redacted] of due process by closing its investigation on May 2, 2019, before interviewing him or obtaining his side of the story.[369] Claimants showed in their Memorial that, prior to the closing of this investigation, [redacted] offered to give his statement with the only precondition being that the AEP provide him with notice of the allegations against him.[370] Such notice is required under Peruvian law and, without it, [redacted] could not prepare his testimony.[371]

196. In the Counter-Memorial, Peru responded to [redacted] due process contentions with answers that are misleading and unavailing. **First**, Peru alleges that [redacted] admitted through his criminal counsel in July 2018 that he had received sufficient notice of the allegations against him.[372] But this argument fails because, as [redacted]

[368] [redacted]
[369] Prosecutor's Provision No. 08-2019-FPEMA-MP-AR, Arequipa's Environmental Prosecutor's Office, May 2, 2019 (R-0113).
[370] Memorial, ¶¶ 134-135.
[371] [redacted].
[372] Counter-Memorial, ¶ 402.

explains, the quote Peru relies upon is taken completely out of context and does not stand for the proposition Peru proposes.[373] **Second**, Peru argues that [redacted] did not raise his notice argument until after the investigation was closed.[374] But, as [redacted] explains, this allegation is contradicted by the fact that, because of his ongoing complaints about lack of due notice, two separate Peruvian courts admonished the AEP and ordered the prosecutor to provide [redacted] with proper notice of the allegations against him ***before*** the AEP closed the investigation.[375] Rather than provide the legally required notice and take [redacted] testimony, the AEP opted instead to close the investigation and only then provide [redacted] with the required notice, thereby ensuring that his testimony never made it to the criminal file.[376] Because of this denial of due process, the first time [redacted] will be able to tell his side of the story in that proceeding will be during a trial on the merits. By that point, [redacted] will have been subjected to years of harassment and immeasurable damage to his reputation, all due to the AEP's unsubstantiated and misguided investigation.

E. Peru Has Failed To Justify Its Delays To The Civil Works Authorization

1. Peru Is Exclusively Responsible For The Delays

197. In their Memorial, Claimants explained that they suffered through a regulatory rollercoaster from October 2016 through January 2018 caused by the Autoridad Administrativa del Agua Caplina – Ocoña's ("**AAA**") arbitrary delay of approving CHM's last-remaining critical permit, the civil works authorization ("**CWA**").[377] This rollercoaster ride had three stops. **First**, AAA denied CHM's application in May 2017, many months after its deadline for issuing a

[373] [redacted]
[374] Counter-Memorial, ¶ 403.
[375] [redacted].
[376] [redacted]
[377] Memorial, ¶¶ 107-108.

decision had elapsed.[378] **Second**, AAA reversed itself and issued the CWA in July 2017, but it had material defects that made it unusable to CHM.[379] **Third**, CHM requested that AAA fix these defects but AAA inexplicably waited six (6) months to do so, until it was finally ordered to fix those defects by an administrative law judge.[380] The rollercoaster ride finally ended in January 2018, when AAA issued the permit that it should have issued more than a year earlier.[381]

198. Peru's defenses to AAA's measures are misleading and wrong. For example, Peru argues that CHM waited too long to file the CWA application, which, in turn increased the risk that further delays by AAA would cause CHM to miss its upcoming Works Schedule deadlines.[382] But this argument fails for three reasons.

199. **First**, CHM is not responsible for delays improperly caused by AAA and, hence, is not required to account for that "possibility," as Peru contends.[383] Rather, CHM reasonably expected that AAA would adhere to its obligation under the administrative regulations contained in the Texto Unico de Procedimientos Administrativos ("**TUPA**") to finalize its review of the application within thirty (30) business days.[384] If AAA exceeded this review period, CHM had the legitimate expectation that MINEM would issue a corresponding extension to account for any such delays. This type of regulatory compensation was established by the administrative agencies and became the course of dealing between CHM and Peru under the RER Contract, as evidenced by the extensions issued in Addenda 1-2.[385]

[378] Directoral Resolution No. 1480-2017-ANA/AAA I C-O, May 16, 2017 (C-0121).
[379] Directoral Resolution No. 1928-2017-ANA/AAA I C-O, July 5, 2017 (C-0122).
[380] Bartrina I, ¶ 66.
[381] Resolution No. 053-2018-ANA/TNRCH, January 24, 2018 (C-0126).
[382] Counter-Memorial, ¶ 328.
[383] Counter-Memorial, ¶ 328.
[384] TUPA, Ley de Recursos Hídricos, Article 84.1. In December 2016 (weeks after CHM applied for the CWA), this TUPA review period was amended from thirty (30) business days to twenty (20) business days.
[385] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).

200. **Second**, contrary to Peru's baseless allegation, CHM was not behind schedule when it filed the CWA application on November 29, 2016. When it filed this application, CHM already knew (from having received a copy of the Sosa Report in or around October 2016)[386] that it would soon receive compensatory extensions to the Works Schedule extending both the Financial Close milestone to August 2017 and the Commencement of Civil Works milestone to November 2017.[387] If, as reasonably expected, AAA had adhered to the 30-business-day review period under the TUPA, CHM would have received the CWA sometime in January 2017, well ***ahead*** of schedule.

201. **Third**, Peru's Counter-Memorial completely omits any recognition that CHM would have filed the CWA application much earlier had it not been held up by arbitrary delays caused by AAA and ARMA. It is undisputed that CHM could not apply for the CWA until AAA defined the "marginal strip"—*i.e.*, the strip of land surrounding neighboring waterways—since the entire point of the CWA was to authorize CHM to build identified structures within the marginal strip.[388] CHM applied for this determination on May 25, 2016, with the reasonable expectation that AAA would issue its marginal strip determination within the 30-business-day review period.[389] But AAA inexplicably failed to issue its determination until September 16, 2016 (*i.e.*, nearly four (4) months later).[390] CHM could not immediately file its CWA application at that time because it was waiting for ARMA to issue a modified permit authorizing CHM to relocate the intake by the Mamacocha Lagoon in accordance with a request by the Ayo community. The intake was one of the key structures that would be built within the marginal

[386] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).
[387] Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[388] Bartrina II, ¶¶ 40-44.
[389] Bartrina II, ¶¶ 40-44.
[390] Bartrina II, ¶¶ 40-44.

strip. Therefore, with a sense for good order and in an effort to avoid any further delays by AAA, CHM waited until the intake relocation was approved. But, as CHM later learned, ARMA had effectively sat on it due to political pressure from the RGA.[391] After waiting several months, CHM gave up on waiting and proceeded with the CWA application in November 2016. In short, CHM's timing for filing the CWA application was dictated by Peru's delinquent decision-making, not due to any negligence or deficiency of CHM.

202. **Fourth,** Peru next contends that any delays were CHM's fault because CHM failed to submit requisite information that AAA needed to issue the CWA.[392] In Peru's telling, this deficiency forced AAA to send the application back to CHM on multiple occasions to obtain the required information, all before AAA denied the application outright in May 2017.[393] The principal flaw in Peru's defense, however, is that it presupposes that AAA required plenty of information to issue the CWA, which is simply not true. The reality is the CWA's evaluation should have been straightforward.[394] Once the marginal strip was defined, all AAA needed to do was approve the structures that were to be erected within that strip and these were identified in the original information presented by CHM.[395] Peru's defense also fails to take into consideration that AAA was already intimately familiar with the Project's designs because it had dealt with CHM and the Project since 2013.[396] In other words, there was no hand-holding needed for AAA to issue the CWA and its constant requests for further information were entirely unnecessary and pretextual grounds to delay its decision.

[391] Bartrina II, ¶¶ 38-39.
[392] Counter-Memorial, ¶¶ 330-332.
[393] Counter-Memorial, ¶¶ 330-332.
[394] Bartrina II, ¶¶ 44-45.
[395] Bartrina II, ¶¶ 44-45.
[396] Bartrina I, ¶ 63.

203. **Fifth**, Peru fails to introduce any proof to justify AAA's issuance of a defective permit in July 2017. Again, the process was straightforward and AAA's failure to issue a valid, responsive permit reflected administrative negligence, or possibly, an intentional desire to delay the Project.[397] CHM had identified each of the structures that were to be located within the predetermined marginal strip in its application. AAA had to verify that the structures were located within that strip and then authorize their construction through the CWA. Instead, in July 2017, AAA issued a CWA that inexplicably omitted certain of these structures.[398] To make matters worse, the term for the permit was not keyed to the start of the civil works (as should have been the case) but instead began running immediately, thereby ensuring that the CWA would expire long before the construction phase concluded.[399] These material defects rendered the CWA unusable and forced CHM to request that AAA fix these errors and re-issue the CWA.[400] Whether this cavalcade of errors was a reflection of administrative negligence or intentional sabotage of the Project, it is not necessary for the Tribunal to determine. In either case, AAA's actions would constitute a breach of its responsibility to approve permit applications diligently and within the time parameters set out in the administrative regulations.

204. **Seventh**, although Peru concedes that the CWA issued in July 2017 was defective, it contends nonetheless that CHM should have started construction using the defective permit.[401] But DEG required CHM to have all its permits secured and finalized in order to achieve Financial Close, which meant that CHM could not close on its financing agreement with DEG with a defective permit that was still in the process of being fixed.[402]

[397] Bartrina II, ¶¶ 44-45.
[398] Directoral Resolution No. 1928-2017-ANA/AAA I C-O, July 5, 2017 (C-0122).
[399] Bartrina II, ¶¶ 50-53.
[400] Bartrina II, ¶¶ 50-53.
[401] Counter-Memorial, ¶¶ 343-349.
[402] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017 (C-0048).

205. **Eighth**, Peru's attempt to lay the blame on third-parties for its negligent or willful issuance of a defective permit also misses the mark.[403] Peru contends AAA took six (6) months to fix the defective CWA because third-parties had filed an administrative challenge that "made it legally impossible to approve the rectification request right away."[404] But Peru fails to offer any proof that this challenge impeded AAA's ability to rectify the permit. Peru does not cite any law or regulation that prohibits an administrative agency from issuing a permit that has been challenged by a private third party.[405] And Peru has not introduced evidence that an administrative or judicial injunction prevented AAA from issuing an accurate permit.

206. Moreover, Peru's claim that AAA had its hands tied up by this third-party challenge is subject to reasonable doubt. Claimants' lead engineer, Mr. Andrés Bartrina, was in regular communications with AAA from July 2017 through November 2017.[406] But AAA never mentioned this third-party challenge, nor did AAA ever use this challenge as an excuse for its delays in issuing an accurate permit.[407] CHM first learned about the third-party challenge during an in-person visit to AAA's offices on November 24, 2017.[408] Had this proceeding truly made it impossible for AAA to cure the defective permit, as Peru now alleges, a reasonable inference could be made that AAA would have notified CHM about it months earlier, given CHM's persistent inquiries with the agency. But, as explained above, AAA did not give any such notice to CHM.

[403] Counter-Memorial, ¶¶ 337-340.
[404] Counter-Memorial, ¶¶ 337-340.
[405] The legal exhibit Peru introduced as authority for this proposition (RL-0042) is wholly inapt and does not support Peru's argument.
[406] Bartrina II, ¶ 54.
[407] Bartrina II, ¶ 54.
[408] Bartrina, ¶ 56.

2. The Delays To The Civil Works Authorization Were Material

207. In the Counter-Memorial, Peru attempts to downplay the impact of these delays by contending that CHM could have achieved Financial Close even without the CWA in hand.[409] Notably, Peru fails to present any evidence to support this contention. Moreover, as shown below, Peru's argument is based upon a fundamental misunderstanding of prerequisites to Financial Close.

208. Clause 1.4.9 of the RER Contract defines Financial Close as: "the date on which the entire RER project financing contract is signed by all the parties involved in the financing and all the conditions under such contract are met to make disbursements."[410] Stated differently, to achieve Financial Close, CHM had to execute its financing contract with DEG ***and*** satisfy all of DEG's preconditions for disbursement.

209. The RER Contract's requirement that CHM satisfy DEG's preconditions for disbursement to achieve Financial Close is dispositive here because one such precondition was that CHM had to obtain all necessary permits for the Mamacocha Project.[411] This precondition is found in Schedule 3 to the Indicative Term Sheet that DEG submitted to Claimants on March 6, 2017, which is titled "Documentary Conditions Precedent to First Utilisation."[412] This Schedule provides that CHM needed to provide DEG with certified copies of each "Project Document" as a precondition to receiving any disbursements under the loan agreement.[413] And paragraph 57 of the Indicative Term Sheet confirms that "Project Documents" include, *inter alia*, the "***permits,***

[409] Counter-Memorial, ¶¶ 343-349.
[410] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.9 (C-0002).
[411] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017, Schedule 3 (C-0048).
[412] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017, Schedule 3 (C-0048).
[413] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017, Schedule 3 (C-0048).

authorizations and licenses relevant for the Project."[414] Because it is undisputed that the CWA is a relevant authorization for the Mamacocha Project, it was one of the "Project Documents" that CHM was required to secure in order to satisfy DEG's preconditions for disbursement and, thereby, achieve Financial Close.

210. Claimants' project finance expert, Dr. Whalen, agrees with this interpretation. Based on his review of DEG's Indicative Term Sheet and his expertise with project finance agreements, he confirms the CWA would have been a "Project Document" that CHM needed to secure as a precondition to disbursement under the DEG loan agreement.[415] And he finds that the time-sensitive nature of the contract meant that delays to the CWA would "jeopardize [CHM's] ability to meet its RER Contract milestone schedule" and "represent a fundamental barrier to any external lender that relied upon the project's performance."[416]

211. Based on the foregoing, contrary to Peru's claim, it was impossible for CHM to achieve Financial Close, as defined under the RER Contract, until it received the CWA from AAA. Nor could CHM have achieved this milestone using the defective permit that AAA issued in July 2017 while it waited for AAA to re-issue a CWA without defects, as Peru contends.[417] As noted above, DEG required CHM to warrant that it had obtained ***all*** its Project Documents, *e.g.*, all relevant "permits, authorizations and licenses," and to provide certified copies of each to DEG in order to satisfy the preconditions for disbursement.[418] Nothing in the Indicative Term Sheet allows for Peru's interpretation that CHM could have used the defective CWA as a stand-in for this requirement. And Dr. Whalen testifies that "[i]t would be unreasonable for CHM or

[414] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017, ¶ 57 (C-0048) (emphasis added).
[415] Whalen I, ¶¶ 7.2.12-7.2.13.
[416] Whalen I, ¶¶ 6.4.1-6.4.3.
[417] Counter-Memorial, ¶¶ 343-349.
[418] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017 (C-0048).

DEG to proceed with the project financing if there was fundamental uncertainty as to whether the Mamacocha Project would be able to secure the effectiveness and durability of its foundational permits and authorizations."[419]

F. Peru's Explanations For Its December 2018 Measures Strain Credulity

212. The December 2018 measures are pivotal to this case because they killed the Project. But they are also important because they marked ***the first time*** Peru abandoned many of its long-held positions regarding key legal and factual issues that are in dispute in this arbitration. This abandonment was abrupt, full-throated, unexpected and, Claimants contend, unlawful.

213. For example, when it denied the Third Extension Request on December 31, 2018, Peru for the first time reversed its long-articulated and reinforced positions that:

a. CHM did not, and could not, assume the unquantifiable and unforeseeable risks of delays or interferences attributable to government agencies, as memorialized in Addenda 1-2, MR 320, MR 559, the Sosa Report, and the Echecopar Reports;

b. CHM would receive compensatory extensions to the COS date that could extend beyond the December 31, 2018 contractual deadline when its counterparty was responsible for the delays to the Project, as memorialized in Addendum 2, MR 559, the Sosa Report, and the Echecopar Reports; and

c. The four suspensions of the RER Contract meant that CHM would receive corresponding compensatory extensions of the COS deadline in due course, as memorialized in the Suspension Agreement, Addenda 3-6, and Legal Report No. 122-2017-MEM/DGE.[420]

214. Further, when it filed the Lima Arbitration on December 27, 2018, Peru for the first time abandoned its long-articulated and reinforced positions that:

a. The extensions to the Works Schedule via Addenda 1-2 were legal, as memorialized in Addenda 1-2, MR 320, MR 559, and the Sosa Report;

b. Peru was exclusively responsible for the delays to the Project that led to those compensatory extensions, as memorialized in Addenda 1-2, MR 320, and MR 558; and

[419] Whalen I, ¶ 6.4.3.
[420] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).

c. ICSID was the sole forum agreed upon by the Parties to resolve significant claims under the RER Contract that affected the viability of the Project, as memorialized in Clause 11.3(a) of the RER Contract.[421]

215. When Peru announced, on December 27, 2018, that the proposed supreme decree was illegal and contrary to the objectives of the RER Promotion, Peru for the first time abandoned its unambiguous position from November 2018 (*i.e.*, the prior month) that the supreme decree was legally necessary to further the objectives of the RER Promotion, as memorialized in MINEM's Statement of Reasons, dated November 11, 2018.[422]

216. Claimants demonstrated in the Memorial that Peru's sudden and complete reversal of its legal approaches to the Mamacocha Project was a classic illustration of regulatory opportunism. Peru nearly overnight abandoned its long-recognized legal commitments in order to avoid likely adverse political fallout that would have occurred if the Mamacocha Project were permitted to continue. These repercussions became politically unpalatable due to: (i) plummeting spot market prices in the electricity sector due to excess production and lower-than-expected demand for energy in Peru; (ii) a concomitant spike in the "cost" to electricity end-users of the subsidized 20-year "Premium" payments under the RER Contract; and (iii) complaints from the politically powerful natural gas lobby that viewed the RER Promotion as an example of Peru favoriting RER projects over other energy projects.[423] By caving to these political pressures, Peru consciously reneged on the promises made under the RER Law to safeguard the Mamacocha Project and eliminate barriers to its development, thereby resulting in material breaches under the TPA, RER Contract and Peruvian law.

[421] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).
[422] MINEM Report No. 505-2018-MEM/DGE, December 27, 2018 (C-0175).
[423] Santiváñez I, ¶¶ 65-78.

217. In its Counter-Memorial, Peru denies that its December 2018 measures are examples of regulatory opportunism.[424] Instead, Peru argues its abrupt policy reversals were necessary course corrections based on a new-found belief that the RER Law and its progeny should be interpreted against Claimants, as opposed to in their favor. As demonstrated below, this explanation strains credulity and does nothing to counteract the illegality of these measures.

1. MINEM's Denial Of The Third Extension Request Represented A Complete Reversal Of Peru's Long-Standing Positions

218. In the Memorial, Claimants demonstrate that Peru's decision on December 31, 2018, to reject the Third Extension Request in its entirety represented a complete departure by Peru of its long-standing legal positions and the Parties' uninterrupted course of dealings under the RER Contract. Indeed, this rejection marked the first time MINEM had articulated, let alone adopted, the position that government-caused delays were insufficient grounds for compensatory contract extensions because CHM allegedly had assumed ***all*** risks related to this Project, including the risk of government interference.

219. In the Counter-Memorial, however, Peru pretends that its December 2018 reversals were nothing new. According to Peru, it was always "indisputabl[e]" that CHM's requested extensions were illegal.[425] In support of this claim, Peru points to the RER Regulations, the materials disseminated during the Third Auction, and the RER Contract, contending that these documents on their face "clearly and expressly set forth" that CHM had no reasonable expectation that government interferences would result in extensions to the COS deadline and the Term Date.[426]

[424] Counter-Memorial, ¶ 983.
[425] Counter-Memorial, ¶ 142.
[426] Counter-Memorial, ¶ 426.

220. Peru's argument in this arbitration begs the question: if the Peru's view on compensatory extensions was so "indisputably" clear as of February 2014 (when the Parties executed the RER Contract), why is it that from February 2014 to December 2018, MINEM, its inside lawyers, and its outside consultants consistently determined that extensions to the RER Contract were ***legally necessary and entirely consistent*** with the existing legal framework? **Section II.A**, *supra*, memorializes the Parties' established course of dealing on this issue at length. A brief summary is included below for the Tribunal's convenience:

a. July 2015: MINEM decides (via MR 320 and Addendum 1) that CHM should be held harmless from delays caused by government agencies and agrees to extend the Works Schedule by 705 days;[427]

b. October 2016 – January 2017: MINEM decides (via the Sosa Report, MR 559, and Addendum 2) that CHM should be held harmless from delays caused by government agencies and agrees to extend the Works Schedule by 462 days;[428]

c. July 2017: MINEM reaffirms (via Legal Report No. 122-2017-MEM/DG) MR 559's findings that compensatory extensions to the COS deadline are proper in instances where CHM's counterparty interfered with the Project and concludes that if, because of such interferences, the RER Contract is suspended, then the suspended time "should be, in due course, added to the current works schedule" by way of an extension;[429]

d. April 2018: MINEM's outside counsel concludes (via the Echecopar Reports) that extensions to the Term Date and Works Schedule are legally required when government agencies are responsible for these delays and that any interpretation to the contrary is unconstitutional because it would violate the express objectives of the RER Law;[430] and

e. July 2018: MINEM offers to grant the Third Extension Request in part, such that CHM would receive an 18-year term of validity (which would have included multi-year extensions to both the Term Date and COS deadline).[431]

[427] Addendum 1 to the RER Contract, July 22, 2015 (C-0008).
[428] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[429] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[430] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[431] Sillen II, ¶¶ 82-85; Email from A. Holstein (DEG) to S. Sillen et al., January 29, 2019 (C-0244); Email from S. Sillen to E. Powers, October 23, 2018 (C-0243).

221. Peru has no response to this consistent line of decision-making, other than its current proclamation that MINEM "erred" in making these decisions.[432] But the unmistakable inference that can be drawn from this uncontroverted history is that from February 2014 to December 2018, all Parties to the RER Contract "indisputably" believed, and Claimants' reasonably relied on, a consistent line of government decisions reflected in an uninterrupted course of dealing between the Parties supporting the conclusion that CHM did not assume the risk of government interference or the risk of its counterparty breaching its obligations under the contract, under Peruvian law or the TPA. Peru's complete failure to introduce any contemporaneous documentation from 2014 up to December 2018 to justify these dramatic reversals underscores the non-transparent, arbitrary, unfair, inequitable, and bad faith rejection of the Third Extension Request in December 2018.

2. MINEM's Pursuit Of The Lima Arbitration Was Without CHM's Consent, As Confirmed By The Lima Arbitration Panel

222. It is undisputed that MINEM commenced the Lima Arbitration on December 27, 2018, for the principal purpose of nullifying the extensions MINEM previously granted under Addenda 1-2. As Claimants demonstrated in their Memorial, this arbitration came as a complete surprise to them. Prior to this filing, MINEM had ***never*** informed Claimants that it considered the extensions MINEM had issued several years earlier to be unauthorized or illegal.[433] On its face, this contention was arbitrary and unreasonable as it asserted that the original COS deadline of December 31, 2018, had to be reinstated. And MINEM first articulated this unjustified position on December 27, 2018, four days before the alleged reinstated COS deadline.

[432] Counter-Memorial, ¶ 451.
[433] Memorial, ¶ 169.

Obviously, MINEM's contentions, if proven, would have killed any likelihood that the Project could be completed on time.

223. Not only were the Lima Arbitration's substantive allegations unreasonable and unsupported, but also MINEM's surreptitious tactical ploy of trying to exploit a local venue constituted a fundamental breach of its express agreement in the RER Contract to resolve any disputes of consequence in an ICSID proceeding sited in Washington, D.C. MINEM tried to take advantage of the tactical element of surprise, despite the fact that MINEM and Claimants were still engaging in settlement discussions to avoid litigation and CHM, itself, and presumably both Parties had pledged not to commence an ICSID case until April 1, 2019, to give their settlement discussions an opportunity to succeed.[434] Peru does not deny any of these facts.

224. Apart from being unexpected, MINEM's commencement of the Lima Arbitration was also illegal because MINEM tried to circumvent the Parties' commitment to have all large disputes resolved in Washington, D.C., before an ICSID tribunal. When it filed the Lima Arbitration request on December 27, 2018, MINEM had already begun to implement its multi-prong strategy (a) to abandon the proposed supreme decree; (b) to deny any further extensions by rejecting CHM's Third Extension Request; and (c) to retroactively deny the previous compensatory extensions granted to the Project. MINEM knew the arbitration demand before the Lima Chamber of Commerce included many of the same contractual issues that Claimants had notified Peru in March 2018 when it served Peru with a notice of claims that it would pursue at ICSID if MINEM did not grant the Third Extension Request ("**Second Notice of Intent**").[435] Peru's litigation tactic was obviously designed to: (i) force Claimants to respond in a forum that

[434] Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), September 21, 2018 (C-0062).
[435] Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).

had not been chosen by the Parties for significant disputes; and (ii) if it succeeded in the local venue, to try to use them against Claimants in their ICSID case.

225. In the Lima Arbitration, Peru sought to annul the extensions under Addenda 1-2 based on its retroactive belief that MINEM had "erred" in granting them.[436] Had MINEM obtained this relief, the COS deadline would have been restored to December 31, 2018, which, in turn, could have led to the termination of the RER Contract and forfeiture of CHM's performance bond.[437] Given these consequences on MINEM's case, CHM successfully argued in the Lima Arbitration that the "dispute" at issue exceeded US $20 million, requiring resolution at ICSID under Clause 11.3(a) of the RER Contract.[438] MINEM argued its claims could not be valued in damages because they sought declaratory judgment relief only.[439]

226. On December 24, 2020, the distinguished three-arbitrator panel unanimously dismissed the Lima Arbitration for lack of subject matter jurisdiction.[440] In so ruling, the panel found that MINEM's interpretation of Clause 11.3 of the RER Contract was not in good faith and opened up the Parties' forum selection agreement to forum shopping, as demonstrated in the following excerpt from that decision:

> In this case, the good faith principle contains the Parties' implied obligation to make their best efforts to define and abide by the economic value of the dispute when determining the agreed-upon forum for the resolution of that dispute. In this regard, determining the amount correlatively requires submitting, along with the complaint, such documents or expert reports as will establish the

[436] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).
[437] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 8.4 (C-0002).
[438] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 11.3 (C-0002).
[439] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).
[440] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245). The panel consisted of Ms. Patricia Saiz González (President of the Tribunal), Mr. Jorge Vega Soyer (Co-Arbitrator appointed by Peru), and Mr. Carlos Alberto Soto Coaguila (Co-Arbitrator appointed by CHM).

> amount of the disputed matter such that the Arbitral Tribunal may determine its jurisdiction.
>
> The assessment of the value of the disputed matter cannot be left up to the mere will or procedural strategy of one Party alone; rather, it is a reciprocal contractual obligation of the Parties. A contrary argument would mean leaving up to a party's discretion the determination of a forum which could potentially be more favorable to it for the resolution of the dispute, based on whether the Party quantifies the claim and how much it has framed its claims.[441]

227. The tribunal also rejected as "nonsensical" Peru's position, which its lawyers presented during the Final Hearing in that arbitration, that the Parties could compartmentalize a dispute into different components that, based on how the claims were styled, could lead to at least three (3) different arbitrations, two at the Lima Chamber of Commerce and one at ICSID, arising out of the same dispute.[442] Below is the tribunal's full reaction to Peru's position:

> Such a structure would have the following consequences:
>
> It would violate the procedural efficiency principle;
>
> It would jeopardize the effectiveness of the arbitration agreement, since a party against whom arbitration has been commenced before a given forum could, in turn, institute proceedings before another forum, asserting a different amount, thus creating parallel and potentially overlapping and conflicting proceedings;
>
> It would mean that ICSID, which is, perhaps, one of the more costly and sophisticated arbitration forums, might turn into a mere enforcement tribunal, with its role limited to just quantifying the applicable compensation, without it being able to rule on the merits.
>
> This is not just nonsensical from an efficiency perspective. The Tribunal cannot fathom a rational litigator wishing to institute

[441] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020, ¶¶ 96-97 (C-0245).
[442] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020, ¶ 125 (C-0245).

> several different arbitration proceedings to resolve one and the same dispute.[443]

228. In the Counter-Memorial, Peru insists the Lima Arbitration was not an improper circumvention of the RER Contract dispute resolution clause because the legal and factual issues at issue in the Lima Arbitration were completely different from those at issue in the case at bar.[444] In support of this defense, Peru contends that when MINEM filed the Lima Arbitration, Claimants had only noticed Peru of possible TPA claims relating to the RGA Lawsuit but had not notified Peru of potential claims under the RER Contract.[445] This defense fails for three reasons.

229. **First**, contrary to Peru's arguments, CHM ***did*** notify MINEM of claims CHM had under the RER Contract. This notice occurred on June 20, 2017, shortly after MINEM denied CHM's request to have the RER Contract suspended.[446] Because of this notice, CHM and MINEM entered into consultations and negotiation, which resulted in MINEM agreeing to suspend CHM's obligations under the RER Contract, including its obligation to achieve COS by March 14, 2020.[447] When it failed to honor this suspension in December 2018 (by rejecting the Third Extension Request in its entirety), MINEM knew CHM would pursue its previously noticed claims, as ultimately happened here.

230. **Second**, contrary to Peru's arguments, the claims Claimants noticed were not just about the RGA Lawsuit. The Second Notice of Intent, which Claimants served in March 2018,

[443] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020, ¶¶ 124-125 (C-0245).
[444] Counter-Memorial, ¶¶ 478-481.
[445] Counter-Memorial, ¶¶ 478-481.
[446] Latam Hydro LLC and CH Mamacocha S.R.L.'s First Notice of Intent, June 19, 2017 (C-0252).
[447] Addendum 3 to the RER Contract, September 8, 2017 (C-0014).

noticed claims that were about MINEM's ability to make extensions under the RER Contract, which was the main issue that MINEM raised in the Lima Arbitration later that year.[448]

231. **Third**, MINEM has already admitted that its claims in the Lima Arbitration overlapped extensively with the claims in this arbitration. This admission came in a pleading in the Lima Arbitration, dated December 30, 2019, in which MINEM admits that the following factual and legal issues overlap directly between the two arbitrations:

a. MINEM's interferences with the Project;

b. MINEM's repudiation of its obligation to protect the Project;

c. MINEM's ability to grant extensions under the RER Contract;

d. MINEM's repudiation of the suspension period;

e. MINEM's inconsistent positions with respect to the governing contract principles;

f. Peru's sovereign guarantee of a 20-year term of validity for the guaranteed-revenue concession; and

g. MINEM's obligation to "*coadyuvar*" CHM in the permitting process.[449]

232. From the above, the following reasonable inferences can be drawn: (i) MINEM knew since June 2017 that Claimants would bring all manner of claims at ICSID once they learned of Peru's wholesale reversal of its prior legal decisions regarding the Project; (ii) MINEM sought to preempt these anticipated claims by launching a preemptive strike in an improper local forum; (iii) MINEM knew full well that Clause 11.3(a) was the appropriate forum selection clause, requiring disputes that affected the viability of the Project to be brought before ICSID; and (iv) MINEM's theory that jurisdiction was proper before the Lima Chamber

[448] Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).
[449] MINEM's Brief C-8 submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 30, 2019 (C-0098).

was groundless, as the respected Lima Arbitration tribunal unanimously found after consideration on a preliminary basis.

233. Peru, nonetheless, tries to minimize the impact of its tactical ploy to subvert Claimants' rights to ICSID dispute resolution outside Peru by arguing the Lima Arbitration did not affect the Project "in the least" because it "did not suspend the performance of the RER Contract or prevent[] CH Mamacocha from achieving COS."[450] Peru's defense is equivalent to planting a bomb, but claiming "no harm, no foul" when the bomb fails to detonate. Even putting aside the direct damages incurred by CHM for having to defend against MINEM's spurious lawsuit – which were considerable and are included as damages in this case – Peru's "no harm, no foul" defense fails to consider that commencement of the Lima Arbitration would have doomed the Project, even if the other measures in December 2018 had not occurred. Just as the RGA Lawsuit temporarily put the Project on hold, given that no investor would invest in or loan to a project whose permits were being challenged by the very government entity that had issued them, no rational investor would continue to invest in a project that was being challenged by the authorizing agency, particularly where the agency was trying to nullify previously issued compensatory extensions in an effort to force termination of the project. It is wholly inconsequential that MINEM merely sought to declare null and void the extensions, and on its theory, MINEM would have been required to commence a separate action to terminate the RER Contract. Without the previously issued extensions, there would be no project, as the COS deadline would have expired four days after the Lima Arbitration was launched by MINEM.

[450] Counter-Memorial, ¶ 483.

3. Peru's Explanation For Abandoning The Proposed Supreme Decree Does Not Hold Up

234. Peru's decision to abandon its proposed supreme decree is another textbook example of regulatory opportunism. It is undisputed that MINEM published for notice and comment the proposed supreme decree on November 11, 2018.[451] The draft supreme decree would have amended the then-existing RER Regulations explicitly to allow for extensions to the Term Date and COS deadline beyond the contractual parameters in the event of government interference.[452] As explained in MINEM's "Statement of Reasons," the purpose of the proposed supreme decree was, *inter alia*, to: (i) confirm RER projects must be protected from government interference in accordance with the RER Law's objectives: (ii) avoid legal challenges from projects, like the Mamacocha Project, that had been illegally stalled by government interference; and (iii) promote stability in renewable energy projects.[453] As Claimants demonstrate in the Memorial, this proposed amendment was unnecessary because the existing RER Regulations already provided authority for MINEM to grant compensatory extensions under these circumstances.[454] The draft supreme decree would merely have codified what was already accepted legal jurisprudence.

235. To the dismay of Claimants, MINEM announced for the first time on December 27, 2018, that it was abandoning the proposed supreme decree in its entirety because the draft conflicted with Peru's new-found legal position that concessionaires bore the full risk of government interference.[455] In other words, in less than a seven (7) week period (from November 11, 2018 to December 27, 2018), MINEM's top lawyers and officials went from

[451] MINEM's Ministerial Resolution No. 453-2018-MEM/DM, November 11, 2018 (C-0173).
[452] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-0018).
[453] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-0018).
[454] Memorial, ¶ 160.
[455] MINEM Report No. 505-2018-MEM/DGE, December 27, 2018 (C-0175).

arguing the proposed supreme decree was ***legally necessary*** to advance the RER Law's objectives to deciding that the proposed supreme decree undermined these very objectives.

236. Peru does not deny that MINEM performed a complete about-face on the proposed supreme decree in a matter of weeks. Instead, Peru contends this reversal was reasonable because the public comments emphasized that the proposed supreme decree would violate the "principle of legal certainty" by changing how RER projects would be protected.[456] Peru also justifies this reversal due to the receipt of warnings that the proposed supreme decree could result in litigation against the State because it allegedly "would result in harm to third parties" who had not participated in the RER auctions due to their belief that the RER Law and its Regulations made it impossible for MINEM to move the Term Date and COS deadline beyond their contractual parameters.[457] Neither explanation justifies MINEM's sudden reversal.

237. **First**, the "principle of legal certainty" argument fails because the extensions contemplated by the proposed supreme decree would ***not*** have created "new" or "different" legal principles that changed how the RER projects would be protected, as Peru contends.[458] These principles already existed under the RER Law, whose express purpose was to protect RER projects, eliminate any barriers to their advancement, and create an investor-friendly legal framework that promotes and incentivizes investment in these projects.[459] As MINEM's Statement of Reasons explained, the purpose of the proposed supreme decree was not to create new law or to new legal principles but, rather, to ensure that the RER projects would be protected and promoted as had been expected under the RER Law.[460]

[456] Counter-Memorial, ¶ 283.
[457] Counter-Memorial, ¶ 278.
[458] Counter-Memorial, ¶ 283.
[459] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).
[460] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-0018).

238. The Echecopar Reports support this interpretation. As explained in **Section II.A**, *supra*, MINEM commissioned these Reports in April 2018 to assess the legality of granting extensions to RER projects (like the Mamacocha Project) that had been delayed by government interference. These Reports: (i) confirmed that MINEM had a legal obligation under the existing legal framework to extend the Term Date and COS deadline in instances of government interference; and (ii) cautioned MINEM that an interpretation to the contrary would be unconstitutional because it would create new restrictions and obligations that ran directly counter to the RER Law's mandate.[461] These Reports also recommended that MINEM amend the existing RER Regulations to make it expressly clear that RER concessionaires should receive extensions to the Term Date and COS deadline if delayed by government interference.[462] As these expert Reports explain, while such an amendment was technically unnecessary (since MINEM should already be interpreting the then-existing RER Regulations in this manner), this amendment would mitigate against the "risk that the provisions of the RER Regulations under analysis might be ascribed an unlawful and unconstitutional interpretation in violation of" the RER Law and Peruvian law.[463]

239. In essence, the Echecopar Reports anticipated the instant case wherein Claimants contend that the RER Regulations as administered by MINEM in December 2018 would be an unconstitutional application of the RER Law. In other words, the then-existing principles required compensatory extensions and the Echecopar Reports merely recommended that the RER Regulations should conform to the existing law. It is ironic that Peru now tries to exploit the draft supreme decree to justify its baseless contention that this proposed regulation would

[461] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[462] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § I.4 (C-0235).
[463] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § I.4 (C-0235).

have changed the law, and hence violate the "principle of legal certainty."[464] Peru's interpretation stands the Echecopar Reports on their head.

240. The record of consistent state practice in regard to granting extensions to compensate for government interferences also demonstrates that the draft Supreme Decree would not have created "new law," but rather would have maintained and clarified existing law. The purpose of the draft Supreme Decree was to ensure that all similarly situated concessionaires would be held harmless from instances of government delays or interferences.[465] Indeed, those were the precise words that MINEM used when it extended the RER Contract deadlines two times via Addenda 1-2.[466] Establishing a specific procedure for RER concessionaires to receive similar extensions ensured MINEM would continue interpreting the RER Regulations in a manner consistent with these decisions, which, in turn, promoted the "principle of legal certainty." Rather than violating the "principle of legal certainty," the draft Supreme Decree would have supported the long-standing objectives of the RER Law and the decisions that MINEM historically made vis-à-vis the Mamacocha Project.

241. **Second**, Peru's explanation that MINEM had "no choice" but to abandon the proposed supreme decree in order to placate third parties—particularly the politically powerful natural gas lobby—who were not participating in the RER Promotion similarly fails.[467] As an initial matter, the RER Law provides that MINEM's ***sole obligation*** is to promulgate, amend, and/or interpret the RER Regulations in a manner that is consistent with the RER Law's objectives and the "public interest" of promoting, protecting, and incentivizing RER projects.[468]

[464] Counter-Memorial, ¶ 283.
[465] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-0018).
[466] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[467] Counter-Memorial, ¶¶ 278-282.
[468] Legislative Decree No. 1002, May 1, 2008, Supplementary Provisions (C-0007).

Nothing in the RER Law gives MINEM discretion to give private interests priority over this public interest. Hence, to the extent MINEM abandoned the proposed supreme decree to placate the interests of private third-parties (as Peru now contends), this rationale only confirms that MINEM's decision was unreasonable.

242. **Third**, Peru's explanation strains credulity. Peru contends MINEM was justified in abandoning the proposed supreme decree because the proposed regulation would have resulted in the State being sued.[469] But this argument makes no sense because MINEM's abandonment of the proposed supreme decree all but guaranteed the State ***would be sued*** by Claimants (and other RER concessionaires) who had already noticed their claims against Peru and made clear they would pursue their claims if Peru did not grant them compensatory extensions.[470]

243. **Fourth**, Peru's explanation is also unpersuasive because it suggests that comments from third-parties could override MINEM's legal conclusions (such as those included in its Statement of Reasons) that the proposed supreme decree was legally necessary. It is undisputed that MINEM studied the legality of the proposed supreme decree for months and meticulously drafted it to ensure compliance with the law. But now Peru would have the Tribunal believe this months-long effort was swiftly and abruptly upended by negative comments from two (2) private parties. As Dr. Santiváñez confirms, this story does not add up:

> I would be surprised if, at the time the proposed Supreme Decree was being contemplated and drafted, the competent legal and technical teams of MINEM had not anticipated all of the comments subsequently received. The MINEM teams could not have missed in their analysis the obvious fact that the proposal intended to modify the rules of the third and fourth RER auctions, and that this modification could be considered by unsuccessful bidders as a

[469] Counter-Memorial, ¶¶ 278-282.
[470] Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).

> questionable change of the auction rules that would generate complaints.[471]

244. Dr. Santiváñez adds that what makes this explanation particularly dubious is that these comments came from entities who had never participated in the RER Promotion and had strong economic motivations to oppose all RER projects: Inland Energy and Kallpa Generación. Because of this fact, neither of these entities would have standing to challenge the proposed supreme decree under Peruvian law.[472] Hence, MINEM's supposed concern that the proposed supreme decree would expose the State to liability is pure conjecture and Peru has failed to submit any facts that substantiate this concern.

245. As the adage goes, the simplest explanation is usually the best one. And here, the simplest explanation for MINEM's sudden and abrupt reversal with respect to the proposed supreme decree is that killing the RER projects was more politically expedient than keeping them alive. As Claimants have demonstrated, and Peru does not refute, the spot market prices had plummeted to record lows in late 2018, to approximately US $10 per megawatt hour. Because the RER projects were promised fixed prices of around US $60 per megawatt hour, Peru would have had to make significant Premium payments and raise consumer prices in the process if the RER projects were kept alive.[473] Conversely, if Peru let the RER projects die, it could stand to collect as much as US $55 million from the performance bonds belonging to the RER projects that were expected to fail without further extensions, including the US $5 million performance bond belonging to the Mamacocha Project.[474]

[471] Santiváñez II, ¶ 46.
[472] Santiváñez II, ¶¶ 47-48.
[473] Santiváñez I, ¶¶ 65-78.
[474] Memorial, ¶ 162; C-0175.

246. Moreover, abandoning the proposed supreme decree alleviated MINEM from the growing political pressure from the powerful natural gas lobby. Noticeably missing from the Counter-Memorial is mention that Inland Energy and Kallpa Generación (the entities that Peru contends swayed MINEM with their comments against the proposed supreme decree) are subsidiaries or affiliates of large energy companies who are active in Peru's natural gas sector. As Dr. Santiváñez explains, this sector actively opposed the RER projects because of the preferential access they were given if power was oversupplied (economic dispatch) and their contribution to the oversupply of electricity, which, in turn, caused the spot market price to continue at low levels.[475] For these reasons, the natural gas lobby exerted significant political pressure on MINEM to abandon the supreme decree and, judging by MINEM's reaction, its political strategy may have worked.

247. Because MINEM abandoned the proposed supreme decree, at least thirteen (13) of the twenty (20) RER hydro projects from the Third and Fourth Auctions (*i.e.*, 65%) failed.[476] This fact alone demonstrates this measure did not further the RER Law's objective to protect the RER projects and eliminate barriers to their advancement. Instead, as shown in this section, this measure furthered the private interests of the natural gas lobby and the political and opportunistic interests of MINEM.

G. Peru's Assertion That It Always Dealt With Claimants In "Good Faith" Is Contradicted By Evidence Originating From The Government Itself

248. In the Counter-Memorial, Peru repeatedly asserts it always acted in "good faith" in its dealings with Claimants. This assertion is divorced from reality. Below are representative examples of Peru's lack of good faith during the relevant period.

[475] Santiváñez II, ¶¶ 47-48.
[476] Santiváñez II, ¶ 44.

249. **First**, Peru failed to act in good faith when it filed the RGA Lawsuit. As described in **Section II.B**, *supra*, the evidentiary record confirms that the RGA knew its Lawsuit lacked merit, but it filed it, nonetheless. The RGA's Attorney General personally recommended ***against*** filing the Lawsuit because it lacked merit.[477] But as recounted in the Regional AG Report, the Attorney General's recommendation was overruled by members of the Regional Council.[478] The Attorney General was so suspicious of the motivation of the Regional Councilmembers that she asked the Regional Councilmembers to substantiate the RGA Lawsuit's allegations, but they refused.[479] The Attorney General then recommended to the RGA Governor that the Councilmembers should be investigated for their "EVASIVE CONDUCT" (emphasis in original).[480]

250. Shortly after the RGA filed its Lawsuit, two of these Regional Councilmembers admitted in a press interview that the legal theories in their Lawsuit had never been used before but were being debuted here to specifically target the Mamacocha Project.[481] Around the same time, the head of ARMA, Mr. Sanz, admitted in a press interview that the environmental allegations that the RGA had been making against the Project were completely unfounded.[482] Months later, the Morón Report surfaced, which conclusively reported what the Regional Attorney General already knew: the allegations and claims in the RGA Lawsuit were untimely, lacked merit, misapplied the applicable law, and relied on baseless conspiracy theories.[483]

[477] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[478] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[479] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[480] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[481] Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).
[482] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[483] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).

Accordingly, by Peru's own admissions (through the Regional AG Report, the press interviews of regional government officials, and the Morón Report), the RGA Lawsuit was a discriminatory and meritless challenge of the Project.

251. **Second**, Peru failed to act in good faith when the AEP investigated and charged the Project's lawyer, [redacted], with a crime based on nothing more than his having signed a permitting application on behalf of his client, CHM. Peru insists there is more evidence out there that supports the AEP's theory that [redacted] "fraudulently collaborated" with ARMA officials to commit a crime. But, as described in **Section II.D**, *supra*, more than three (3) years after the criminal proceeding began, neither the AEP nor Peru have produced any such evidence. The truth is [redacted] never met with nor spoke to the ARMA officials with whom he supposedly collaborated, except last year during a virtual hearing in his criminal case, when they met and spoke for the first time.[484] And the allegations supporting his "crime" (*i.e.*, ARMA's reclassification of the Project from Category III to Category I) were, by Peru's own admission, taken wholesale from the RGA Lawsuit.[485] In other words, they are the ***exact same allegations that Peru, itself, has already discredited and debunked*** through the Morón Report,[486] the Regional AG Report,[487] and the press interview of Mr. Sanz.[488] To make matters worse, the criminal statute the AEP is using to prosecute [redacted] of this "crime" was not even in existence at the time of the alleged "wrongdoing." Taken together, these facts demonstrate that the commencement and continued prosecution of the criminal proceeding against [redacted] has not been in good faith.

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[484] [redacted]
[485] Counter-Memorial, ¶ 386.
[486] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).
[487] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[488] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).

252. **Third**, Peru failed to act in good faith when MINEM refused to extend the RER Contract milestone deadlines by the amount of time that CHM's obligations and the project, itself, was under suspension (seventeen (17) months). As described in **Section II.D**, *supra*, on July 13, 2017, MINEM sent Claimants Legal Report No. 122-2017-MEM/DGE, which plainly informed CHM that suspensions of the RER Contract would, in due course, result in compensatory extensions to the Works Schedule to account for this suspended time.[489] Claimants relied on this representation when they agreed to formalize the suspension of the RER Contract via Addendum 3 and when they extended the suspension period via Addenda 4-6.[490] But, on December 31, 2018, MINEM refused to restore any of the suspended time to the Works Schedule when it denied CHM's Third Extension Request in its entirety.[491] MINEM adopted the unreasonable legal position that the suspension of "all obligations" was not really a suspension. To compound the arbitrary nature of this rejection, MINEM admitted one year later in a pleading in the Lima Arbitration that the 17-month suspension period should have been restored to the Works Schedule by way of extension.[492]

253. **Fourth**, Peru failed to act in good faith when it commenced the Lima Arbitration. As described in Section II.F, *supra*, the tribunal in the Lima Arbitration unanimously concluded that MINEM's decision to file its claims before the Lima Chamber of Commerce, instead of ICSID, resulted from an interpretation of the RER Contract that was not in good faith and was undertaken for the improper purpose of circumventing ICSID jurisdiction.[493] Further

[489] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[490] Addendum 3 to the RER Contract, September 8, 2017 (C-0014); Addendum 4 to the RER Contract, January 17, 2018 (C-0015); Addendum 5 to the RER Contract, March 26, 2018 (C-0016); Addendum 6 to the RER Contract, July 23, 2018 (C-0017).
[491] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).
[492] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).
[493] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).

highlighting the improper nature of this measure is that Peru ***never*** gave Claimants notice of these claims, much less an opportunity to resolve them. This fact is significant because, when it filed the Lima Arbitration, Peru was a party to an agreement with Claimants through which the Parties undertook to use their "best efforts" to resolve their disputes and to "coordinat[e]" with each other on matters related to their disputes through April 1, 2019.[494] In good faith, Claimants adhered to their commitments and withheld from pursuing any of their noticed claims during this time period. By contrast, Peru failed to act in good faith by surreptitiously filing the Lima Arbitration on December 27, 2018, as a preemptive strike to undermine the Parties' mutual agreement to resolve any large disputes before ICSID.

H. Peru Has Failed To Sustain Its Attempts To Deflect Blame For The Impact Of Its Measures

254. In the Counter-Memorial, Peru attempts to deflect blame for the offending measures by contending the Project would have failed for reasons other than the government's interferences. As demonstrated below, these unsupported attempts by Peru to point to alternative causes are not sustained in the record and do not change the undeniable fact that Peru's measures were the proximate cause for the Project's demise on December 31, 2018.

1. Claimants' Financing Strategy Was Conventional, Sound, And Would Have Been Successful

255. In the Memorial, Claimants explained their detailed plans and efforts to pursue a conventional, sound and successful financing strategy centered on securing a US $60 million non-recourse, project finance loan from DEG, plus an equity infusion of approximately US $25 million from Latam Hydro and Innergex. Claimants devised this strategy after conducting extensive due diligence, including seeking advice from a high-end private equity and advisory

[494] Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), September 21, 2018 (C-0062).

boutique, Equitas Partners, and analyzing the financing strategies of other RER developers pursuing similar hydro projects.[495] Claimants' capital-raising strategy was working as planned until Peru engaged in a series of back-breaking measures in March 2017 that derailed the financing negotiations indefinitely.

256. In the Counter-Memorial, Peru tries to deflect blame by arguing that Claimants' financing strategy was materially flawed and would have failed even if Peru had not interfered with the Project. Peru also contends that Claimants should have just financed the entire Project themselves, rather than continue with their original plan of securing a project loan. As shown below, these attempts to contest Claimants' proof of proximate cause are entirely unfounded and based on pure conjecture and material mischaracterizations of Claimants' financing strategy.

a. Peru Mischaracterizes Claimants' Financing Strategy

257. In trying to paint Claimants' financing strategy as "risky" and "unconventional," Peru makes a series of mischaracterizations that find no support in the evidentiary record. For example, Peru contends DEG's ability to finance the Project "was contingent on the entry of a new shareholder" (*i.e.*, Innergex) and this contingency made the project financing negotiations overly "complex and risky."[496] But this contention is wrong. DEG never required Innergex's involvement as a precondition to closing on the project loan. Claimants were the ones who wanted Innergex involved in the Project due to its expertise, but it was not a pre-condition to closing the loan and the sponsors committed to DEG that they would provide one hundred percent of the equity if need be.[497]

[495] Memorial, ¶¶ 66-68.
[496] Counter-Memorial, ¶¶ 298-303.
[497] Jacobson II, ¶¶ 14-15; Sillen II, ¶ 11.

258. As Mr. Jacobson explains, Claimants wanted Innergex to become a majority equity stakeholder because: (i) Claimants expected Innergex to oversee the Project's construction while Claimants pivoted to developing the Upstream Projects; (ii) Innergex had substantial experience constructing hydro projects; and (iii) Claimants believed Innergex's reputation and stature would strengthen their negotiating position with DEG.[498] Had Innergex been unwilling or unable to join the Mamacocha Project (for reasons unrelated to Peru's interference), Claimants' financing negotiations with DEG would have continued apace. In an e-mail from Latam Hydro to DEG, dated January 29, 2016, Latam Hydro explained to DEG that the sponsors – Mike Jacobson and Gary Bengier – would provide ***all*** necessary equity financing in the "unlikely event" that Innergex or other prospective investors did not commit to the Project:

> **Equity**: We have invited select potential investors to submit a term sheet for acquiring a 70% stake in the project by February 12. The response has been good and several investors have begun a due diligence review of the project. The investors include Union Energy Group, Alupar, ENEL, InterGen and Innergex. In the unlikely event that we are not able to reach an agreement with any of the investors, our sponsors – Mike Jacobson and Gary Bengier – are fully committed to the project and will provide the necessary funding. It should not come to that, but you should be aware they have already invested over $10m including guarantees.[499]

259. The sponsors made good on this commitment. Due to the unfortunate circumstances created by Peru's breaches, Innergex did not commit and Latam Hydro has already invested more on the Project and its related litigations than it would have been required to invest with a full one hundred percent equity share if the Project had successfully proceeded.[500]

[498] Counter-Memorial, ¶¶ 298-303.
[499] Email from S. Sillen to P. Luetkebohmert (DEG) et al., January 29, 2016 (C-0213).
[500] Jacobson II, ¶ 16.

260. Peru is also wrong when it speculates that having the Innergex negotiations ongoing in parallel with the DEG negotiations increased the risk that the DEG negotiations would not close on time.[501] Peru does not present any evidence supporting this inaccurate hypothesis. Claimants' evidence shows the opposite: Claimants' parallel negotiations with DEG and Innergex ***actually were working and would have closed successfully but for the government's interruptions***.[502] Indeed, Claimants have demonstrated that when the Project received its second set of extensions in January 2017 the negotiations with Innergex and DEG advanced rapidly.[503] In February 2017, Innergex and Latam Hydro agreed to the terms of their investment agreement.[504] In early March 2017, DEG finalized its technical and legal diligence on the Project and, based on the positive results of that diligence, circulated its proposed terms for the project finance loan.[505] Representatives and legal counsel for all Parties – Latam Hydro, Innergex and DEG – held extensive meetings in New York City in late March 2017 to finalize the terms for the loan.[506] These advanced negotiations were interrupted by the troubling news that the RGA Lawsuit had been filed and was being served.[507]

261. If anything, the rapid pace at which these negotiations progressed supports the inference that Innergex's involvement actually ***de-risked*** Claimants' negotiations with DEG, as Claimants had intended. Moreover, Peru's suggestion that it was unusual for Claimants to have pursued parallel and simultaneous equity capital and debt financing strategies is completely

[501] Counter-Memorial, ¶ 299.
[502] Jacobson II, ¶¶ 19-25; Sillen II, ¶ 13.
[503] Email from S. Sillen to P. Gyergyay and J. von Frowein (DEG), January 2, 2017 (C-0161); Email from S. Sillen to G. Bengier et al., January 5, 2017 (C-0041); Email from S. Sillen to M. Jacobson et al. attaching C.H. Mamacocha Timeline v.1, January 24, 2017 (C-0163).
[504] Email from S. Sillen to M. Jacobson et al., February 25, 2017 (C-0046).
[505] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017 (C-0048).
[506] Jacobson II, ¶¶ 21; Sillen, ¶¶ 14.
[507] Jacobson II, ¶¶ 22-23; Email from J. Lepon to M. Jacobson et al., March 30, 2017 (C-0050).

unfounded.[508] As Dr. Whalen explains, this practice is actually "typical" in renewable energy projects:

> It is typical, in my experience, for IPP developers to pursue parallel and simultaneous equity capital and debt financing strategies. This is because:
>
> (I) many IPP developers seek partners with complementary capabilities in constructing or operating the project;
>
> (II) many IPP developers seek to redeploy capital invested in early-stage developments into other early-stage development opportunities in their portfolio; and
>
> (III) the work required to support the due diligence and the structuring of terms and conditions for project equity investors is substantially similar to the activities necessary to secure the support of project finance debt providers.[509]

262. Peru also makes a series of mischaracterizations about Claimants' ability to achieve Financial Close while the Project's most important permits were subject to threats of rescission. According to Peru's undocumented speculation, the government's efforts to annul the environmental permits did not impede Claimants' ability to finalize their negotiations with DEG and achieve Financial Close.[510] And, if they did, Peru alleges Claimants should have just obtained a loan from another financial institution.[511] Both of these arguments are silly and have no evidentiary support.

263. Claimants demonstrated in **Section II.E**, *supra*, that CHM could not have achieved Financial Close until it had all of its permits. To summarize, Clause 1.4.9 of the RER Contract defines Financial Close as the date when CHM satisfies "all the conditions" for

[508] Sillen, II, ¶ 15.
[509] Whalen I, ¶ 4.3.3.
[510] Counter-Memorial, ¶¶ 311-321.
[511] Counter-Memorial, ¶¶ 311-321.

disbursement.[512] DEG's Indicative Term Sheet makes clear that these conditions require, among other things, for CHM to have certified and translated copies of ***all*** "Project Documents," which is defined as including the "permits, authorizations and license relevant for the Project."[513] Thus, CHM could not have achieved Financial Close while the government delayed approving permits or threatened to annul previously granted permits starting in March 2017. As Dr. Whalen confirms, AAA's unwillingness to issue the CWA and the RGA Lawsuit's attempt to annul the environmental permits each would have independently made closing on the DEG loan impossible.[514] Nothing Peru cites is to the contrary.

264. Further, Peru's suggestion that Claimants should have had a backup financial institution in place is similarly frivolous.[515] This suggestion postulates that CHM could have found other financial institutions that would have been willing to loan the Project US $60 million while: (i) the environmental permits were subject to legal challenge by the same government that had issued them in the first place; (ii) regional criminal authorities initiated a criminal investigation into the Project; and (iii) the all-important CWA was being improperly withheld by AAA. As Dr. Whalen confirms, this scenario was highly unlikely:

> In my opinion, no project finance lender (or any other external lender that relied upon CHM's performance) would have reasonably proceeded with the financing for the Mamacocha Project after March 2017 based on:
>
> (I) the uncertainty of whether the Mamacocha Project would be able to achieve fully effective key permits and authorizations; (II) the uncertainty of whether the Mamacocha Project would be in a position to realize any of the benefits of the RER Contract given the schedule risk associated with the RER Contract milestones if not extended by MINEM;

[512] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.9 (C-0002).
[513] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017, Schedule 3 and ¶ 57 (C-0048).
[514] Whalen I, ¶¶ 6.1-6.4.
[515] Counter-Memorial, ¶ 300.

> (III) the certainty that the Mamacocha Project, if stripped of the benefits of the RER Contract as I describe in sub-section **Error! Reference source not found.**, would be a fundamentally different, and higher risk, lending opportunity than anticipated.[516]

b. Claimants' Pursuit Of A Non-Recourse, Project Finance Loan Constituted A Prudent Business Strategy

265. Because neither DEG nor any other financial institution would finance the Project amidst Peru's measures against the Project, Peru argues that it was unreasonable for Claimants to continue pursuing a project finance loan. According to Peru, Claimants should have pivoted to other financing strategies, *e.g.*, self-financing, since the RER Contract in no way limited CHM's financing options.[517] In so arguing, Peru contends it was overly "rigid" and "risky" for Claimants to have singularly focused on financing the Project through a project finance loan. None of this is true.[518]

266. The RER Contract did not limit CHM's financing options. But that does not mean Peru had the right to undermine the reasonable and prudent financing strategy CHM chose. The RER Contract only obligated CHM to pursue its obligations—such as its obligation to achieve Financial Close—with ordinary diligence and reasonableness.[519] That is precisely what CHM did here when it pursued a financing strategy centered on obtaining a project finance loan to be augmented with equity contributions. Peru's contention that this decision was somehow unreasonable or unexpected fails for several reasons.

267. **First**, project finance is one of the most common financing strategies used by project developers. From 2013-2017 alone, there was more than US $1.7 trillion issued in

[516] Whalen I, ¶ 7.5.1.
[517] Counter-Memorial, ¶¶ 293, 296, 301.
[518] Counter-Memorial, ¶ 300.
[519] Articles 1314 and 1317 of the Civil Code, which are incorporated under the RER Contract under Clauses 1.2 and 1.4.30., and Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).

project finance loans and bonds and, of that amount, US $638 billion (*i.e.*, 38%) was issued for projects in the power sector.[520] Dr. Whalen explains that this strategy is attractive to developers in the power sector because these developers "must leverage their finite equity capital resources across a portfolio of development-phase, construction-phase, and operational projects" and are, thus, "constantly seeking to recycle capital across a broader range of opportunities."[521] Consistent with this expert view, Mr. Jacobson explains that project finance loans are almost always preferred over other financing strategies because these loans "free up the project's working capital,"[522] which, in turn, increases the profitability of the project. In other words, project financing is the preferred financing strategy because it makes these projects more profitable and economically feasible.

268. **Second**, Peru ***specifically designed the RER Contract*** so that RER project developers would pursue project financing as their main source of financing. It is undisputed that Peru created the RER Promotion in 2008 to eliminate barriers that previously had impeded the development and construction of RER projects. As Dr. Whalen explains, because these projects required extensive up-front capital expenditures, they were too risky and costly to self-finance, and because of the uncertainty and volatility of the expected income streams, financial institutions refused to loan the money needed to get the project off the ground.[523]

269. Peru sought to fix this impediment by offering RER project developers a 20-year, Guaranteed Income concession through the RER Contract at a premium price determined by public auctions.[524] This sovereign guarantee made the RER Contract a "bankable" investment

[520] Whalen I, ¶ 3.2.2.
[521] Whalen I, ¶ 3.3.7.
[522] Jacobson II, ¶ 6.
[523] Whalen I, ¶ 4.2.4.
[524] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.26 (C-0002).

agreement, meaning that it was attractive to international lenders because it protected them from the volatility and uncertainty of the spot market. As Dr. Whalen confirms, this Guaranteed Revenue concession is just one way that Peru designed the RER Program to make RER projects more attractive to international financial institutions:

> In my opinion the RER Program was clearly structured to maximize "bankability." Compelling features in awarded RER concessions can be observed in CHM's own RER Contract. Among these were:
>
> (I) Peru, represented via MINEM, was the RER Contract "grantor" and therefore the contractual commitments within represented a sovereign obligation. This would be the highest level of creditworthiness available for a domestic project;
>
> (II) The tariff paid under the RER Contract was long-term (20-years) and fixed (under a system in which a RER producer was paid a spot price plus a premium if the spot price declined below the award tariff). This resulted in stable tariffs suitable for higher leverage and long-term debt;
>
> (III) The tariffs were paid in U.S. dollars and indexed to U.S. inflation rates, eliminating foreign exchange risk for non-Peruvian investors and lenders;
>
> (IV) The RER producer enjoyed priority dispatch (zero marginal cost), and access to transmission and distribution networks, as well as compensation for any inability to dispatch for reasons beyond its control. This eliminated the risk of revenues being reduced by transmission curtailment;
>
> (V) Non-technical disputes above US $20 million were to be arbitrated in accordance with ICSID rules either in Washington DC or Lima at the choice of RER concessionaire. International project finance lenders prefer potential disputes with host governments to be resolved in neutral forums;
>
> VI) MINEM, at the request of the contracted RER producer, would use its best endeavors to allow access to third-party facilities, and assist (coadyuvar) in obtaining permits and other authorizations in the event these were not timely granted by relevant authorities. This underscored Peru's stated commitment to support project developers through prolonged or unreasonable permitting delays.

> *******
>
> In my opinion, ***the RER Contract anticipated and was purposefully structured to be suitable for the use of third-party project financing. I have seen few comparable programs that reflect as much careful design and purposeful effort to be compatible with international project finance parameters as the RER Program***. This reflects, I believe, the strong interest of Peru at the time to attract substantial inward flows of international project finance capital to support this program.[525]

270. For these reasons, Peru always expected that RER concessionaires who were awarded the RER Contract, like CHM, would use the RER Contract to obtain a project finance loan. This inference is supported by the RER Contract's definition of "Financial Close," which specifically provides that the RER concessionaire would sign a "project financing contract" with third-parties (*i.e.*, financial institutions) that would result in "disbursements," as shown below:

> **1.4.9. "Financial Closing"** means the date on which the entire RER project financing contract is signed by all the parties involved in the financing and all the conditions under such contract are met to make disbursements.[526]

271. **Third**, it would have made no economic sense for Claimants to self-finance this Project. As an initial matter, Dr. Whalen confirms it is extremely rare for project developers to self-finance renewable energy projects because the substantial risks and up-front costs associated with these projects make the self-financing option economically infeasible.[527] That is why, in Dr. Whalen's view, renewable energy projects were simply not being developed or constructed in Peru until the RER Promotion was created in 2008.[528] And since the RER Law came into effect, every RER project has been financed, at least in part, by a project finance loan.[529] Peru's

[525] Whalen I, ¶¶ 4.2.10, 4.2.20 (emphasis added).
[526] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.9 (C-0002).
[527] Whalen I, ¶¶ 4.3.8-4.3.9.
[528] Whalen I, ¶ 4.2.4.
[529] Santiváñez II, ¶¶ 5-6.

contention that at least one RER project (CH Yarucaya) achieved Financial Close through self-financing is factually inaccurate.[530] Dr. Santiváñez confirms in his Second Witness Statement that CH Yarucaya achieved Financial Close because of a project finance loan extended from the Inter-American Investment Corporation in 2019.[531]

272. Further, Peru had no reasonable expectation that CHM, or any other RER concessionaire, would be capable of self-financing these projects. As Dr. Whalen confirms, had Peru intended for RER concessionaires to have this capability, it would have required it as a precondition for them to be able to participate in the RER auctions:

> Additionally, in my opinion, Peru had no expectation that any successful bidder in a RER Program auction would be capable of self-funding the capital required for a RER concession (or of guaranteeing loans to the same effect). If it had, Peru would have narrowed eligibility to bid only to a smaller number of firms with high credit ratings and substantial balance sheets. To my knowledge, it did not and the RER Auction requirements did not require applicants to submit their credit ratings or financial wherewithal. Instead, it required that bidders provide performance bonds specified under the RER Program and facilitated bidders' ability to secure external financing.[532]

273. **Fourth**, even if it would have been economically feasible for Claimants to self-finance the Project (which it was not), that feasibility would have evaporated in March 2017 once it became clear that the RGA had initiated an existential challenge against the Project and its permits. Dr. Whalen confirms that, in his opinion, "no project sponsor or owner would have reasonably proceeded to self-fund the Mamacocha Project after March 2017 given the fundamental uncertainties" caused by Peru's measures.[533] For these reasons, Peru's speculative defense that Claimants should have self-financed the Project is unsupported.

[530] Counter-Memorial, ¶¶ 301-303.
[531] Santiváñez II, ¶ 7.
[532] Whalen I, ¶ 4.2.22.
[533] Whalen I, ¶ 7.5.2.

2. Claimants Earned The Local Communities' Support

274. Peru also attempts to deflect blame by arguing Claimants would not have completed the Project because the *Ayeños* (*i.e.*, the Ayo residents who lived a few kilometers from the Project site) were against the Project. According to Peru, when Claimants asked ARMA to reclassify the Project under Category I in late 2013, this act was seen by the *Ayeños* "as a mockery of the law" and "a transparent attempt" by Claimants to circumvent environmental studies and public scrutiny that "would reveal the true impact of the Mamacocha Project."[534] Peru argues this event was an early turning point that soured Claimants' relationship with the *Ayeños* throughout the Project's existence, as evidenced by a purported petition that more than 150 *Ayeños* signed against the Project in 2017.[535] None of this fictional story is true.

275. As an initial matter, Claimants have introduced uncontroverted proof that their decision to seek reclassification of the Mamacocha Project was done solely because the original classification was wrong. They were not trying to "circumvent environmental studies" into the Project's expected environmental impact, as Peru baselessly alleges.[536] Claimants' proof includes, *inter alia*: (i) after obtaining reclassification of the Project, Claimants still commissioned numerous environmental studies as part of its continuing commitment to minimize the Project's environmental and ecological impact;[537] (ii) Claimants' agreed in November 2017 to undertake a semi-detailed environmental impact study (*i.e.*, the same study that Peru suggests Claimants were trying to circumvent when they sought reclassification) when asked by the Special Commission;[538] (iii) Claimants' agreed with DEG to be bound by the

[534] Counter-Memorial, ¶¶ 200-203.
[535] Counter-Memorial, ¶¶ 200-203.
[536] Counter-Memorial, ¶ 201, n. 302.
[537] Bartrina, ¶¶ 29-30; Chávez I, ¶¶ 19-24.
[538] CH Mamacocha S.R.L. letter to R. Ampuero, September 4, 2017 (C-0221); CH Mamacocha S.R.L. letter to R. Ampuero, October 30, 2017 (C-0224); Email from S. Sillen to M. Jacobson et al., November 1, 2017 (C-0225);

highest international environment standards encompassed in the *Equator Principles,* which standards are more stringent than those imposed under Peruvian law regardless of the project's classification;[539] (iv) the Morón Report concluded that there are no "documents manifestly evincing that Mamacocha sought to circumvent the law in order to obtain a less stringent environmental classification and, thus, conceal its project from the general public;"[540] and (v) Mr. Jorge Chávez, the EnvPhys licensing professional with over 30 years' experience preparing projects for environmental permitting in Peru, testifies in his Witness Statement that the Mamacocha Project was not properly classified under Category III in the first place, and therefore, CHM's request for reclassification was reasonable and appropriate.[541]

276. Peru's baseless characterization that Claimants ignored the *Ayeños*' concerns about the Project is unfounded. For example, when the *Ayeños* communicated their desire for Claimants to relocate the Project's intake to another area of the Mamacocha Lagoon, Claimants agreed to make this modification even though it was not required by law and it meant CHM had to invest time and money to seek modification of existing permits from ARMA and other regional permitting authorities.[542] The exact same thing happened when the *Ayeños* and the Rural Community of Andagua asked Claimants to modify the transmission line route for the Project and, separately, to supply the village of Ayo with electricity produced by the Project.[543] These voluntary modifications of the Project design demonstrated Claimants' goodwill and earned the *Ayeños*' support.

Letter from CH Mamacocha S.R.L. to R. Ampuero, November 16, 2017 (C-0226); CH Mamacocha S.R.L. Comments to Nine Issues Highlighted by the Special Commission, November 17, 2017 (C-0228)

[539] CH Mamacocha S.R.L. Comments to Nine Issues Highlighted by the Special Commission, November 17, 2017 (C-0228); Chávez I, ¶¶ 25-30.

[540] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.4 (C-0229).

[541] Chávez I, ¶¶ 12-18.

[542] Bartrina II, ¶¶ 38-39.

[543] Bartrina II, ¶ 31, n. 27.

277. Claimants also earned the *Ayeños*' support by committing more than US $360,000 in designing and implementing myriad social initiatives that helped the *Ayeños* and other neighboring communities over the course of the Project, such as: (i) improving the drinking water supply system; (ii) installing a sewage water treatment plant; (iii) providing veterinary assistance to livestock; (iv) providing supplies to schools; (v) donating a truck; (vi) completing a museum; (vii) donating to various businesses in the local avocado, cattle, cheese, milk, and weaving communities; (viii) building roads; (ix) providing medical supplies to the local health centers; and (x) publishing two books extolling the culture of Ayo and promoting local artisan products.[544] As Mr. Jacobson explained, even though these initiatives were not required, Claimants "cheerfully approved these expenditures knowing that they could have a direct impact on the social welfare of the community."[545] This, after all, was one of his goals in backing this Project.

278. Contrary to Peru's contentions, the "opposition" that Peru refers to in the Counter-Memorial did not come from *Ayeños*.[546] Instead, the opposition came from RGA politicians and their constituents who lived approximately eight (8) hours away from the Project site in the city of Arequipa.[547] This fact is evident from the minutes of the roundtable discussions (*mesas de trabajo*) that the RGA hosted in Arequipa in 2016, which demonstrate the RGA officials who moderated the discussions refused to let the *Ayeños* in the audience speak because they presumably were in favor of the Project.[548] Even the Mayor of Ayo, Mr. Juan

[544] Jacobson I, ¶ 60.
[545] Jacobson II, ¶ 83.
[546] Counter-Memorial, ¶¶ 201-203.
[547] Jacobson II, ¶ 86.
[548] Email from A. Arch (Poyry) to A. Bartrina et al. attaching Poyry's Report of Participation in the Presentation of Technical Aspects of Mamacocha Hydropower Plant, June 17, 2017 (C-0116).

Vilca, who traveled many hours to speak in favor of the Project, was not given an opportunity to speak during these roundtables.[549]

279. The unreasonableness of the opposition is reflected in a public press interview by Mr. Sanz, the head of ARMA, dated July 19, 2017.[550] Mr. Sanz confirms that the individuals who opposed the Project did not have the interests of the *Ayeños* in mind:

> This a project that promotes development, it fosters electricity; moreover, they will be getting the energy free at the town of Ayo, ***I don't see a reason to oppose the project***. (Those claiming the [Project's environmental permit] is illegal) should ask to see the document but should also produce the expert report and submit it for review, to see why it does not conform to law; otherwise, I could very well claim anything at all, but the relevant authority should tell me that my assessment is wrong.[551]

280. Peru's contention that 150 *Ayeños* signed a petition against the Project is misleading.[552] These signatures did not come from *Ayeños* who lived in Ayo. Rather, they came from individuals who lived elsewhere (primarily in Arequipa) and did not stand to gain anything from the Project.[553] The only accurate proof of local community support was the petition obtained by CHM in July 2017, signed by 108 resident Ayeños.[554] This number is significant as there were **fewer *than 150 people*** living in Ayo at the time.[555] Notwithstanding Peru's misleading document, Claimants have demonstrated that the Project was supported by approximately 80% of the resident *Ayeños* at the time.

[549] Email from A. Arch (Pöyry) to A. Bartrina et al. attaching Pöyry 's Report of Participation in the Presentation of Technical Aspects of Mamacocha Hydropower Plant, June 17, 2017 (C-0116).
[550] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[551] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218) (emphasis added).
[552] Counter-Memorial, ¶ 203.
[553] Diez Canseco II, ¶ 43.
[554] Letter from Ayo residents to Y. Osorio, Regional Governor of Arequipa, September 22, 2017 (C-0058).
[555] Diez Canseco II, ¶ 43.

281. Mr. Carlos Diez Canseco, CHM's representative, explains that had the Project lost the support of the *Ayeños*, as Peru contends, CHM would not have been allowed to set up an office and conduct activities in Ayo:

> When a village, especially a small village like Ayo, opposes a project, you will not even be allowed to go into it, or allowed to move a stone out of place. This was not our situation. We used to meet frequently with the population, we had our office there, we had our social coordinators, and the population itself benefited greatly from several of our social and infrastructure projects. In other words, we were part of the life of the Ayo population, who even to this day continue to benefit from the implementation of our Social and Trucks Projects, machinery, school roof, milk and avocado businesses, the *Ayo Teje* Project, among others, which have become a part of Ayo's heritage.[556]

3. Claimants Would Have Finished Construction On Time Had Peru Not Interfered With The Project

282. Peru also attempts to deflect blame by claiming that Claimants would have run out of time even if Peru never interfered with the Project. Peru bases this contention on several theoretical premises: **first**, Peru assumes that it would have taken CHM 33-36 months to construct the Project;[557] **second**, Peru assumes that construction would not have begun before August 1, 2017;[558] and **third**, Peru then postulates that the Project could not have achieved COS until May 1, 2020 at the earliest (which is approximately six (6) weeks after the COS deadline of March 14, 2020 under the amended Works Schedule).[559] As demonstrated below, Peru's hypothetical extrapolation is inaccurate because its underlying assumptions are wrong. In addition, Peru's hypothetical calculations fail to take into account the normal opportunities to speed up construction if a contractual deadline is approaching.

[556] Diez Canseco II, ¶ 25.
[557] Counter-Memorial, ¶¶ 352-354.
[558] Counter-Memorial, ¶ 356.
[559] Counter-Memorial, ¶ 356.

283. **First**, Peru incorrectly assumes that but for Peru's interferences in March 2017, Claimants would have started construction on August 1, 2017. This is wrong. The Parties were relying upon the construction schedule prepared by GCZ (the Project's EPC contractor), which had been previewed to the Parties in March 2017 and which reflects the Parties' mutual understanding that construction was to start no later than July 1, 2017.[560] There is simply no evidence in the record to dispute the expected start-date set forth in GCZ's schedule.

284. **Second**, as Mr. Jacobson testifies and as Mr. McTyre (Claimants' delay expert) confirms, if the contractor believed that it would not have ample time to complete the Project on time, the sponsors or Innergex would have paid for early mobilization which could have brought forward the start date into June or perhaps even into May.[561] The investment agreement with Innergex anticipated that Innergex would pay in US $400,000 upon execution, and these monies were earmarked for the early stages of construction.[562] These monies could have been invested even before the DEG loan closed.[563] And, as mentioned earlier, the Sponsors were committed to capitalizing the Project in full if an investor like Innergex were not signed up in time.

285. **Third**, Peru's contentions that a 33-month construction schedule was the "baseline scenario" and that a 36-month schedule might occur depending on how the tunnel excavation progressed are also misleading.[564] It is true the Hatch Report assumed a construction schedule of approximately 32.5 months, which it rounded up to a "base-case scenario" of 33 months, and that it concluded that if everything went wrong during the excavation phase (the so-called "stress-case scenario" that assumed the rock quality was far worse than what every other

[560] Email from P. Gonzalez-Orbegoso to A. Ledesma et al. attaching GCZ's updated proposal, April 3, 2017 (C-0109); GCZ Work Schedule chart, April 3, 2017 (C-0110); Handmade illustration showing EPC schedule dates, March 22, 2017 (C-0111).
[561] Jacobson II, ¶ 27; HKA II, ¶ 98.
[562] Jacobson II, ¶ 27.
[563] Jacobson II, ¶ 27.
[564] Counter-Memorial, ¶¶ 352-354.

engineering study had concluded), the construction schedule could last 36 months.[565] But Peru places undue weight on these conclusions for the following reasons:

a. Hatch Engineering was the consultant for DEG and, as Dr. Whalen confirms, it is entirely expected for the lender's engineering consultant to provide "excessively conservative estimates designed to protect the lender" given that "[l]enders' risk tolerances are lower than that of project sponsors as lenders do not participate in any of the project upsides . . . but are exposed to all of the project's downsides."[566]

b. As Messrs. Jacobson and Bartrina testify, if the rock quality turned out to be worse than expected (similar to Hatch Engineering's "stress-case scenario"), Claimants would have used the ample reserves in the construction budget to provide additional funding to allow for GCZ to work longer hours during the day with more personnel on-site.[567] They would not have sat idly by if they incurred unforeseen construction delays, as Peru's contentions imply.

c. Consistent with the testimony of Messrs. Jacobson and Bartrina, Mr. McTyre confirms that Claimants could have sped up the construction schedule if necessary: "Acceleration measures could be enacted to reduce the Project duration . . . [such as] additional workers to insure longer workdays and concurrent activities, additional equipment, etc."[568]

286. The 26-month construction schedule prepared by the project's contractor GCZ was a more realistic estimate than the 32.5-month cushion prepared by the lender's engineer. Hatch Engineering had no prior experience constructing projects in the mountains of Southern Peru.[569] By contrast, GCZ had significant experience constructing renewable energy projects in the Peruvian mountains and knew better than any other contractor how long it would take to excavate the mountain tunnel and other structures required for the construction of the power plant.[570] Also, Pöyry, which also had experience constructing RER projects in this region, similarly estimated that construction should take approximately 26 months, in line with GCZ's

[565] Hatch, Independent Engineering Review of the Mamacocha Project, No. H352051, April 26, 2017, § 8.1.10 (C-0013).
[566] Whalen I, ¶ 7.2.9, n. 109.
[567] Jacobson II, ¶ 27; Bartrina II, ¶ 35.
[568] HKA II, ¶ 98.
[569] Bartrina II, ¶ 34.
[570] Bartrina II, ¶ 34.

projections.[571] Accordingly, Hatch Engineering's estimate was based upon educated guesswork rather than experience.

287. Claimants' construction and delay expert, Mr. McTyre, concluded that it was entirely reasonable for Claimants to rely on the schedules from GCZ and Pöyry—two companies who had spent years studying the Project and had unique experience building Projects in the mountains of Southern Peru—rather than the schedule from Hatch Engineering:

> Basically, the difference was in the interpretation of the subsurface data by two engineering firms, one that spent years working on the Project (Pöyry) and the other that spent months providing an evaluation of the Project (Hatch).
>
> It is reasonable that the engineering firm with the most experience with this particular Project, Pöyry, would have a greater understanding and comprehension of the characteristics of the area and would therefore provide a more reliable interpretation of the subsurface data.
>
> In addition, GCZ, the firm that submitted a proposal to act as the EPC contractor, had extensive experience with construction in the region. As such, GCZ's 26-month schedule is more reliable than a consultant, such as Hatch, that has not constructed a project in the region.
>
> *******
>
> In summary the 26-month construction schedule put forth by Pöyry and GCZ is more reliable than the schedule presented by Hatch because both Pöyry and GCZ have more relevant experience than Hatch. In addition, there were several options available to CHM to insure timely completion of the construction.[572]

288. Notably, even Peru's damages expert in the Lima Arbitration, Versant Partners, did not assume that a 33-month construction schedule would have been the "baseline scenario" for this Project. Instead, Versant Partners hypothesized and adopted a 30.3-month schedule that

[571] Pöyry Laguna Azul Feasibility Report Phase II (C-0181).
[572] HKA II, ¶¶ 93-99.

it believed "reasonabl[y]" accounted for likely delays that could occur during construction.[573] Versant arrived at this schedule by averaging the various schedules from GCZ, Pöyry, Hatch Engineering, and others, rather than simply ignoring the construction schedules from GCZ and Pöyry (as Peru does in its Counter-Memorial).[574]

289. Had Peru not interfered with the Project, the documentary evidence and expert testimony establishes that CHM would have achieved Financial Close sometime in May 2017 and begun construction no later than July 1, 2017.[575] According to GCZ, this timeline put CHM on schedule to achieve COS on or about August 29, 2019 (*i.e.*, 26 months later and approximately seven (7) months ahead of the March 14, 2020 COS deadline).[576] And this schedule also means that CHM would still have finished on time even if construction lasted 30 months, as Versant testified to,[577] or 32.5 months, as projected in the conservative base case by Hatch.[578]

290. This conclusion is also supported by common sense. Had Hatch and DEG truly believed CHM would have run out of time, as Peru suggests, then DEG would not have worked tirelessly from January 2017 through March 2017 to get this deal over the finish line, as was the case here. Indeed, in March 2017, DEG circulated its Indicative Term Sheet and had its lawyers host an all-hands-on-deck meeting in New York City in late March 2017, to finalize the legal diligence and commercial agreements and put the deal in position to be reviewed by its credit

[573] Versant Partners Expert Report, ¶¶ 41-42.
[574] Versant Partners Expert Report, ¶¶ 41-42.
[575] Email from P. Gonzalez-Orbegoso to A. Ledesma et al. attaching GCZ's updated proposal, April 3, 2017 (C-0109); GCZ Work Schedule chart, April 3, 2017 (C-0110); Handmade illustration showing EPC schedule dates, March 22, 2017 (C-0111).
[576] Email from P. Gonzalez-Orbegoso to A. Ledesma et al. attaching GCZ's updated proposal, April 3, 2017 (C-0109); GCZ Work Schedule chart, April 3, 2017 (C-0110); Handmade illustration showing EPC schedule dates, March 22, 2017 (C-0111).
[577] Versant Partners Expert Report, ¶¶ 41-42.
[578] Hatch, Independent Engineering Review of the Mamacocha Project, No. H352051, April 26, 2017, § 8.1.10 (C-0013).

committee in April 2017.[579] For this reason alone, Peru's contention that the Project "was already at risk of failure" even before the government interferences began can be rejected.[580]

4. Peru's Efforts To Weaponize The Amparo Action Must Be Rejected

a. The Amparo Action Had No Discernible Effect On The Mamacocha Project

291. To the extent Peru argues that the Project would have been derailed by the Amparo Action, this argument is also unproven and baseless. As explained in **Section II.B**, *supra*, Peru gives undue prominence to the Amparo Action as being an existential threat during the life of the Project (*i.e.*, January 2012 through December 2018). The reality is that, prior to this arbitration, all the relevant parties, including Peru, viewed the Amparo Action as nothing more than a nuisance suit and the Counter-Memorial does not contain any documentary evidence demonstrating otherwise.

292. It is undisputed that P.J. Begazo López filed the Amparo Action against ARMA, MINEM, and CHM in September 2016 seeking nullification of the Project's environmental permits and final concessions.[581] The Amparo Action was based upon unproven claims, such as: (i) the Project would adversely affect certain animal species; (ii) the Project would adversely affect tourism in the region; and (iii) ARMA and MINEM erred when dividing the Project into two parts (the power-generation plant and transmission line) and should have instead issued permits to the Project as a whole.[582] It is further undisputed that the Amparo Action was rejected on two (2) separate occasions in September 2016 and April 2017 on the grounds that Mr. Begazo López should have pursued his claims through a *contencioso administrative* proceeding—an "administrative litigation" proceeding similar to the RGA Lawsuit—rather than through a

[579] Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017 (C-0048).
[580] Counter-Memorial, ¶ 356.
[581] Counter-Memorial, ¶ 231.
[582] Benzaquén II, ¶ 30.

constitutional *amparo* procedure because the former is the proper forum to request the nullification of permits.[583]

293. Though Peru now suggests the Amparo Action had merit, Peru believed otherwise during the relevant period. For example, MINEM and ARMA filed several pleadings in the Amparo Action expressly arguing that Mr. Begazo López 's claims were unfounded and controverted by the myriad reports and resolutions that substantiated ARMA's decision to re-classify the Project under Category I.[584] Further, ARMA argued the Amparo Action should be dismissed because a constitutional *amparo* proceeding is not the proper procedure through which to challenge ARMA's administrative resolutions.[585] Rather, these challenges must be filed under Peruvian law through a *contencioso administrativo* proceeding, which is a very specific type of proceeding under Peruvian law under which a party may seek to nullify an administrative act.[586]

294. On December 21, 2018, just days before Peru destroyed the Project, DEG's local counsel, CMS Grau, studied the Amparo Action as part of the bank's due diligence review of the Project. According to CMS Grau, the probability that the Amparo Action would succeed was "remote" due to the fact that it was procedurally improper because it should have been filed as a *contencioso administrativo* proceeding, not an *amparo* action, since it was seeking the nullification of an administrative act.[587] Further, CMS Grau concluded that the Amparo Action's allegations were unfounded because there was no evidence supporting the environmental claims, as demonstrated in the excerpt below:

> We believe that the probabilities of success in the complaint would be remote due to that fact that complaint seeks the nullity of the

[583] Counter-Memorial, ¶¶ 232-234.
[584] Benzaquén II, ¶ 32.
[585] Benzaquén II, ¶ 32.
[586] Benzaquén II, ¶ 32.
[587] Report from CMS Grau Law Firm to DEG setting forth analysis of certain legal proceedings related to the Mamacocha project, December 21, 2018 (C-0247).

> administrative acts and, to that effect, the suitable channel would be the contentious administrative proceeding.
>
> Also, the alleged violation of the environmental right is not substantiated by any evidence; therefore, it is not possible to prove the damage or threat of damage to the environment.[588]

295. Against this backdrop, it cannot be reasonably disputed that the Amparo Action had no part in causing the demise of the Mamacocha Project on December 31, 2018. As of that date, the Amparo Action was still mired in appeals and had been deemed by all relevant parties and two courts as a meritless proceeding.

b. The Recent Decisions In The Amparo Action Underscore The Arbitrary Nature Of The Political Opposition To The Project In Arequipa

296. More than a year after Peru destroyed the Mamacocha Project through illegal measures, the Amparo Action suddenly and inexplicably changed course. As noted above, the Amparo Action had been mired in appeals throughout most of the relevant period in the wake of multiple decisions by Arequipa courts that found the claims lacked merit and had been pursued through a constitutional *amparo* proceeding rather than a *contencioso administrativo* proceeding, as Peruvian law required.

297. In January 2020, the Arequipa Superior Court deviated from the prior rulings in this Action and summarily granted the relief requested by Mr. Begazo López .[589] This decision was completely unexpected by Claimants, given the Amparo Action's procedural posture and the fact that the Project had ended more than a year before. Claimants were dismayed to discover that the Superior Court failed to address the argument that the Amparo Action was being pursued though the wrong type of proceeding, which had been the primary defense raised by CHM and

[588] Report from CMS Grau Law Firm to DEG setting forth analysis of certain legal proceedings related to the Mamacocha project, December 21, 2018 (C-0247).
[589] Judgment No. 29-2020, Resolution No. 33, Specialized Constitutional Court of Arequipa, January 30, 2020 (R-0070).

ARMA alike.[590] Instead, the Superior Court assumed, without analysis, the proceeding was procedurally proper and ruled in conclusory fashion that Mr. Begazo López had met his burden of demonstrating that the Project would have a significant environmental impact, which, in turn, meant the ARMA resolutions that had re-classified this Project under Category I were wrong.[591]

298. Entirely missing from that opinion, or the evidentiary record, however, was any report, study, or analysis from any reputable scientific or technical expert that in any way supported the court's findings. To the contrary, all scientific and technical studies in the record conclusively found that the Project's environmental impact would be minimal. In fact, that was one of the main objections that MINEM and ARMA, themselves, had raised about the allegations and claims in this Action. Given the glaring inconsistencies and legal errors in the court's ruling, CHM, MINEM, and ARMA appealed that decision to the Arequipa Superior Court of Justice.[592]

299. On February 4, 2021, in a 12-page decision, the appellate court affirmed the Superior Court's decision and ordered nullification of the Project's environmental permits and concessions.[593] Similar to the Superior Court's January 2020 ruling, the appellate ruling does not squarely address the argument that the Action should be dismissed because it sought relief that could only be obtained through a *contencioso administrativo* proceeding and ***not*** through an *amparo* proceeding.[594] And it assumes in conclusory fashion that the Mamacocha Project would

[590] Judgment No. 29-2020, Resolution No. 33, Specialized Constitutional Court of Arequipa, January 30, 2020 (R-0070).
[591] Judgment No. 29-2020, Resolution No. 33, Specialized Constitutional Court of Arequipa, January 30, 2020 (R-0070).
[592] Benzaquén II, ¶ 32.
[593] Judgment No. 72-2021 from the Superior Court of Arequipa, First Civil Chamber, February 21, 2021 (C-0295).
[594] Judgment No. 72-2021 from the Superior Court of Arequipa, First Civil Chamber, February 21, 2021 (C-0295).

have significantly affected the surrounding climate, again without any scientific or expert evidence to support this judgment.[595]

300. These recent rulings in the Amparo Action underscore the arbitrariness that the Project faced in the region of Arequipa (in Southwest Peru) during its existence and that Claimants and [redacted] continue to face in the criminal proceeding. The Amparo Action, just like the RGA Lawsuit, was based entirely on baseless assertions about the expected Project's environmental impact, each of which have been thoroughly and repeatedly debunked. As Claimants explained in **Section II.B**, *supra*, they are not aware of any study from an independent scientist, engineer, or expert that has ever held that the Project would have any significant impact on the environment. ARMA and its former head, Mr. Sanz, have also stated on the record that they do not know of any such study.[596] Mr. Chávez, the EnvPhys representative who thoroughly studied the Project, unequivocally testifies that no such study could exist given the Project's design and where it was sited.[597] Dr. Morón, the Special Commission's administrative law expert, studied this matter closely and discredited any notion that the ARMA resolution regarding the Project's reclassification decision was wrong.[598] Notwithstanding this background of uniform opinion based upon deep analysis of the science and location, an appellate court without the benefit of this wealth of consistent information, ruled summarily to the contrary without citing any evidentiary support.[599]

301. On June 2, 2021, CHM filed a constitutional *amparo* proceeding in light of the flagrant due process violations associated with the appellate court's February 2021 decision.[600]

[595] Judgment No. 72-2021 from the Superior Court of Arequipa, First Civil Chamber, February 21, 2021 (C-0295).
[596] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[597] Chávez I, ¶¶ 12-16.
[598] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017, § 6.2.4 (C-0229).
[599] Judgment No. 72-2021 from the Superior Court of Arequipa, First Civil Chamber, February 21, 2021 (C-0295).
[600] Amparo lawsuit filed by CH Mamacocha S.R.L., June 2, 2021 (C-0296).

In that action, CHM argues that it never had to defend itself in the original Amparo Action because Mr. Begazo López 's complaint had been improperly filed as a matter of law.[601] Mr. Begazo López should have pursued his claims through a *contencioso administrativo* proceeding, just like the RGA did when it challenged the ***same*** ARMA resolutions on the nearly identical grounds. The appellate court's failure to even address this issue in its February 4, 2021 decision is illustrative of the fact that CHM (and ARMA and MINEM) never got a fair shake in the Amparo Action in the Arequipa courts.

302. For purposes of this arbitration, however, the key take-away is that, contrary to Respondent's attempt to inflate the importance of the Amparo Action on the fate of the Project, it had zero impact. The adverse court decisions all took place after the death knell was sounded on the Project's fate in December 2018. Just like in criminal law, shooting a dead body cannot be murder because the person died by other causes. Here, the Project died at the hands of Respondent's actions, not the inexplicable and baseless decisions of the Arequipa courts.

I. The Tribunal Should Infer That Peru Failed To Produce Documents Because Those Documents Would Have Been Adverse To Its Interests

303. Despite Claimants' significant investment of efforts to obtain copies of the underlying authorizations, reports, and correspondence relating to the measures at stake in this arbitration – all of which are in the possession, custody or control of Respondent and not available to Claimants – Peru largely failed to comply with Claimants' document requests during the disclosure phase, even when ordered to do so by the Tribunal. The relevant background is as follows:

a. March 2, 2021: Claimants served Peru with thirty-six (36) requests for documents;[602]

[601] Amparo lawsuit filed by CH Mamacocha S.R.L., June 2, 2021 (C-0296).
[602] Claimants' Request for Production of Documents, March 2, 2021.

b. March 11, 2021: Peru objected to each one of Claimants' requests and noted that it would only produce two (2) documents in response to only one of these requests;[603]

c. April 1, 2021: The Tribunal issued Procedural Order No. 3 ("**PO3**"), which ordered Peru to produce documents in response to thirty-one (31) requests;[604]

d. April 13, 2021: On the deadline for the Parties to comply with PO3, Peru produced only 113 documents in response to only twenty-three (23) of Claimants' requests;

e. April 30, 2021: Seventeen (17) days after the deadline to produce documents under PO3, Peru produced forty-two (42) additional documents but still failed to produce ***any documents*** in response to five (5) of the document requests that were endorsed by the Tribunal under PO3;[605]

f. May 9, 2021: Claimants wrote the Tribunal "to express serious concerns regarding Peru's deficient document production" and to request that it order Peru to comply fully with its document production obligations under PO3;[606]

g. May 24, 2021: The Tribunal issued Procedural Order No. 5 ("**PO5**"), which: (i) invited Peru to confirm whether it had any further responsive documents with respect to Claimants' Document Requests Nos. 1, 7, 11, and 12; and (ii) invited Peru to produce a July 25, 2018 document that was responsive to Claimants' Document Request No. 24;[607] and

h. May 31, 2021: In response to PO5, Peru issued a letter confirming that Peru would not be producing any additional documents.[608]

304. In total, Peru produced 155 documents to Claimants.[609] In their letter to the Tribunal, dated May 9, 2021, Claimants explained that this production was deficient because: (i) Peru ***failed to produce any documents*** in response to five (5) of the requests the Tribunal endorsed in PO3 (*i.e.*, Requests Nos. 4, 5, 22, 27, and 30); and (ii) Peru's production with respect to nine (9) of the requests the Tribunal endorsed in PO3 was non-responsive and materially

[603] Peru's Objections to Claimants' Document Production Requests, March 11, 2021.
[604] Procedural Order No. 3, April 1, 2021.
[605] Claimants' Letter to the Tribunal, May 9, 2021.
[606] Claimants' Letter to the Tribunal, May 9, 2021.
[607] Procedural Order No. 5, May 24, 2021.
[608] Respondent's Letter to the Tribunal, May 31, 2021.
[609] When put into the context of the seven (7) measures at issue in this case and involving nearly ten (10) government agencies, this number of documents is exceedingly small, particularly in light of the requirements under Peruvian law for each administrative decision to be supported by an entire file of technical and legal reports and accompanying low-, mid- and high-level approvals.

incomplete (*i.e.*, Requests Nos. 1, 2, 7, 9, 10, 11, 12, 15, and 24).[610] Peru has not given any satisfactory explanation for these material deficiencies.

305. On May 13, 2020, the Tribunal issued Procedural Order No. 2 ("**PO2**"), which sets out the procedural rules that govern this arbitration.[611] In Paragraph 16.9 of PO2, the Tribunal confirmed this arbitration is "guided by the IBA Rules on the Taking of Evidence in International Arbitration, approved on 29 May 2010 by Resolution of the IBA Council" ("**IBA Rules**").[612] Article 9(6) of the IBA Rules provides that arbitral tribunals can make negative inferences where, as here, a party fails to produce documents that were ordered by the arbitral tribunal without giving a satisfactory explanation for this omission:

> **Article 9. Admissibility and Assessment of Evidence**
>
> *******
>
> (6) If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.[613]

306. Based on the foregoing, Claimants respectfully request that the Tribunal make the following negative inferences in response to Peru's materially deficient production:

307. **Claimants' Document Request No. 1**: As approved by PO3, this request sought the administrative file related to Peru's decision to promulgate SD 24, including legal or technical reports analyzing the need for this regulation, resolutions and orders approving this

[610] Claimants' Letter to the Tribunal, May 9, 2021.
[611] Procedural Order No. 2, May 13, 2020.
[612] Procedural Order No. 2, May 13, 2020, ¶ 16.9.
[613] IBA Rules, Art. 9(6).

regulation, correspondence between government officials about SD 24, and all other documents evidencing SD 24's legislative history.[614]

a. Peru produced only two (2) documents: (i) a copy of SD 24 (which was not responsive to the request); and (ii) the "Statement of Reasons" that MINEM issued with this regulation, which is a public document and easily accessible.[615]

b. Peru failed to provide a satisfactory explanation as to why it has not produced any of the legal reports, technical studies, resolutions, and correspondences that relate to SD 24. This omission is particularly glaring given that Peru bases ***nearly its entire case*** on its baseless and mistaken interpretation that SD 24 caused a seismic shift in the risk-allocation structure under the RER Contract which, in its view, effectively flipped the RER Promotion from an investor-friendly regime to one where the investors suffered all risks, and Peru is held harmless even for acknowledged government delays and interferences.[616]

c. Claimants, therefore, respectfully request that the Tribunal infer that Peru did not produce the requested documents because they do not support Peru's self-serving interpretation of SD 24.

308. **Claimants' Document Request No. 2**: As approved by PO3, this request sought the memoranda or reports from MINEM or OSINERGMIN, or other governmental authorities, as well as correspondences with third-parties, that evidence Peru's contemporaneous interpretation of SD 24 and how it changed or affected the legal framework governing the RER projects.[617]

a. Peru produced only two (2) documents, both of which contain MINEM's written responses to questions posed by third-parties who planned to partake in the Third Auction and had raised some questions concerning the changes implemented by SD 24.[618]

b. Peru has not provided a satisfactory explanation as to why it has not produced reports from MINEM or OSINERGMIN about SD 24 and its effects on the RER Promotion. Again, this omission is particularly glaring given that Peru bases ***nearly its entire case*** on its baseless and mistaken interpretation of SD 24 and its unproven theory that SD 24 caused a seismic shift in the risk-allocation structure under the RER Contract which, in its view, effectively flipped the RER Promotion from an investor-friendly

[614] Procedural Order No. 3, March 23, 2021, Annex A.
[615] Claimants' Letter to the Tribunal, May 9, 2021.
[616] Counter-Memorial, ¶¶ 93-98.
[617] Procedural Order No. 3, March 23, 2021, Annex A.
[618] Claimants' Letter to the Tribunal, May 9, 2021.

regime to one where the investors suffered all risks, and Peru is held harmless even for acknowledged government delays and interferences.[619]

c. Claimants, therefore, respectfully request that the Tribunal infer that Peru did not produce the requested documents because they do not support Peru's self-serving interpretation of SD 24.

309. **Claimants' Document Request No. 4**: As approved by PO3, this request sought technical and legal reports from MINEM that discussed, analyzed, and/or interpreted the timing, procedure, or scope of the permitting process for RER projects.[620]

a. Peru produced no documents in response to this request.[621]

b. Peru has not provided a satisfactory explanation as to why it has not produced any documents related to this request, particularly given that Peru has argued at length in this arbitration that MINEM "shift[ed] onto" the concessionaires all risks concerning the permitting process.[622]

c. Claimants, therefore, respectfully request that the Tribunal infer that Peru did not produce the requested documents because they do not support Peru's self-serving interpretation of the allocation of risks between the concessionaire and permitting agencies with respect to the timing, procedure, and approvals during the permitting processes.

310. **Claimants' Document Request No. 5**: As approved by PO3, this request sought all documents from MINEM, OSINERGMIN, or ARMA that discuss, analyze, or interpret how the environmental classification process should have worked for RER projects.[623]

a. Peru produced no documents in response to this request.[624]

b. Peru has not provided a satisfactory explanation as to why it has not produced any documents related to this request, particularly given that Peru's chief defense of the RGA Lawsuit and the related criminal proceeding is that it was reasonable for the RGA and AEP to believe that ARMA had erred when classifying the Mamacocha Project under Category I.[625]

[619] Counter-Memorial, ¶¶ 93-98.
[620] Procedural Order No. 3, March 23, 2021, Annex A.
[621] Claimants' Letter to the Tribunal, May 9, 2021.
[622] Counter-Memorial, ¶ 59.
[623] Procedural Order No. 3, March 23, 2021, Annex A.
[624] Claimants' Letter to the Tribunal, May 9, 2021.
[625] Counter-Memorial, ¶¶ 208-213, 220, 400-405.

c. Claimants, therefore, respectfully request that the Tribunal infer that Peru did not produce the requested documents because they do not support Peru's self-serving position that the RGA and AEP had a justifiable reason to doubt ARMA's environmental classification of the Mamacocha Project.

311. **Claimants' Document Request No. 10**: As approved by PO3, this request sought: (i) all documents referenced, or relied upon by the RGA, in the Regional Council's Report; (ii) minutes of any meetings within the RGA in which the Project's environmental permits were addressed; and (iii) any correspondence by the RGA from July 2017 to October 2017 related to these permits.[626]

a. Peru produced four (4) documents, all of which are documents that CHM submitted to ARMA in 2013 when CHM was seeking its environmental permits.[627] Peru's production did not include any environmental studies, scientific reports, or any technical analyses that in any way supported the conclusions the RGA reached in the Regional Council's Report.

b. Peru has not provided a satisfactory explanation as to why it has not produced any of the requested documents, particularly given that Peru's chief defense of the RGA Lawsuit and the related criminal proceeding is that it was reasonable for the RGA and AEP to believe that ARMA erred when classifying the Mamacocha Project under Category I.[628]

c. Claimants, therefore, respectfully request that the Tribunal infer that Peru did not produce the requested documents because they do not support Peru's self-serving position that the RGA and AEP had a justifiable reason to doubt ARMA's environmental classification of the Mamacocha Project.

312. **Claimants' Document Request No. 12**: As approved by PO3, this request sought all documents evidencing the reasons, circumstances, and motives behind the RGA's decision to file the RGA Lawsuit, including technical or legal reports from the RGA or ARMA, resolutions and orders greenlighting this measure, and correspondence between RGA officials regarding this measure between December 12, 2016 and March 14, 2017.[629]

[626] Procedural Order No. 3, March 23, 2021, Annex A.
[627] Claimants' Letter to the Tribunal, May 9, 2021.
[628] Counter-Memorial, ¶¶ 208-213, 220, 400-405.
[629] Procedural Order No. 3, March 23, 2021, Annex A.

a. Peru produced two (2) documents: (i) the resolution from the Regional Council, dated October 21, 2016, that recommended the RGA Lawsuit; and (ii) correspondence between RGA officials, between October and November 2016, that transmitted the Regional Council Report.[630]

b. Peru has not provided a satisfactory explanation as to why it has not produced any other documents that relate to the RGA's momentous decision to file its Lawsuit against the Project in March 2017. This omission is particularly glaring given that Claimants have introduced the Regional AG's Report, in which the RGA Attorney General, himself, states it had "already pointed out" to other RGA officials, prior to the filing the Lawsuit, "that the likelihood of succeeding in this Proceeding to have the resolutions ruled harmful to the public interest would be minimal[.]"[631] Peru had failed to produce to Claimants this document from the RGA Attorney General.

c. Claimants, therefore, respectfully request that the Tribunal infer that Peru did not produce the requested documents because they establish that the RGA Lawsuit was not commenced for *bona fide* administrative law purposes.

313. **Claimants' Document Request No. 22**: As approved by PO3, this request sought all documents containing and/or evidencing MINEM's initial analysis of the Third Extension Request, including technical or legal reports from MINEM and OSINERGMIN.[632]

a. Peru produced no documents in response to this request.[633]

b. Peru has not provided a satisfactory explanation as to why it has not produced any of the requested documents. This omission is glaring here because the Parties disagree as to whether the Third Extension Request was denied for lawful reasons consistent with Peru's responsibilities under the TPA and the RER Contract. Peru contends that any extensions would be impermissible and unlawful; whereas Claimants have presented documentary evidence that MINEM and its outside counsel, Estudio Echecopar, believed the Third Extension Request was proper and legally necessary to advance the goals and objectives of the RER Law.[634]

c. Claimants, therefore, respectfully request that the Tribunal infer that Peru did not produce the requested documents because they do not support Peru's self-serving position that the Third Extension Request was effectively dead on arrival.

[630] Claimants' Letter to the Tribunal, May 9, 2021.
[631] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[632] Procedural Order No. 3, March 23, 2021, Annex A.
[633] Claimants' Letter to the Tribunal, May 9, 2021.
[634] Counter-Memorial, ¶ 273.

III. PERU'S JURISDICTIONAL OBJECTIONS ARE NONMERITORIOUS AND MUST BE REJECTED

314. As explained in our Memorial, Latam Hydro brings claims (a) on its own behalf under Article 10.16(1)(a)(i)(A) of the TPA for Peru's breaches of its obligations under Section A of the TPA and (b) on behalf of CHM under Article 10.16(1)(b)(i)(C) for Peru's breaches of an investment agreement.[635] Additionally, CHM brings claims on its own behalf under Clause 11.3(a) of the RER Contract for Peru's breaches of its obligations under the RER Contract and Peruvian Law.[636]

315. Claimants demonstrated in its Memorial that the Tribunal has jurisdiction to hear both the claims under the TPA, as well as the claims under the RER Contract.[637]

316. In in its Counter-Memorial, Peru does not dispute that the Tribunal has jurisdiction under the RER Contract. Peru objects to the Tribunal's jurisdiction under the TPA on five bases.

- *First,* Peru argues that there is no jurisdiction *ratione voluntatis* over claims based on the TPA because Claimants have not complied with the Waiver Requirement under Article 10.18(2)(b) of the TPA;
- *Second,* Peru alleges that the Tribunal lacks jurisdiction *ratione voluntatis* over certain claims by Claimants for the alleged failure to comply with the notice and wait requirement under Article 10.16(2) of the TPA;
- *Third,* Peru says that the Tribunal lacks jurisdiction *ratione materiae* because the Contract does not constitute an Investment Agreement under Article 10.28 of the TPA;

[635] Memorial, ¶ 188.
[636] Memorial, ¶ 241.
[637] Memorial, ¶¶ 188-257.

- *Fourth,* Peru alleges that there is no jurisdiction *ratione materiae* with respect to the claims related to the Upstream Projects;[638]
- *Fifth,* Peru argues that the Tribunal does not have jurisdiction *ratione personae* because Peru never attributed to CH Mamacocha the character of "national of other Contracting State" required under Article 25(2)(b) of the ICSID Convention.

317. Each of these jurisdictional objections is meritless, as shown below.

A. Respondent's Focus On Burden Of Proof Is An Improper Approach To Jurisdictional Objections

318. In its Counter-Memorial, Peru describes the "legal principles applicable to the determination of the Tribunal's jurisdiction."[639] Claimants do not dispute that "consent of the Parties is the cornerstone of ICSID's jurisdiction,"[640] nor that "the Tribunal must be convinced that not only the jurisdictional requirements under the ICSID Convention have been met, but also those established in the instrument securing the State's alleged consent"[641] (*i.e.*, the TPA and the RER Contract). Claimants have shown in its Memorial that the Parties have consented to Arbitration under the TPA, the ICSID Convention, and the RER Contract, and have fulfilled all the requirements under those instruments.[642]

319. In support of its objections to this Tribunal's jurisdiction, Peru argues that "Claimants bear the burden of proof in establishing the Tribunal's jurisdiction" and "[Claimants] must prove the fulfillment of all relevant jurisdictional requirements."[643] As shown below,

[638] Respondent refers to these developments as the "Upper River" projects. They are the same projects and are so named as they were an integral part and designed to take advantage of the Mamacocha Project concession and water rights, as well as the staff employed to get the Mamacocha Project up and running.
[639] Counter-Memorial, ¶¶ 484-495.
[640] Counter-Memorial, ¶ 485.
[641] Counter-Memorial, ¶ 488.
[642] Memorial, ¶¶ 205-240.
[643] Counter-Memorial, ¶ 491.

Respondent's attempt to place the burden of proof on Claimants fails. In the *Fisheries Jurisdiction case,* the Court found that:

> there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, 'whether the force of the arguments militating in favour of jurisdiction is preponderant, and to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.[644]

320. Several investment arbitration tribunals have similarly rejected Respondent's contention that claimants bear the burden of proof regarding jurisdiction.[645] In *Grand River v. United States,* the tribunal considered that there was no need to operate with any rules on burden of proof when determining jurisdiction. The tribunal must examine the evidence presented by the Parties without imposing a burden of proof on either party.[646] In *Itisaluna v Iraq,* the Tribunal found that:

> As an initial matter, the Tribunal observes that nothing in its analysis turns on any question of burden or standard of proof. These evidential principles address the responsibility of parties to establish the evidential case on which they rely, and typically shift between claimant and respondent to adduce a sufficiency of evidence to establish facts germane to their case. These principles do not operate in respect of contentions of international law addressed to an international tribunal which, as in this case, has a responsibility for determining the content and application of international law. Still less do they operate in respect of legal questions going to the jurisdiction of a tribunal, which a tribunal is required to address *proprio motu*, even if not raised by a party.[647]

321. As explained by Professor Scheurer:

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[644] *Fischeries Jurisdiction (Spain v. Canada),* Jurisdiction of the Court, Judgment, December 14, 1988, I.C.J, Reports 1998, p 432 (CL-0142). *See also* Schreuer Report I, ¶ 7.
[645] Schreuer I, ¶¶ 10-12 *citing WNC v Czech Republic,* PCA Case No. 2014-34, Award, ¶ 293, February 22, 2017 (RL-0129); *Itisaluna v Iraq,* ICSID Case No. ARB.17/10, Award, ¶ 151, April 3, 2020 (CL-0144); *Addiko v Croatia,* ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis,* ¶ 200, June 12, 2020 (CL-0121).
[646] *Grand River Enterprises Six Nations, Ltd. et al. v United States,* UNCITRAL, Decision on Objection to Jurisdiction, ¶ 37, July 20, 2006 (RL-0084).
[647] *Itisaluna v Iraq,* ICSID Case No. ARB.17/10, Award, ¶ 151, April 3, 2020 (CL-0144).

> It appears from these cases that in determining a tribunal's jurisdiction, a focus on burden of proof is not the correct approach. The International Court of Justice as well as investment tribunals have discarded the burden of proof approach and have adopted a method whereby the weight of legal arguments is decisive to establish jurisdiction.[648]

322. Therefore, in analyzing the jurisdictional objections raised by Respondent, the Tribunal should look at the weight of the legal authorities and the evidence and not, as Peru argues, impose the burden of proof on Claimants.

B. Claimants Have Complied With The Waiver Requirement Under Article 10.18.2(b) Of The TPA

1. The Waiver Requirement Under Article 10.18.2(b) Of The TPA

323. Under Article 10.18.2(b) of the TPA, a claim submitted to arbitration must be accompanied by a waiver:

> No claim may be submitted to arbitration under this Section unless: …(b) the notice of arbitration is accompanied, … (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or ***other*** dispute settlement procedures, ***any proceeding*** with respect to any measure alleged to constitute a breach referred to in Article 10.16.[649]

324. By its very terms, the waiver requirement prevents a claimant in an arbitration before ICSID from initiating or continuing another "proceeding," whether it be before an administrative tribunal or court under the law of any Party, or "other" dispute settlement procedures, involving the same claims or measures as are presented in the ICSID case. As explained below, Respondent does not allege that Claimants initiated or continued another "proceeding" or another "dispute settlement procedure." Rather, it tries through inartful wordsmithing to posit that the word "proceeding" does not mean what it says – a separate legal

[648] Schreuer I, ¶ 14.
[649] United States-Peru Trade Promotion Agreement, February 1, 2009, Article 10.18.2(b) (C-0001) (emphasis added).

action -- but rather is synonymous with different types of claims, causes of action or instruments of consent. Respondent's argument does violence to the plain language of the waiver provision, and could lead to unlimited abuse.

325. The waiver clause is not unique to the TPA. As described by Professor Schreuer, "[t]his provision is characteristic of the approach taken by the United States in its treaties. It started with NAFTA Article 1121 and has since found entry into other treaties to which the United States is a Party, such as, the CAFTA Article 10.18."[650]

326. As explained in the Memorial, Claimants fulfilled this requirement by submitting with its Request for Arbitration Resolutions and Waivers by their respective Board of Directors, expressly waiving

> any right to initiate or continue before any administrative tribunal or court under the laws of any Party to the TPA, or other dispute settlement proceedings, any proceeding with respect to any measure alleged to constitute a breach of (a) an obligation under Section A of Chapter 10 the TPA; (b) an investment authorization, as defined in Article 10.28 of the TPA, or (c) an investment agreement, as defined in Article 10.28 of the TPA.[651]

327. Moreover, Claimants affirmed that they had not submitted this dispute for resolution before Peru's administrative tribunals or courts, or to any other binding dispute

[650] Schreuer I, ¶ 46 *citing* **NAFTA Article 1121**: '1. A disputing investor may submit a claim under Article 1116 to arbitration only if: '… (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.'; **CAFTA Article 10.18.2**: 'No claim may be submitted to arbitration under this Section unless: … (b) the notice of arbitration is accompanied, … (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.'

[651] Request for Arbitration, ¶ 263(f); Resolution and Waiver of the Board of Directors of Latam Hydro LLC, August 14, 2019 (C-0003); Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 (C-0004). *See also* Memorial, ¶ 216 (f).

settlement procedures.[652] For example, even when erroneously dragged into the Lima Arbitration by MINEM, CHM did not counter-claim in that arbitration by raising claims that it legitimately possessed, but it intended to bring before this Tribunal.[653]

328. In its Counter-Memorial, Peru argues that Claimants failed to comply with the Waiver Requirement under Article 10.18(2)(b) of the TPA by submitting "***two types of proceedings*** before this Tribunal based on two categories of claims, and with respect to ***the same underlying measure***s: (i) the claims of Latam Hydro under the TPA, on its own behalf and on behalf of CH Mamacocha, and (ii) the claims of CH Mamacocha under the TPA."[654] Simply put, Peru's contention is that by bringing all aspects of the present dispute before this ICSID Tribunal, Claimants violated the Waiver Requirement. In Peru's view, Claimants submission of both treaty claims and contract claims before the same Tribunal constitutes bringing two separate, parallel "proceedings" and thus, violated the TPA's Waiver Requirement.[655]

329. Peru's interpretation of the waiver provision in the TPA is not supported by a proper application of Article 31 of the Vienna Convention of the Law of the Treaties (VCLT) or applicable case law.[656]

2. Peru's Interpretation Of The Waiver Requirement Does Not Withstand Scrutiny Under Article 31 Of The VCLT

330. Article 31 of the VCLT provides: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose." During the process of interpreting the TPA's waiver clause, the

[652] Request for Arbitration, ¶ 263(g). *See also* Memorial, ¶ 216(g).
[653] The Lima Arbitration tribunal rejected MINEM's attempt to pre-empt this case and denied that it had jurisdiction to hear MINEM's claims.
[654] Counter-Memorial, ¶ 497.
[655] Counter-Memorial, ¶ 501.
[656] Schreuer I, ¶ 50.

Tribunal must consider: (i) the ordinary meaning of the Waiver Clause; (ii) its context in the TPA; and (iii) the object and purpose of the Waiver Requirement.

331. **Ordinary Meaning**. With respect to the ordinary meaning of the Waiver Requirement, Peru argues that *"*the wording of Waiver Requirement of Article 10.18.2(b) supports the argument that the claims based on the Treaty and the Claims based on the RER Contract constitute separate complaints."[657] According to Peru:

> [t]he repeated use of the term 'any,' as well as its application in the phrase 'any proceeding,' is not qualified in any manner, which shows that the application of the waiver clause is broad and ***may encompass claims submitted before the same tribunal but under different arbitration clauses included in different legal instruments.*** In addition, while the phrase 'administrative tribunal or court' is limited to domestic entities ('under the law of any Party'), the phrase 'other dispute settlement procedure' is not limited and, as such, encompasses international arbitration proceedings.[658]

332. Respondent's interpretation of the ordinary meaning of the Waiver Requirement is misguided for several reasons.

333. **First,** while Respondent's interpretation focuses on the term "any" as the keystone, in fact, the critical terms which it overlooks is the seminal term "proceeding" and the phrase "*other* dispute settlement procedures." Merriam-Webster defines the term "proceeding" to mean: "legal action"[659] and it identifies as an exemplar, "a divorce proceeding." A proceeding, thus, is a separate legal action. It is not congruent with a cause of action or claim. Nor does it mean a basis for consent, as Respondent argues. Rather it is a separate procedure dealing with a dispute between the parties. Every separate procedure initiated would be considered a separate proceeding, such as the various exemplars of proceedings identified in the

[657] Counter-Memorial, ¶ 504.
[658] Counter-Memorial, ¶ 505.
[659] https://www.merriam-webster.com/dictionary/proceeding (accessed on July 7, 2021).

Article 10.18.2(b): namely, a proceeding before an administrative tribunal, court or dispute settlement procedures.

334. Significantly, the express exemplar "dispute settlement procedures" is preceded by the term "other." Applying its ordinary meaning, the Merriam-Webster dictionary defines "other" as "not the same: DIFFERENT."[660] In other words, a waiver is only required of claims or measures brought in a "different" arbitration. The waiver is, by its terms, inapplicable to claims brought in the "same" arbitration.

335. **Second**, Respondent's reliance on the term "any" to obviate the restricted terms used in the waiver requirement is unsupported. Respondent argues that the use of the term "any proceeding" is "not qualified in any manner" and hence, in its view, "the application of the waiver clause is broad and ***may encompass claims submitted before the same tribunal but under different arbitration clauses included in different legal instruments***."[661] Respondent's reasoning makes no sense. The use of the determiner "any" before a noun does not change the meaning of the noun. It just permits all forms of the noun to be considered. Here, the word "any" does not transform the word "proceeding" into the word "claim," "cause of action," "right of action," or "basis for consent," which Respondent would have the Tribunal believe. Read in its broadest possible manner, then, the term "any" only means that the waiver includes any form of "legal action." In combination with the term "other," it can only reasonably be interpreted to encompass claims initiated or continued in a "different" arbitration proceeding than the one in which the claimant has brought the action and claims jurisdiction. Respondent has failed in its

[660] https://www.merriam-webster.com/dictionary/other (accessed on July 7, 2021).
[661] Counter-Memorial, ¶ 505.

proof of showing that Claimants brought the same claims with respect to the same measures in a separate arbitration apart from the ICSID case itself.

336. **Second**, as stated, Respondent has failed to demonstrate that the reference to "other dispute settlement procedures" refers to the very proceedings in which the waiver has to be made. This proposition would be outlandish, as it would require a claimant to waive any and all rights to pursue claims for which the international tribunal has jurisdiction.[662] In essence, this is the position Respondent presents here. Respondent does not differentiate between the treaty and contract claims brought by Claimants. It merely states that all of Claimants' claims must be rejected on grounds that Claimants violated their waiver obligation under the TPA. Respondent's argument would have the pernicious result of undermining legitimate claims being heard by a tribunal with consent and jurisdiction to hear the dispute, as here.

337. **Third**, a reasonable interpretation of the plain text of the waiver provision does not encompass claims brought before international arbitral tribunals. According to the text of Article 10.18(2)(b), the first portion of the waiver extends to a proceeding before "any administrative tribunal or court ***under the law of any Party,***" but by its terms, does not contemplate proceedings before an ICSID tribunal which is not "under the law of any Party," but rather is brought under international law. While the reference to "other dispute settlement procedures" does not specify whether the arbitration would proceed under the law of a Party or would include international dispute settlement proceedings, the better interpretation is that international dispute settlement proceedings are not covered. As explained by Professor Schreuer:

> The nature of administrative tribunals or courts as belonging to a Party is spelt out in the waiver clause. The reference to other dispute settlement procedures, immediately thereafter, suggests that the latter must also be under the law of a

[662] Schreuer I, ¶ 54.

> Party. Had the drafters of Article 10.18.2(b) meant to include international dispute settlement procedures, ***one would expect that they would have said so***.[663]

338. **Fourth,** the case law Peru cites in support of its unreasonable interpretation of the waiver clause does not support its argument. Rather, it is wholly consistent with Claimants' position. Peru relies on *Renco v. Peru* alleging that the tribunal adopted a broad interpretation of the waiver requirement when the tribunal found that: [664]

> there is no basis in the text of the Treaty for qualifying the temporal scope of the 'proceeding[s]' in respect of which a written waiver must be provided, for example by excluding future proceedings which may be 'initiated' by an investor if the Tribunal were to decide that it lacked jurisdiction or that Renco's claims were inadmissible.[665]

339. In *Renco,* the claimant had reserved its right to resort to domestic courts, in the event that the arbitral tribunal dismissed its complaint on the grounds of lack of jurisdiction.[666] Significantly, the dispute in *Renco* had to do with "separate proceedings," namely, the ICSID case under consideration and a potential future domestic court litigation. *Renco* does not support Respondent's current interpretation that an ICSID tribunal has allegedly waived claims brought in the same proceeding. In any event, the *Renco* case is inapt, as the waiver executed by Latam Hydro and CH Mamacocha in the present case did not contain any qualifications, as did *Renco*'s, and further, the present case does not present a "temporal" issue. Latam Hydro and CH Mamacocha's waivers were absolute and unrestricted.

340. **Context.** Applying Article 31 of the VCLT, the terms of a treaty must also be interpreted in their context, which means that an interpretation of the Waiver Requirement must

[663] Schreuer I, ¶ 52 (emphasis added).
[664] Counter-Memorial, ¶ 506.
[665] *The Renco Group c the Republic of Peru,* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶ 83 (RL-0079).
[666] *The Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶ 58 (RL-0079).

take into account the treaty's entire text.[667] Article 10.18(2)(b) of the TPA makes reference to Article 10.16 of the TPA which describes the types of claims that a claimant may submit to arbitration.[668] As explained by Professor Schreuer:

> Article 10.16 of the TPA endows the Tribunal with jurisdiction over treaty claims as well as over contract claims. A claimant may pursue one type of claim, as spelt out in Article 10.16, or several types cumulatively. Any suggestion that, in order to pursue one type of claim, a claimant would have to forgo the possibility to pursue other types of claims over which the Tribunal has jurisdiction does not make sense. A treaty provision that explicitly states that a tribunal has jurisdiction over violations of the treaty's substantive standards as well as over investment agreements, cannot reasonably be interpreted to mean that a claimant, to be permitted to pursue its treaty claims, must waive its contract claims. Even less can it mean that a claimant, that pursues treaty claims and contract claims, is barred from proceeding altogether.[669]

341. The present case does not involve parallel or different proceedings, but just one proceeding before one ICSID tribunal involving contract and treaty claims against measures taken by Peru. This is in line with the purposes of Article 10.18(2)(b) of the TPA: (i) avoidance of potentially inconsistent determinations in fact and law; (ii) minimization of the risk of double recovery; and (iii) avoidance of multiple proceedings in different fora. It is an accepted practice that treaty claims and contract claims can be pursuit before one tribunal. As Professor Schreuer finds, the TPA "cannot reasonably be interpreted" otherwise.[670]

342. Peru also alleges that Claimants violated the Waiver Requirement because Claimants different claims involve the same "measures," which according to Peru is impermissible.[671] Peru's position is incorrect. As explained by Professor Schreuer,

> In this context it makes no difference if the criminal investigation is described as a "measure" rather than as a "claim." The flexibility shown by tribunals in the application of notice and wait provisions

[667] Schreuer I, ¶ 68.
[668] Breach of an obligation under Section A of Chapter Ten, Breach of an Investment Authorization, and Breach of an Investment Agreement.
[669] Schreuer I, ¶ 69.
[670] Schreuer I, ¶ 69.
[671] Counter-Memorial, ¶ 513.

> extends to additional claims that were triggered by measures taken after the submission of the notice of dispute.[672]

343. **Object and Purpose**. With regard to the object and purpose of the Waiver Requirement, Peru argues that waiver clauses serve different purposes including "precluding a claimant from commencing several proceedings against the same measures in an attempt to maximize their chances of success" and "the reduction of the costs related to the defense of claims filed under several legal instruments against the same measure."[673] Peru alleges that Claimants attempted to defeat these purposes by allegedly filing "complaints under two different dispute settlement mechanisms," even if they did so before the same tribunal. According to Peru, "this gambit is precisely the type of 'duplication of recourses' that the Waiver Requirement seeks to prevent."[674] Peru's position is plainly wrong.

344. As explained by Professor Schreuer, the object and purpose of Article 10.18.2(b) and of similar clauses in other treaties such as NAFTA and CAFTA is to "ensure that duplicative claims are not brought simultaneously before municipal courts and international arbitral tribunals."[675] The *Renco* tribunal, on which Peru relies, found that the object and purpose of the Waiver Requirement had three aspects: (i) avoidance of multiple proceedings *in different fora*, (ii) minimizing the *risk of double recovery*, and (iii) avoiding *inconsistent determinations* of fact and law.[676]

345. None of these risks are present in this case. In the present case, the claims are not pursued before different fora, but rather they were brought in a unified proceeding in which the risks identified by *Renco* can be avoided by this Tribunal. As explained by Professor Schreuer, in

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[672] Schreuer I, ¶ 106.
[673] Counter-Memorial, ¶ 508.
[674] Counter-Memorial, ¶ 509.
[675] Schreuer I, ¶ 55.
[676] *The Renco Group c the Republic of Peru,* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15th, 2016, ¶ 84 (RL-0079).

cases where several types of claims are pursued in conjunction, the situations identified by the *Renco* tribunal do not present a risk:

> The object and purpose of the waiver clause, as articulated by these tribunals, does not apply to an international arbitration, such as the present one, in which several types of claims are pursued in conjunction. There are no multiple proceedings in different fora but one unified proceeding. There is no risk of double recovery since the determination of liability and the calculation of quantum are in the hands of one tribunal. And, for the same reason, there is no danger of inconsistent decisions.[677]

346. Professor Schreuer's views have been confirmed by arbitral tribunals interpreting Article 1121 of NAFTA and Article 10.18(2) of CAFTA. These tribunals emphasized that "the respective waiver clauses were designed to avoid a duplication of proceedings between the international arbitration and proceedings in domestic courts."[678] In *Waste Management v Mexico II,* the tribunal found that "the waiver concerns the right 'to initiate or continue' domestic proceedings."[679] Similarly, in *Pac Rim v El Salvador,* the tribunal found that:

> the Tribunal finds no juridical difficulty in having an ICSID arbitration based on different claims arising from separate investment protections and separate but identical arbitration provisions, here CAFTA and the Investment Law. To the contrary, when consent to the same tribunal´s jurisdiction is contained in two or more instruments, the Respondent's suggestion that different ICSID arbitrations must be commenced under each instrument would render nugatory the natural inclinations of both investors and States for fairness, consistency and procedural efficiency in international arbitration.[680]

347. An interpretation of the object and purpose of the Waiver Requirement under VCLT Article 31, as emphasized by the relevant jurisprudence, also supports Professor Schreuer's view that "[a]n ICSID tribunal may exercise jurisdiction in one proceeding on the basis of several consents given by the parties.[681]

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[677] Schreuer I, ¶ 61.
[678] Schreuer I, ¶ 62.
[679] *Waste Management v Mexico II,* Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002, ¶ 31 (CL-0192).
[680] *Pac Rim v. El Salvador,* ICSID Case No. ARB/09/12, Decision on Jurisdiction, June 1, 2012, ¶ 5.45 (CL-0043).
[681] Schreuer I, ¶ 67.

348. For the above reasons, Claimants have shown that they have fully complied with the Waiver Requirement of Article 10.18(2)(b) and Peru's jurisdictional objection must be dismissed.

C. Claimants Have Complied With The Notice And Wait Requirement Of Article 10.16(2) Of The TPA With Respect To All Of Its Claims

349. Article 10.16(2) of the TPA provides:

> At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:
>
> (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
>
> (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
>
> (c) the legal and factual basis for each claim; and
>
> (d) the relief sought and the approximate amount of damages claimed.

350. Peru argues that the Tribunal does not have jurisdiction *Ratione Voluntatis* over Claimants' claim related to the criminal investigation and the Arequipa Environmental Prosecutor's later formalization of criminal charges against CHM's lead Peruvian Lawyer, Dr. [redacted], due to Claimants' alleged non-compliance with the Notice and Wait Requirement of Article 10.16(2) of the TPA.[682] According to Peru, Claimants did not comply because they allegedly failed to reference in the Third Notice of Intent the measures regarding the Criminal Investigation against [redacted] among "the legal and factual basis for each claim."[683] Peru's allegations are wrong on the law and on the facts, as demonstrated below.

[682] Counter-Memorial, ¶ 518.
[683] Counter-Memorial, ¶ 521.

1. The Notice And Wait Requirement Has A Procedural And Non-Jurisdictional Character

351. Several investment treaties, including NAFTA and USMCA, contain notice and wait provisions similar to the one incorporated in Article 10.16(2) of the TPA.[684] As explained by Professor Schreuer, the majority of arbitral tribunals have found that "the notice and wait provisions were procedural in nature and their non-observance did not affect the tribunal's jurisdiction."[685]

352. In *SGS v Pakistan,* the tribunal found:

> Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.[686]

353. Other investment tribunals have agreed with this view, concluding that the notice and wait requirement is not a jurisdictional predicate, but a procedural rule that does not deprive the Tribunal of jurisdiction.[687] In *Bayindir v Pakistan*, the tribunal said:

> In the Tribunal's view, the requirement of notice contained in Article VII of the BIT should not be interpreted as a precondition to jurisdiction. … international tribunals tend to rely on the non-absolute character of notice requirements to conclude that waiting period requirements do not constitute jurisdictional provisions but merely procedural rules that must be satisfied by the Claimant. … The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan's position, the non-fulfilment of this requirement is not "fatal to the case of the claimant."[688]

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[684] Schreuer I, ¶ 81.
[685] Schreuer I, ¶ 83.
[686] *SGS v Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003. ¶ 184. Footnote omitted (RL-0130).
[687] Schreuer I, ¶¶ 84-86.
[688] *Bayindir Insaat Turizm Ticaret Ve Sanayi A. S. v Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 95, 99, 100. *See also* ¶ 102 (RL-0044).

354. The procedural and non-jurisdictional character of the notice and wait requirement applicable to this case is confirmed by the wording and context of Article 10.16(2) of the TPA. As described by Professor Schreuer:

> Article 10.16 (2) provides that 'a claimant shall deliver to the respondent a written notice.' It does not, however, condition jurisdiction on that step. By contrast, immediately before and immediately after the TPA's notice and wait provision, Articles 10.16 (1) and 10.16 (3) condition jurisdiction on the existence of two requirements. These two requirements are the directness of the claim in relation to the investment and the lapse of six months since the events giving rise to the claim. Both these requirements are introduced by the word 'provided.' A claimant may submit a claim only provided its claim meets these two requirements. By contrast, the notice and wait provision of Article 10.16 (2) is not introduced by the word 'provided,' indicating that this rule is procedural, and compliance with it is not a condition for jurisdiction.[689]

355. Therefore, the notice and wait requirement of Article 10.16(2) of the TPA has a procedural character, and its non-observance would not affect the tribunal's jurisdiction.[690]

2. Claims Additional To Those Listed In The Notice Of Intent Are Allowed Provided They Are A Factual Extension Of The Case And Are Related To The Same Dispute

356. Peru alleges that the Third Notice of Intent did not comply with the Notice and Wait Requirement of Article 10.16(2) of the TPA because the Notice did not include the claims related to the Criminal Investigation against [redacted] and, thus, the Notice was incomplete when submitted.[691]

357. However, a notice of intent is not required to be complete or exhaustive for purposes of complying with the Notice and Wait requirement. Tribunals have found that all that is required is a reasonable degree of specificity that allows an adequate identification of the dispute.[692] It is not necessary to restart a separate notice and wait period each time an additional

[689] Schreuer I, ¶ 89.
[690] Schreuer I, ¶ 88.
[691] Counter-Memorial, ¶ 521.
[692] Schreuer I, ¶ 93.

claims is added, assuming that the new claims are a factual extension of the case and are related to the same dispute. To interpose such a requirement is not provided in Article 10.16(2) and would impose an unreasonable, recurring burden.[693]

358. What is important is that the submission of additional claims does not change the general character of the case.[694] This restriction was confirmed by the Tribunal in *RREF v Spain,* which found:

> … the Tribunal is of the view that the core issue is whether the additional claims change the character of the case: if yes, then they are not part of the dispute, the new claims must be declared inadmissible and the Tribunal must abstain to exercise jurisdiction. If this is not the case, the objection must be dismissed since (i) it can be admitted that the cooling-off period will have elapsed at the time the Tribunal's decision is taken and (ii) it would be totally artificial and unreasonably heavy to request the Claimant to lodge new applications directed against facts which are but the continuation of those at stake in the initial Application.[695]

359. Claimants respectfully refer the Tribunal to Professor Schreuer's Report, in which he identifies many other decisions by arbitral tribunals that have found that additional claims relating to the same dispute in substance do not require a separate notification and waiting period.[696] In the words of the tribunal in *Kappes v Guatemala,* requiring a clamant to recommence the notice of intent and waiting period process for every new State measure "would provide potential for disruption and duplication, as well as potential for mischief."[697]

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[693] *See* Schreuer I, ¶¶ 94-95.
[694] Schreuer I, ¶ 95.
[695] *RREEF v Spain,* ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 226 (CL-0173). Similarly, the tribunal in *Eiser v Spain* found that "[i]t would be unreasonable and inefficient in case like this, involving an evolving situation, to interpret Article 26 [ECT] to require the dispute to be carved into multiple slices, with each new development requiring additional request for negotiations and a subsequent request for a separate additional arbitration." *Eiser v Spain,* Award, May 4, 2017, ¶ 348 (CL-0134).
[696] Schreuer I, ¶¶ 94-103.
[697] *Daniel W Kappes v Guatemala,* ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, March 13, 2020, ¶ 199 (CL-0126).

3. Contrary To Respondent's Unsubstantiated Allegation, The Facts Show That Claimants Complied With The Notice And Wait Requirement Of Article 10.16(2)

360. Claimants submitted their Third Notice of Intent on May 28, 2019, and their Request for Arbitration on August 30, 2019, 94 days later. It is undisputed that Claimants complied with the Notice and Wait Requirement before submitting its claims to arbitration.

361. Peru argues, however, that the Notice and Wait Requirement was violated with respect to measures related to the Criminal Investigation and later formalization of criminal charges against [redacted], counsel to CHM. According to Peru's theory, if a claimant fails to serve a notice of intent on the Respondent State specifying the legal and factual basis for *each* claim at least 90 days before submitting a claim to arbitration, the State's consent is not effective.[698]

362. As explained above in the Facts section, the AEP announced on February 2, 2018, that the prosecutor was investigating [redacted] as a suspect. On May 2, 2019, the AEP issued Disposition No. 07-2018-FPEMA-MP-AR, declaring that the AEP had finished its investigation and was ready to bring formal charges against the suspects.[699] However, it was not until October 18, 2019, that the AEP formally charged [redacted] of having committed a "crime" for nothing more than signing an application on behalf of CHM requesting administrative reconsideration of ARMA's environmental classification of the CHM Project.

363. Claimants did not specifically mention the early phases of the Criminal Investigation against [redacted] in its Third Notice of Intent, dated May 28, 2019, because at that time Claimants were still assessing the nature and impact of the AEP's investigation which closed on May 2, 2019. Even after filing the Third Notice of Intent in May 2019, the Criminal

[698] Counter-Memorial, ¶ 520.
[699] [redacted]

Investigation kept evolving. Formal charges were not lodged against [redacted] until October 18, 2019, five months *after* the Notice of Intent was submitted on May 28, 2019.

364. In any event, the evolving claims related to the Criminal Investigation and Formalization of Charges brought against [redacted] do not change the general character of the case. These facts were plainly "a factual extension of the case and are related to the same dispute."[700] As demonstrated in Claimants' Memorial and in this Reply, the AEP's investigation and charges were merely a groundless and vindictive parallel campaign against the Project. It was premised on the same allegations as had been alleged in the RGA Lawsuit's complaint, which was later withdrawn because the allegations were specious and meritless. The regional prosecutor's pursuit of baseless charges against the legal representative of CHM is intimately tied to, and not separate from, the overall circumstance of obstruction and interference by the Arequipan regional officials, which form the essential character of Claimants' claims against Respondent. Peru has failed to prove otherwise.

4. Both the TPA And The ICSID Convention Anticipate New Claims Being Raised After A Notice Of Arbitration

365. Article 10.16(4) of the TPA reads:

> A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

366. As explained by Professor Schreuer, "[i]f new claims are admissible even after the notice of arbitration, it is hardly possible to argue that they may not be asserted after the notice of intent."[701]

[700] Schreuer I, ¶ 94.
[701] Schreuer I, ¶ 109.

367. Additionally, the ICSID Convention allows a claimant to raise incidental or additional claims arising out of the subject-matter of the dispute before the Tribunal, which may be raised *at any time* during the arbitral proceeding provided that they are submitted no later than the Reply.[702]

368. Article 46 of the ICSID Convention regulates the treatment of incidental or additional claims, as follows:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine ***any incidental or additional claims*** or counterclaims ***arising directly out of the subject-matter of the dispute*** provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.[703]

369. Implementing Article 46 of the ICSID Convention, ICSID Arbitration Rule 40 provides:

> (1) Except as the parties otherwise agree, a party may ***present an incidental or additional claim*** or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) ***An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial***, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding. …[704]

370. Arbitral tribunals have found that ancillary claims do not require another notice of intent nor the need to observe another waiting period.[705] In *CMS v. Argentina*, the tribunal analyzed Arbitration Rule 40 and found that:

> It is clear from the ICSID Arbitration Rules that [incidental or additional claims] do not require either a new request for arbitration or a new six-month period for consultation or negotiation, before the submission of the dispute to arbitration under the Treaty…. [Since] the disputes are not separate and independent and relate to the same subject-

[702] Schreuer I, ¶ 110.
[703] Article 46 ICSID Convention (emphasis added).
[704] ICSID Arbitration Rule 40 (emphasis added).
[705] Schreuer I, ¶ 116.

> matter, it is immaterial whether the pertinent events occurred before or after the submission of the dispute to arbitration as long as any ancillary claim is made before [the] reply, as required by Arbitration Rule 40(2).[706]

371. Other tribunals have similarly found that the ICSID Rules allow Claimants to submit additional claims at later points in the arbitration, up to the filing of the Reply on the Merits, as long as these claims arise directly out of the subject-matter of the dispute.[707]

372. As proven, the criminal investigation and prosecution of [redacted] is merely one more step that the RGA took to defeat the Project. Claimants' claims relating to this Measure is closely related to the original claims notified in the Third Notice of Intent and arises out of the same subject matter. As described by Professor Schreuer, "the criminal prosecution claim qualifies as an ancillary claim that could have been made as late as the Reply. As such, it is not subject to a separate notice and wait period."

373. Accordingly, Claimants have complied with the Notice and Wait Requirement of Article 10.16(2) of the TPA and Respondent's jurisdictional objection must be dismissed.

D. The RER Contract Qualifies As An "Investment Agreement" And Thus, The Tribunal Has Jurisdiction *Ratione Materiae*

374. Latam Hydro submitted claims on behalf of CHM in accordance with TPA Article 10.16(1)(b)(i)(C) arising from Peru's breaches of an "investment agreement." CHM also submitted claims on its own behalf in accordance with the TPA Article 10.16(1)(a)(i)(C).

375. Article 10.28 of the TPA defines an "investment agreement" as follows:

[706] *CMS v Argentina,* ICSID Case No. ARB/01/8, Decision on Jurisdiction, July 17, 2003, ¶¶ 123, 125 (CL-0123).
[707] Schreuer I, ¶¶ 119-123.

> ***investment agreement*** means a written agreement[708] between a national authority[709] of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:
>
> (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
>
> (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
>
> (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

376. As explained in the Memorial, the RER Contract is an "investment agreement," as defined in Article 10.28 of the TPA, because it is a:

> "written agreement between a national authority of [Peru] and a covered investment (*i.e.,* CHM) . . . on which the covered . . . investor (*i.e.,* Latam Hydro) relies in establishing or acquiring a covered investment (*i.e.,* the Mamacocha Project and CHM) other than the written agreement itself, that grants rights to the covered investment (*i.e.*, CHM) . . . to supply services to the public on behalf of [Peru], such as power generation or distribution, water treatment or distribution, or telecommunications."[710]

377. Peru alleges that the RER Contract does not qualify as an investment agreement for purposes of Article 10.16(1) of the TPA, and therefore the Tribunal does not have jurisdiction *ratione materiae.*[711] As described below, Respondent's arguments are plainly wrong.

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[708] Original footnote: "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement. United States-Peru Trade Promotion Agreement, February 1, 2009 (C-0001).
[709] Original footnote: For purposes of this definition, "national authority" means an authority at the central level of government. United States-Peru Trade Promotion Agreement, February 1, 2009 (C-0001).
[710] Memorial, ¶ 209. CHM's claims and damages under Article 10.16(1)(b)(i)(C), relate directly to the Mamacocha Project, the covered investments that was established or acquired in reliance on the "investment agreement" (i.e., the RER Contract). With respect to both categories of claims, Claimants have "incurred loss or damage by reason of, or arising out of," these breaches, as explained in Section VI.A of the Memorial and below in Section VII.
[711] Counter-Memorial, ¶ 529.

1. The RER Contract Qualifies As An "Investment Agreement" Under Article 10.28 Of The TPA

378. As explained in the Memorial, the RER Contract is an investment agreement since it "grants rights to the covered investment or investor . . . (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications."[712]

379. Respondent argues that Claimants' characterization of the RER Contract as an investment agreement under section (b) of Article 10.28 of the TPA is mistaken, because an investment agreement must "[grant] rights … to supply services to the public on behalf of the Party [in this case, Peru]."[713] According to Peru, the RER Contract is a long-term power purchase agreement ("**PPA**") which does not confer any right to generate power. Respondent argues it is the *concession,* not the RER Contract, that gives the concessionaire a right to generate electricity.[714]

380. Peru's argument fatally overlooks the plain language of the title of the RER Contract – "Concession Agreement for the Supply of Renewable Energy – National Interconnected Electric System" -- as well as the definition of "Agreement" embodied in Clause 1.4.12, which provides:

> This is the Concession Agreement for the Supply of Renewable Energy resulting from the Auction … which establishes the commitments and conditions related to the construction, operation, ***supply of energy***, and tariff regime of the generation plants with RER.[715]

[712] Memorial, ¶ 209. *See* United States-Peru Trade Promotion Agreement, February 1, 2009, Article 10.28(b) (C-0001).
[713] Counter-Memorial, ¶ 532.
[714] Counter-Memorial, ¶¶ 533-536.
[715] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.12 (C-0002) (emphasis added).

A plain language interpretation of this definition and the contract's title establish, beyond doubt, that the RER Contract, itself, established the commitments and conditions for the supply of energy. In further support of this reading, Clause 10.2(d) granted MINEM authority to terminate the RER Contract if the concessionaire company "persists, after being administratively sanctioned by OSINERGMIN up to two (2) times, in not fulfilling its obligations to supply the generated energy…"[716]

381. Peru's attempt to distinguish between the RER Contract and the power-generation and transmission line concessions is without textual support and makes no sense. The whole purpose of the RER Contract was to incentivize Claimants to invest in Peru to build a hydroelectric plant and to "supply the generated energy." The RER Contract, without the underlying concessions, would be valueless.

382. Even if Peru were right that the RER Contract qualifies merely as a long-term PPA – which it is not -- it would still fall under the description of an investment agreement under the TPA. As explained by Professor Schreuer:

> The definition of 'investment agreement' in Article 10.28 (b) refers to the right 'to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunication.' ***The primary component of this definition is the supply of services to the public***. It is followed by several examples: **'*such as*** power generation or distribution, water treatment or distribution, or telecommunication.' The words 'such as' clearly indicate that what follows is a non- exhaustive list of examples. ***Therefore, the decisive part of the definition is the supply of services to the public. It is not necessary that the services to the public meet the description of any of the examples.*** The RER Contract fits into the general description of an agreement to supply services to the public and is hence covered by the

[716] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 10.2(d) (C-0002).

> definition. This remains true even if the delivery to end users is in the hands of another company.[717]

383. The RER Contract also qualifies as an "investment agreement" under TPA Article 10.28 subparagraph (a), since it is an agreement "with respect to natural resources that a national authority controls," and under subparagraph (c), since it is an agreement "to undertake infrastructure projects." As described by Professor Schreuer, "[t]he water utilized to produce the electricity is a natural resource that the Peruvian authorities control, and the hydroelectric power station is an infrastructure project."[718]

384. Additionally, the RER Contract falls within the generally accepted concept of investment, complying with the elements of the *Salini* test. Whether it is viewed as a contract to supply energy to the grid or as a PPA, the RER Contract has a duration, together with contribution and risk, and therefore qualifies as an investment.[719]

2. The RER Contract Is An Investment Agreement Because Claimants Have Relied On The RER Contract To Acquire A Covered Investment

385. Peru alleges that the RER Contract is not encompassed under the *chapeau* of the definition of 'investment agreement' under the Treaty. In the *chapeau*, an investment agreement is described as an agreement "on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself."[720]

386. Respondent argues that Claimants have not satisfied the burden of proving that they relied on the RER Contract to acquire the alleged "covered investment," and that since the

[717] Schreuer I, ¶ 129 (emphasis added).
[718] Schreuer I, ¶ 130.
[719] Schreuer I, ¶ 131.
[720] Counter-Memorial, ¶ 537.

RER Contract was executed after CHM was formed and some of the permits had been obtained, Claimants could not have relied on the RER Contract when making their investment.[721]

387. As described above, there is no burden of proof to be discharged by Claimants in the matter of jurisdiction. Moreover, the execution of the RER Contract after CHM's formation was a requirement under Peruvian Law and the TPA Article 10.28, itself, which required that an "investment agreement" must be executed between a national authority of a Party and a covered investment of ***an investor of another Party***. To comply with these requirements, CHM had to be owned or controlled by a United States person or entity at the time of the RER Contract's signature.[722] To qualify as an investment agreement, the RER Contract had to be signed between a host State and the foreign investor, or a local company owned or control by the foreign investor.

388. The fact that some permits or activities were obtained or carried out before the execution of the RER Contract does not diminish the strength of the evidence establishing that Claimants relied on the RER Contract to acquire a covered investment. As described by Professor Schreuer, Peru's argument ignores the principle of the unity of the investment: "[t]ribunals, when dealing with inter-temporal questions, have found that activities taking place at an early stage of an investment could not be dissociated from subsequent activities but that all activities had to be regarded as one integrated whole."[723] In *Bear Creek v. Peru,* respondent argued that there were some necessary permits that were still missing and therefore claimant's rights had not crystalized into an investment. The Tribunal found that:

[721] Counter-Memorial, ¶ 538.
[722] Schreuer I, ¶ 135.
[723] Schreuer I, ¶ 139.

> Indeed, it is uncontroversial that an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project such as mining activity.[724]

389. In the present case, the permits and activities that were carried out by Claimants before the execution of the RER Contract cannot be disassociated from the whole investment, as they form part of the integrated whole investment. Additionally, as described in the Memorial, there were numerous activities, permits and studies that were carried out *after* execution of the RER Contract. This also includes the approval of the concessions for the hydroelectric generation plant and transmission lines which also qualify as investments, and were obtained in 2016.

390. Therefore, the RER Contract "was part of the overall investment activity and inextricably linked to all its components. It was an indispensable element of the Claimant's overall business plan upon which they relied through the course of the investment activity."[725]

391. Finally, Respondent mistakenly argues that "Claimants have not proved that the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement, as required by Article 10.16(1)(b)(i)(C) of the Treaty."[726]

392. It should first be noted that this objection does not address the question of whether the RER Contract is an Investment Agreement under Article 10.28 of the TPA, which is the article under which Respondent bases its jurisdictional objection. Its argument is wholly irrelevant to the definition of an investment agreement under Article 10.28.

[724] *Bear Creek Mining v Peru,* ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 296 (CL-0016).
[725] Schreuer, ¶ 142.
[726] Counter-Memorial, ¶ 541.

393. In total refutation of Respondent's objection, Claimants demonstrate in Section VI.A of the Memorial and again in the Damages section below that the subject matter of the claim (breach of an investment agreement) and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

394. In conclusion, the RER Contract qualifies as an "investment agreement" and meets the definition of a "written agreement between a national authority of a Party and a covered investment or an investor of another Party" under Article 10.28 of the TPA. Respondent's jurisdictional objection based on its unproven argument that the RER Contract does not qualify as an investment agreement must be dismissed.

E. The Tribunal Has Jurisdiction *Ratione Personae* Because Peru Agreed To Treat CH Mamacocha As A National Of Another Contracting State For Purposes Of Article 25(2) Of The ICSID Convention

395. In their Memorial, Claimants demonstrated that the Tribunal has jurisdiction over CHM because Peru agreed to treat CHM as a "National of Another Contracting State"—in this case, CHM is a foreign-controlled company, directly or indirectly owned and controlled by a U.S. citizen or U.S. entity at all relevant times.[727] Claimants also had provided a detailed response to the ICSID Secretariat which had asked, upon submission of the Claimants' Request for Arbitration, as to the basis for submitting CHM, a Peruvian-incorporated entity, as a "national of another Contracting State."[728] Claimants' response to the ICSID Secretariat of September 18, 2019, provides a comprehensive explanation why under the plain language of ICSID Convention, Article 25(b)(2), established legal authority from distinguished scholars, consistent decisions by previous international investment tribunals and the uninterrupted course

[727] Memorial, ¶ 256.
[728] Letter from K. Reisenfeld to A. Conover, September 18, 2019 (C-0210).

of dealings of the Parties, Peru has unconditionally and without equivocation always treated CHM as a "national of another Contracting State" because it has, at all times relevant to this proceeding, been owned by a US investor.

396. In its Counter-Memorial, however, Peru argues that it has no agreement with CHM to treat it as a national of the United States. It also argues that the attribution of character as a national of another Contracting State "must be express and unequivocal and cannot be implied."[729]

397. As shown below, Peru's objections and arguments are misstatements of the legal authority and demonstrably wrong on the facts. In this case, Claimants have proven that Peru unequivocally agreed to treat CHM as a national of another Contracting State for purposes of ICSID Convention Article 25(2)(b) by entering into a dispute resolution clause requiring resolution of large disputes before ICSID, by including CHM in its negotiations before the Special Commission knowing that CHM was a Peruvian entity owned and controlled, directly and indirectly, by a US national, and through other course of dealing.

398. The RER Contract explicitly provides that CHM can seek ICSID arbitration for disputes over US $20 million. This provision of the RER Contract satisfies the requirement under Article 25(2)(b) of the ICSID Convention, as described below.

1. Article 25(b)(2) Provides An Exception To The Nationality Requirement Of Article 25(b)(1)

399. Article 25 of the ICSID Convention establishes the parameters for jurisdiction of ICSID dispute settlement between States and foreign investors. Article 25(2)(b) of the ICSID Convention provides that a foreign investor and host State can agree to treat juridical persons

[729] Counter-Memorial, ¶ 572.

incorporated in the host State, but controlled by nationals of another State, as foreign nationals for purposes of the ICSID Convention.[730] It reads:

> 'National of another Contracting State' means: ... any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.[731]

400. Peru argues that the Tribunal lacks jurisdiction *ratione personae* because CHM does not comply with the nationality requirement under article 25(1) of the ICSID Convention nor with the requirements of the exception established in Article 25(2)(b) of the ICSID Convention.

401. As explained by Professor Schreuer, the application of Article 25(2)(b) embodies a two-part test. First, the local company must be under foreign control. Second, the Parties must have agreed to treat the local company as a national of another Contracting State to the ICSID Convention.[732] Both requirements are met in the present case: CHM at all relevant times has been wholly owned, directly or indirectly, by and is controlled by Claimant Latam Hydro, a US company. Additionally, as explained below, Peru assigned CHM the status of another Contracting State. Therefore, the Tribunal has Jurisdiction *ratione personae* to hear the present dispute.

2. The Agreement To Treat A Company As A Foreign National Because Of Foreign Control Does Not Require Any Specific Form

402. Peru acknowledges that the agreement regarding the exception introduced in Article 25(2)(b) of the ICSID Convention to treat a juridical person as a 'national of another Contracting State,' despite that entity being incorporated in the host State, can be explicit or

[730] Schreuer I, ¶ 15.
[731] Article 25(2)(b) of the ICSID Convention (excerpts).
[732] Schreuer I, ¶ 16.

implicit.[733] However, Peru argues that if the agreement is implicit, such agreement must be "***indisputable and unequivocal, without a shadow of a doubt.***"[734]

403. In support of this presumption of a burden of proof, Peru relies on *Cable Television of Nevis, c. St. Kitts y Nevis*[735] in which the tribunal found that "… one would expect that parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should therefore normally be explicit."[736] However, the tribunal recognized the acceptance of an implied agreement "in the event that the specific circumstances would exclude any other interpretation of the intention of the parties."[737] For example, recognition as a national of another State could be inferred from the granting of privileges that are reserved to foreign investors.[738]

404. As explained by Professor Schreuer, there is no requirement under the ICSID Convention of any specific form to establish an agreement to treat a juridical person that has the host State's nationality as a national of another Contracting State due to foreign control:

> Already during the Convention's drafting there was a suggestion that consent to proceed under the Convention implied recognition by the host State of the foreign nationality of the other party (History, Vol. II, pp 450, 582). ***A comparison of Article 25(1) with Article 25(2) of the Convention shows that, while consent to the Centre's jurisdiction must be 'in writing', there is no such requirement for the agreement on nationality. This would***

[733] Counter-Memorial, ¶ 569.
[734] Counter-Memorial, ¶¶ 568-569, 572.
[735] Counter-Memorial, ¶ 580.
[736] *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, ¶ 5.24 (citing *Holiday Inns v. Morocco*) (RL-0064).
[737] *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, ¶ 5.24 (citing *Holiday Inns v. Morocco*) (RL-0064).
[738] *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, ¶¶ 5.17-5.18 (citing *Holiday Inns v. Morocco*) (RL-0064).

indicate that the standard of formality is somewhat lower for the agreement on nationality than for consent. [739]

405. Professor Schreuer states: "Tribunals have shown an increasing readiness to accept implicit agreements to treat a juridical person as a foreign national because of foreign control."[740] In his expert report, he describes the evolution of arbitral tribunals chronologically with respect to this issue, showing that even though a few tribunals in early decisions might have adopted a restrictive approach, the tendency has been throughout the years to accept that no formal requirement is needed for this agreement.[741]

406. Peru relies on *Klöckner v. Cameroon* to argue that "if the treatment as 'national of another Contracting State' under Article 25(2)(b) is implicit, then the intent of the parties to that end must be unequivocal and must completely exclude any other interpretation."[742] According to Peru, the arbitration clause in that case was different than the arbitration clause in the RER Contract because it only contemplated one forum to resolve disputes, ICSID (instead of, as here, a dual possibility depending upon the amount in dispute).[743] Peru argues that in *Klöckner* the Tribunal concluded that Cameroon had agreed to implicitly accord *Klöckner* the character of foreign national because the arbitration clause had excluded all other fora and the only available forum was ICSID.[744]

407. Respondent misreads this decision and misstates its rationale. The *Klöckner* opinion does not support Respondent's argument that the tribunal's dismissal of an Article 25 objection was based on the fact that the Contract excluded other possible fora. In fact, the

[739] Schreuer I, ¶ 24 (emphasis added).
[740] Schreuer I, ¶ 25.
[741] Schreuer, ¶¶ 25-38.
[742] Counter-Memorial, ¶ 570.
[743] Counter-Memorial, ¶ 570.
[744] Counter-Memorial, ¶ 570.

tribunal expressly held that the ***mere existence of an ICSID arbitration clause, without more,*** indicated an agreement to treat the host company as a foreign national:

> The insertion of an ICSID arbitration clause *by itself* presupposes and implies that the parties were agreed to consider SOCAME at the time to be a company under foreign control, thus having the capacity to act in ICSID arbitration**. *This is an acknowledgment which completely excludes a different interpretation of the parties' intent.*** Inserting this clause in the Establishment Agreement would be nonsense if the parties had not agreed that, by reason of the control then exercised by foreign interests over SOCAME, said Agreement could be made subject to ICSID jurisdiction.[745]

408. This approach has been confirmed by multiple tribunals.[746] In *Letco v. Liberia,* for example, the tribunal found that:

> When a Contracting State signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting State and ***it does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting State***, the Contracting State could be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause. This is especially the case when the Contracting State's laws require the foreign investor to establish itself locally as a juridical person in order to carry out an investment.[747]

As Professor Schreuer observes: the *LETCO* "tribunal confirmed the reasoning of the previous cases, holding that the mere fact of an ICSID clause constituted an agreement to treat LETCO as a national of another Contracting State." He also states: "[t]o conclude otherwise would have amounted to imputing bad faith to Liberia in that it had never intended to honour the ICSID clause."[748]

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[745] *Klöckner v Cameroon*, Award, 21 October 1983, 2 ICSID Reports 3, ¶ 16 (CL-0033) (emphasis added).
[746] *See* Schreuer I, ¶¶ 25-38.
[747] *LETCO v Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 349, p 352. (Decision on Jurisdiction reproduced in the Award) (CL-0149) (emphasis added).
[748] Schreuer I, ¶ 30.

409. It follows from the evolution of relevant jurisprudence that an agreement on foreign nationality does not require any specific form. All that is needed is an agreement, express or implied, consenting to ICSID's arbitration with a national of the host State that is under foreign control.[749] Therefore, as explained below, the ICSID Clause contained in the RER Contract constitutes an implied agreement by Peru to treat foreign-controlled CHM as a foreign investor for purposes of Article 25(2)(b) of the ICSID Convention.

3. The Presence Of The ICSID Clause In The RER Contract Constitutes An Implied Agreement By Peru To Treat CHM As A Foreign Investor

410. As explained in the Memorial, CHM brings claims on its own behalf under Clause 11.3(a) of the RER Contract for Peru's breaches of its obligations under the RER Contract and Peruvian Law. The RER Contract expressly authorizes CHM, a Peruvian local operating company, to bring claims under the ICSID Rules of Arbitration where, as here, the amount in dispute exceeds Twenty Million Dollars (US $20,000,000) or its equivalent in national currency.

411. Article 11.3(a) of the RER Contract provides:

> Disputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency shall be settled through international arbitration of law by means of a procedure carried out in accordance with the Rules for Conciliation and Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID) established in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States approved by Peru through Legislative Resolution No. 26210, to whose standards the Parties submit unconditionally. Where the Concessionaire Company does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rules referred to in subparagraph b) below.[750]

[749] *See* Schreuer I, ¶ 38.
[750] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, February 18, 2014, Clause 11.3(a) (C-0002).

412. The agreement by Peru to treat CHM as a foreign controlled entity (a US company) for purposes of Article 25(2)(b) can be implied from the RER Contract, RER Law, Peruvian law and the practices of the Parties. The RER Contract incorporates by reference and was designed to implement Legislative Decree No. 1002, which expressly created Peru's renewable energy resources program, in part, "to facilitate the implementation of the United States-Peru Trade Promotion Agreement and its Protocol of Amendment" by attracting US investors to invest in the RER concessions. The RER Law and by inference the RER Contract were expressly designed to attract foreign investment. Peru simultaneously required all foreign investors under the RER Program to invest and operate through local operating companies.[751]

413. Clause 11.3(a) of the RER Contract contained an unequivocal consent to ICSID arbitration for disputes exceeding US $20 million. As explained above and by Professor Schreuer, tribunals facing the question of attribution of foreign nationality to a local foreign-controlled company have determined that the mere existence of an ICSID clause was deemed an implied agreement to treat the local company as a national of another Contracting State.

414. Peru tries to overcome this wealth of persuasive authority by arguing that Clause 11.3(a) did not constitute an implicit acknowledgment by Peru of CHM's status as a "national of another Contracting State," let alone an "indisputable, unequivocal acknowledgment" of such status. Peru relies upon the last sentence of Clause 11.3(a), which provides: "[w]here the Concessionaire Company does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rules referred to in subparagraph b) below." [752] Subparagraph (b) of Clause 11.3, provides for arbitration before the Lima Chamber of Commerce for disputes "whose

[751] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.44 (C-0002).
[752] Counter-Memorial, ¶ 578.

amount is equal to or less than Twenty Million Dollars (US $20,000,000) or its equivalent in national currency."

415. Peru contends that:

> The last sentence of the first paragraph of Clause 11.3(a) explicitly provides for the possibility of a concessionaire (in this case, CH Mamacocha) *not* complying with the *ratione personae* requirement under Article 25 of the ICSID Convention. If a claimant does not comply with the *ratione personae* requirement under the ICSID Convention, it may resort to local arbitration in Peru. This means that the mere fact that the referred provision refers to ICSID arbitration does not mean that Peru was considering CH Mamacocha to be a foreign entity *ipso facto* for the purposes of Article 25(2)(a) of the ICSID Convention.[753]

416. As explained by Professor Schreuer, "[t]he reference to non-compliance with the requirement to access ICSID does not detract from the unequivocal nature of the ICSID clause as suggested by Peru. It merely confirms that only disputes involving amounts above US$ 20 million are subject to ICSID jurisdiction. In the dispute at hand this is clearly the case."[754]

417. Moreover, the reference in the last sentence of Article 11.3(a) could refer to any requirements for jurisdiction under Article 25 of the ICSID Convention. There might be other hypothetical circumstances that might preclude a foreign-controlled entity from bringing its claims before ICSID, such as if the dispute did not "arise out of an investment," or there was no "legal dispute." But these hypotheticals do not apply to this case, nor did their existence diminish the knowledge and unequivocal commitment of Peru to accept jurisdiction at ICSID for all disputes greater than US $20 million.

418. In its Counter-Memorial, Respondent also tries to deny the unequivocal nature of Peru's consent to treat CHM as a "national of another Contracting State" by pointing to another

[753] Counter-Memorial, ¶ 578.
[754] Schreuer I, ¶ 39.

MINEM contract which Respondent alleges expressly recognized that the investor, even if a Peruvian entity, would qualify for status as a "national of another Contracting State" under Article 25(2)(b). [755]

419. Respondent's reliance on this other MINEM contract is irrelevant. As acknowledged by Peru in the Counter-Memorial and explained by Professor Schreuer, an explicit agreement is not the only form that an agreement under Article 25(2)(b) can take. As explained above, "tribunals have shown an increasing readiness to accept implicit agreements to treat a juridical person as a foreign national because of foreign control."[756]

420. There is no doubt that the presence of the ICSID clause in the RER Contract constitutes an implicit agreement between Peru and CHM that CHM, because of its foreign control, would be treated as a foreign investor for purposes of the ICSID Convention. In words for Professor Schreuer,

> The ICSID arbitration clause in the RER Contract excludes any interpretation that would deny CHM treatment as a national of another Contracting State and hence access to ICSID arbitration. The ICSID arbitration clause was signed by Peru in full knowledge of CHM's local nationality and its control by a U.S. investor. To conclude otherwise would amount to imputing bad faith to Peru in that it had never intended to honour the ICSID clause. This conclusion is reinforced by the fact that Peru required the foreign investor to operate through a local Concessionaire Company.[757]

421. Therefore, the fact that Peru may have on another occasion chosen to execute an agreement with an explicit agreement to treat the foreign-controlled local company as a foreign investor, does not imply that in the contract at bar the same conclusion may be implied. It just

[755] Counter-Memorial, ¶¶ 574-575.
[756] Schreuer I, ¶ 41.

shows the inconsistency of MINEM's practices, which is one of the elements of Claimants' complaint on the merits.

4. The Parties' Course Of Dealing Reinforces The Fact That MINEM Implicitly Agreed To Treat CHM As A National Of Another Contracting State

422. The Parties' course of conduct also reaffirms Peru's intention and implicit agreement to treat CHM as a national of another Contracting State.

423. In *AHS Niger and Menzies v Niger,* the tribunal considered that an offer to refer disputes to ICSID was evidence of an agreement to treat the foreign-controlled local entity as a foreign national.[758] The tribunal emphasized that the obligation to set up a local company reinforced the presumption, derived from the presence of the ICSID clause, to treat the local company as a foreign investor.[759] The tribunal also took into account the *conduct of the Parties* which implicitly acknowledged that AHS Niger was a foreign national, and concluded that Niger "had implicitly accepted the local registered but foreign controlled company as a non-national for purposes of Article 25(2)(b) of the ICSID Convention.[760]

424. The conduct of the Parties in this case also shows that Peru implicitly agreed to treat CHM as a foreign investor for purposes of Article 25(2)(b) of the ICSID Convention.

425. **First,** it is undisputed that Peru knew that CHM was owned and controlled, directly or indirectly, by a US investor not only when the RER Contract was originally executed in February 2014, but also on each of the subsequent six times that the RER Contract was

amended.[761] If MINEM intended to deny CHM this status, it could have amended Clause 11.3(a) on any of these seven times, but it did not.

426. **Second**, even before the current case was filed, Claimants had notified Respondent in each of its Notices of Intent[762] that, if the disputes were not resolved, it intended to bring a case on behalf of CHM and Latam Hydro under Clause 11.3(a). The authorization documents for Addendum 3 is an example, as it directly acknowledges that CHM and Latam Hydro provided notice of bringing a claim under the ICSID clause of the RER Contract:

> Through document No. 135-2017-EF/CE.36 with record No. 2720028 of July 3, 2017, the President of the Special Committee created through Law No. 28933, which establishes the State´s coordination and response system in international investment disputes, informed that through notice of intent to submit to arbitration submitted on June 20, 2017 the companies Latam Hydro LLC (parent company of CH Mamacocha S.R.L. whose place of business is in the United States of America) and CH Mamacocha S.R.L. notify the Peruvian State their intent to submit to the inquiry and negotiation mechanism in the framework of the provisions of article 10.15 of the Trade Promotion Agreement between Peru and the United States of America, approved with Legislative Resolution No. 28766, a dispute arising with respect to the investment of Latam Hydro LLC in the national electrical sector.[763]

427. **Third**, the Special Commission voluntarily and knowingly included representatives from CHM, in addition to representatives from Latam Hydro, to attend the direct negotiations under the SICRESI to resolve this dispute.[764]

428. **Fourth**, the Governor of Arequipa acknowledged in her press conference in December 2017 that CHM was a foreign-controlled entity with rights under the TPA. In response to a reporter's question to Governor Yamila Osorio Delgado, asking whether the

[761] *See* Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009); Addendum 3 to the RER Contract, September 8, 2017 (C-0014); Addendum 4 to the RER Contract, January 17, 2018 (C-0015); Addendum 5 to the RER Contract, March 26, 2018 (C-0016); Addendum 6 to the RER Contract, July 23, 2018 (C-0017).
[762] Latam Hydro LLC and CH Mamacocha S.R.L.'s First Notice of Intent, June 19, 2017 (C-0252); Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170); Latam Hydro LLC and CH Mamacocha, S.R.L.'s Third Notice of Intent to Submit a Claim to Arbitration, May 28, 2019 (C-0023).
[763] *See* Addendum 3 to the RER Contract, September 8, 2017, Annex 1, Para. 2.1 (C-014).
[764] Benzaquén II, ¶ 45.

Governor would "cancel the legal action brought by the Attorney General?," the Governor stated: "Yes, that is what the [Ministry of Economy and Finance] suggests we do, even though I disagree, but there are protections thanks to the FTA with the U.S. The company [CHM] has American capital."[765]

429. **Finally,** based upon the many instances in which Peru treated CHM as a foreign-owned company, despite it having been incorporated in Peru as mandated, Peru is now estopped from arguing that the ICSID Clause in the RER Contract did not constitute an implicit agreement to treat CHM as a foreign investor.[766]

430. In conclusion, the Tribunal has Jurisdiction *Ratione Personae* because Peru agreed to treat CH Mamacocha as a National of Another Contracting State for purposes of Article 25(2) of the ICSID Convention. Peru's jurisdictional objection must be dismissed.

F. The Tribunal Has Jurisdiction *Ratione Materiae* Over The Upstream Projects

431. Peru argues that the Tribunal does not have jurisdiction *ratione materiae* over the Upstream Projects since Claimants allegedly failed to prove that the Upstream Projects constitute an "investment" under Article 25 of the ICSID Convention or under Article 10.28 of the TPA.[767] According to Peru, the Mamacocha Project and the Upstream Projects must be treated as separate investments since "pre-investment activities" have to be treated separately.[768]

432. As explained in the Memorial, Claimants conceptualized their investment in Peru as a Project comprising the Mamacocha and Upstream Projects, in reliance on the legitimate

[765] Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017 (C-0011).
[766] Schreuer I, ¶¶ 42-44.
[767] Counter-Memorial, ¶¶ 543-544.
[768] Counter-Memorial, ¶ 545.

expectations they formed from the promises and commitments offered under the RER Promotion, RER Contract, the TPA, and Peruvian law.

433. When Claimants decided to invest in Peru, they commissioned Pöyry to conduct a feasibility study for the Mamacocha Project and also a conceptual design for the Upstream Projects.[769] Pöyry estimated that the total project costs for the Upstream Projects would be around US $83 million and the final result would be four small hydroelectric plants with a combined installed capacity of 46 megawatts and an annual energy output of about 316,000 megawatt hours.[770]

434. Both the Mamacocha and the Upstream Projects were presented to prospective investors as a combined product, since the Upstream Project were conceived as a natural extension of the Mamacocha Project.[771] The complete project would be developed in phases. As noted in investor presentations,[772] CHM and Latam Hydro planned to develop the Mamacocha Project and partner with an experienced operator who could oversee its construction and operation while Latam Hydro remained a minority shareholder. The expectation was for CHM to transition from development of the Mamacocha Project to development of the Upstream Projects once construction of the Mamacocha Project was underway. The world-class experts hired by CHM were then going to pivot to develop the Upstream Projects.[773]

435. Tribunals have held that activities challenged as being merely preparatory, were actually part of the investment. Following the principle of the "unity of an investment," tribunals have determined:

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[769] Memorial, ¶¶ 50-58.
[770] Email from A. Bartrina to S. Sillen attaching Pöyry 's Memorandum titled "Upstream Addition Mamacocha II," October 3, 2013 (C-0102).
[771] Jacobson I, ¶ 15.
[772] Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014 (C-0032).
[773] Sillen I, ¶ 40; Jacobson I, ¶ 15; Bartrina I, ¶ 25.

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[774]

436. In *Bear Creek Mining v Peru,* respondent argued that the claimant's rights and activities did not mature into an investment because the necessary permits were still missing. The tribunal found that:

> Indeed, it is uncontroversial that an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project such as mining activity.[775]

437. Similarly, the Upstream Projects were an integral part of the overall investment by Claimants and the investment must be examined as a whole. Therefore, the Tribunal has jurisdiction *ratione materiae* over the Upstream Projects and Respondent's jurisdictional objection must be dismissed.

[774] *Ceskoslovenska Obchodni Banka* v *The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶ 72 (CL-0122).
[775] *Bear Creek Mining v Peru,* ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 296 (CL-0016).

IV. PERU IS LIABLE TO CLAIMANTS FOR ITS BREACHES OF THE TPA

438. The Mamacocha Project is a saga about promises made and promises broken due to regulatory opportunism, a regional government gone rogue and acting to stop the Project for arbitrary reasons, a criminal prosecution based on unproven conspiracy theories aimed at one of Peru's most esteemed lawyers, and a central government that reversed its prior energy policy underlying the RER Program to deal a fatal blow to a Project that had every chance to succeed but-for Peru's unlawful measures. In their Memorial and again, in **Section II.A**, *supra*, Claimants set out express admissions by the Peruvian government or government-retained expert lawyers that paint a picture of a series of wrongful acts leading up to the ultimate destruction of the Project. In the Memorial, Claimants demonstrated that Peru's actions and omissions breached several elements of fair and equitable treatment ("**FET**"), resulted in an indirect expropriation of the Mamacocha Project, and breached further substantive protections that Claimants may import through the TPA's most-favored nation ("**MFN**") clause.[776]

439. In response to the Memorial, Peru offers little more than outdated or mischaracterized legal standards, unsupported arguments intended to distract the Tribunal, and an incomplete, distorted or false narrative of unproven facts.[777] In this Section, Claimants[778] will re-establish Peru's multiple breaches of the TPA, as follows: (1) **Section IV.A** will set forth the proper legal standard for assessing FET, as well as the various elements of FET, and reject Peru's attempts to deny and rewrite the proven history of the Project, which is more extensively discussed in **Section II** above; (2) **Section IV.B** will confirm that Peru effectuated an indirect

[776] *See* Memorial, ¶¶ 258-398.
[777] *See* Counter-Memorial, ¶¶ 582-864.
[778] In Section IV, "Claimants" refers to both Latam Hydro and CHM. As Claimants explained in Section III, *supra*, and Section III.A of the Memorial, Latam Hydro brings claims (1) on its own behalf under Article 10.16(1)(a)(i)(A) of the TPA for Peru's breaches of its obligations under Section A of the TPA and (2) on behalf of CHM under Article 10.16(1)(b)(i)(C) for Peru's breaches of an investment agreement.

expropriation, and, in the alternative, Peru's various measures constituted a "creeping" expropriation; (3) **Section IV.C** will explain that an umbrella clause and a provision in the Peru-Paraguay BIT, concerning the government's issuance and assistance with permits, may be imported through the TPA's MFN clause, and that Peru breached those obligations. In addition, Claimants will demonstrate: (4) in **Section IV.D**, that Peru is estopped from claiming that Addenda 1 and 2 are invalid; and (5) in **Section IV.E**, that the Amparo Action is nothing more than a red herring.

440. As Claimants demonstrated in their Memorial, an internationally wrongful measure by Peru comprises any official action or inaction by an organ of Peru's government no matter where that State organ falls within the hierarchy of authority.[779] Accordingly, Peru is liable under international law for the acts and omissions by MINEM, the RGA, the AEP, AAA, and other regional and local government agencies, as well as their officials, ministers, governors, councilmembers, and mayors. To these customary principles of State attribution, Peru has failed to meaningfully respond and even appears to concede the existence of a "unitary State theory under international law."[780] Accordingly, there is no dispute that actions and omissions by all government authorities are measures attributable to Peru for the purposes of finding liability under the TPA.

[779] Memorial, ¶¶ 261-267.
[780] Counter-Memorial, ¶ 883.

A. Peru Breached Its Obligations To Accord Latam Hydro And Its Investments Fair And Equitable Treatment In Accordance With Article 10.5 Of The TPA

1. Customary International Law Has Evolved Such That Fair And Equitable Treatment Under The Minimum Standard Of Treatment Contains The Same Substantive Protections As Are Provided Under An Autonomous Fair And Equitable Treatment Standard

441. Claimants established in their Memorial that contemporary investor-State jurisprudence considers fair and equitable treatment ("**FET**"), in accordance with the minimum standard of treatment ("**MST**") under customary international law, as substantively identical protections as those provided under an autonomous FET standard.[781] In particular, as confirmed by Professor Christoph Schreuer, it is well-established that a State must accord the investor and its investments the following substantive protections of FET: (i) legitimate expectations; (ii) arbitrariness; (iii) transparency; (iv) discrimination; and (v) good faith.[782]

442. In its Counter-Memorial, however, Peru argues that FET applied as the MST under customary international law cannot be equated with the autonomous FET standard; and that a violation of FET under the MST occurs only in the most "shocking," "grossly unfair," or "manifest" instances of wrongful State conduct.[783] As will be explained below, Peru's attempt to minimize the degree of protection of FET under customary international law is off-base and relies on distinguishable, outdated precedents. Peru further alleges that Claimants must prove that customary international law has evolved. While Claimants have more than adequately satisfied their burden of establishing that the MST and FET have converged in their Memorial, Claimants will demonstrate further below, consistent with Professor Schreuer's legal opinion,

[781] Memorial, ¶¶ 270-277.
[782] *See* Schreuer I, ¶ 194.
[783] Counter-Memorial, ¶¶ 589, 594.

that customary international law has evolved such that the MST and FET are now virtually indistinguishable and contain the same substantive protections.

443. As a threshold matter, there is no disagreement between the Parties that Peru's obligation to accord FET to Latam Hydro and its investments includes, at the very least, treatment in accordance with the customary international law MST, as required by Article 10.5 of the TPA.[784] But the Parties disagree on the proper interpretation and application of that standard. It thus bears reiterating how the TPA, itself, describes the relationship between FET and MST. Article 10.5 of the TPA provides in relevant part:

> 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 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 . . . [.][785]

444. Annex 10-A of the TPA clarifies that FET, in accordance with customary international law, offers protections beyond due process and should be interpreted to also include "***all customary international law principles*** that protect the economic rights and interests of

[784] Memorial, ¶ 268; Counter-Memorial, ¶ 585. For the avoidance of doubt, Claimants submit that, should the Tribunal apply the more restrictive standard (which it should not), the Peru's seven (7) measures in this case indeed rise to the level of "shocking," "grossly unfair," or "manifest" State conduct.
[785] TPA, February 1, 2009, Art. 10.5 (C-0001) (emphasis added).

aliens."[786] Annex 10-A further describes customary international law as a "general and consistent practice of States that they follow from a sense of legal obligation."[787] According to Professor Schreuer: "Article 10.5(1) of the TPA speaks of 'customary international law, including fair and equitable treatment.' In other words, customary international law includes FET."[788] Professor Schreuer concludes that "[u]nder Article 10.5(1), [FET] and customary international law are not distinct standards . . . FET is part of customary international law."[789]

445. The TPA's express link between customary international law and FET, Professor Schreuer observes, "has the effect of accelerating the development of customary law through the rapidly expanding practice on FET clauses in treaties."[790] And while Article 10.5(2) of the TPA "states that FET includes a prohibition of denial of justice, and due process" the express use of the word "includes" indicates that those elements "are part of the FET standard but do not exhaust it."[791] Accordingly, for the reasons described below, Peru's heightened standard must be rejected.

a. Peru's Standard Is Only Supported By Controversial And Outdated Precedent Based On *Neer v. Mexico*

446. Peru disagrees with Claimants' contention that the FET standard under customary international law has evolved and expanded in scope over time. Instead, according to Peru, the FET standard under customary international law calcified nearly one-hundred years ago, when it was first articulated in the 1926 decision in *Neer v. Mexico*.[792] In support, Peru relies almost

[786] TPA, February 1, 2009, Annex 10-A (C-0001) (emphasis added).
[787] TPA, February 1, 2009, Annex 10-A (C-0001).
[788] Schreuer I, ¶ 169.
[789] Schreuer I, ¶ 147.
[790] Schreuer I, ¶ 170.
[791] Schreuer I, ¶ 147.
[792] *Neer v. Mexico,* Opinion, US-Mexico General Claims Commission, 15 October 1926, (1927) 21 AJIL 555; 4 RIAA 60-62 (CL-0160).

entirely on *Cargill v. Mexico* and *Glamis Gold v. United States*, which stand for the proposition that customary international law "remains as stringent as it was under *Neer*."[793]

447. But Peru's reliance on *Neer*, *Cargill*, and *Glamis* is unavailing because those cases' articulation of FET under customary international law is completely out of step with modern jurisprudence on this topic.[794] Indeed, contrary to Peru's attempt to limit its breadth based upon stale authority, recent authorities acknowledge that the content of the international minimum standard has evolved over time.[795]

448. According to Professor Schreuer, "[m]ost tribunals have rejected" Peru's overly narrow interpretation of the FET standard under customary international law in recent years "and have pointed out that the international minimum standard was an evolving concept."[796] And the only outlier cases that have notoriously relied on *Neer* just happen to be Peru's principal legal authorities, *Glamis Gold* and *Cargill*.[797] But those cases are unpersuasive because, as Professor Schreuer explains, it would be absurd to hold that customary international law remains the same today as it did a century ago:

> Customary international law is not a static picture but is in a constant state of evolution. Its dependence on practice means that as practice, and the circumstances influencing it, changes so will customary international law. The international minimum standard

[793] *Cargill, Incorporated v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 (CL-0019); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009 (CL-0030); *Neer v. Mexico,* Opinion, US-Mexico General Claims Commission, 15 October 1926, (1927) 21 AJIL 555; 4 RIAA 60-62 (CL-0160).
[794] Schreuer I, ¶¶ 157-159.
[795] *See, e.g.*, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶ 179 (RL-0138) ("…what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development"); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 123 (CL-0158) ("In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitration decisions in the 1920s.").
[796] Schreuer I, ¶ 159.
[797] Schreuer I, ¶ 159.

> of today may well differ from that of a few decades or even of a few years ago.[798]

449. Instead, Professor Schreuer explains, FET under customary international law must be determined in accordance with ***current*** State practice:

> [I]t is generally accepted in the case law of investment tribunals that the content of the international minimum standard is to be determined in accordance with present notions of international law and on the basis of contemporary practice. It cannot be regarded as whatever may have been its content at a certain historical point in time.[799]

450. Consistent with Professor Schreuer's analysis, numerous tribunals and commentators have concluded that the autonomous FET standard that Peru rejects here is no different from the minimum standard of treatment protected by customary international law.[800] On the other hand, parties to arbitral proceedings that have attempted to rely on *Neer* to argue that customary international law froze in time in 1926 have, according to Professor Schreuer, "increasingly attracted criticism."[801]

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[798] Schreuer I, ¶ 156.
[799] Schreuer I, ¶ 168.
[800] *See Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 611 (CL-0050) ("[F]or Respondent, the concept does not raise the obligation upon Respondent beyond the international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law."); *see also Azurix v. Argentina*, Award, July 14, 2006, ¶ 364 (CL-0014); *Saluka v. Czech Republic,* Partial Award, March 17, 2006, ¶ 291 (CL-0052); *AMTO v. Ukraine*, Final Award, March 26, 2008, ¶ 74 (RL-0068); *Impregilo v. Argentina*, Award, June 21, 2011, ¶¶ 287-289 (CL-0143); *ECE and PANTA v. Czech Republic*, Award, September 19, 2013, ¶ 4.754 (CL-0131); *Enkev Beheer v. Poland*, First Partial Award, April 29, 2014, ¶ 376 (CL-0136); *Murphy v. Ecuador (II)*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, ¶ 206 (CL-0040); *Gosling v. Mauritius*, Award, February 18, 2020, ¶ 243 (CL-0141); UNCTAD, *Fair and Equitable Treatment: A Sequel* (2012), at 8 (CL-0201) ("There are some considerations that, with time, can lead to the convergence of the international minimum standard and the unqualified FET standard as far as the actual content of the obligation is concerned"); A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards and Treatment* (2009), at 275 (CL-0202) ("[E]ven if it were accepted that in principle the standards are different, the trend appears to be towards convergence, not divergence."); R. Dolzer & A. von Walter, "Fair and Equitable Treatment and Customary Law – Lines of Jurisprudence" in F Ortino, L Liberti, A Sheppard and H Warner (eds) *Investment Treaty Law: Current Issues* (2007) at 100 (CL-0203) ("[T]he contemporary state of customary law cannot be viewed to be different from the conclusions derived from the analysis and meaning of the free-standing version [of FET].").
[801] Schreuer I, ¶ 176.

451. For example, the *Biwater Gauff v. Tanzania* tribunal observed that "[a]s found by a number of previous arbitral tribunals and commentators, . . . the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."[802] Similarly, the tribunal in *CMS Gas Transmission v. Argentina* proclaimed "the Treaty standard of fair and equitable treatment . . . is not different from the international law minimum standard and its evolution under customary law."[803] Another tribunal found that "there is no material difference between the customary international law standard and the FET standard under the present BIT."[804] And the NAFTA tribunal in *ADF Group v. U.S.* held that customary international law does not project a "static photograph of the minimum standard of treatment of aliens as it stood in 1927 [*sic*] ... for both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development."[805]

452. In sum, Peru's interpretation of the FET standard under customary international law rests on the slender reed of two recent decisions (*Cargill* and *Glamis*) that have been limited, discredited, or criticized by an overwhelming majority of investor-state cases in the recent past. This interpretation must be rejected not only because of its scant support in the case law but also because of its flimsy premise that customary international law is effectively the same now as it

[802] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 592 (RL-0008); *see also CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 284 (CL-0023) "[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.")

[803] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 285 (CL-0023).

[804] *Murphy v. Ecuador (II)*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, ¶ 208 (CL-0040); *see also id.* ("The international minimum standard and the treaty standard continue to influence each other, and, in the view of the Tribunal, these standards are increasingly aligned. This view is reflected in the jurisprudence constante not only of NAFTA caselaw, as discussed above, but also in the arbitral caselaw associated with bilateral investment treaties. Some tribunals have gone so far as to say that the standards are essentially the same.").

[805] *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1, Award, January 9, 2003, ¶ 179 (RL-0138).

was nearly one-hundred years ago. To the contrary, as Professor Schreuer and almost every modern scholar has concluded, customary international law is dynamic in nature, has evolved since the 1920s, and continues to evolve today in a manner that makes it materially indistinguishable from the autonomous FET standard.

b. Peru Raises A Fruitless Argument Concerning Claimants' Alleged Burden Of Proving Customary International Law

453. Peru asserts that Claimants must prove the status of customary international law through an affirmative showing of state practice and *opinio juris*.[806] Peru's argument adds nothing to its case for the following reasons.

454. **First**, Claimants can satisfy their burden simply by relying on investor-State jurisprudence because such jurisprudence reflects the customs and practices of States. To use just one example, the tribunal in *Mondev v. United States* reviewed over 2,000 (now about 3,000) bilateral investment treaties, and many treaties of friendship and commerce.[807] On the basis of State practice and *opinio juris*, as distilled from these sources, the *Mondev* tribunal concluded unequivocally that "the content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitration decisions in the 1920s."[808]

455. **Second**, the dynamic evolution of how investor-State tribunals have interpreted the MST since the *Neer* decision in 1926 is, itself, evidence of an evolving State practice that is in favor of broadening the scope of protections vis-à-vis foreign investors. Professor Schreuer explains that "the evolution of the minimum standard of treatment is driven by the practice on

[806] Counter-Memorial, ¶ 611.
[807] *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 125 (CL-0158).
[808] *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 123 (CL-0158).

fair and equitable treatment."[809] Other arbitral scholars agree with Professor Schreuer. For instance, Dr. Ioana Tudor concludes:

> The transformation of FET from a conventional to a customary standard is supported in great part by the existing network of BITs, which stand for a constant and uniform State practice. … the words of Schreuer summarize the situation: 'in practice its (the FET standard's) application is not restrained by the traditional international minimum standard. If anything, fair and equitable treatment may turn out to be a locomotive in the development of customary international law.' The FET standard became a customary norm of its time: quick in its formation and based essentially on a State practice derived from the treaties signed by an overwhelming number of States, which in the majority contain a FET clause.[810]

456. **Third**, the fact that a State willingly adopts a FET clause in its investment treaty manifests its custom and practice to be bound by contemporary jurisprudence on this standard of treatment. The former President of the International Court of Justice, Judge Stephen Schwebel, has expressed his support of this view, stating that "when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs."[811] For these reasons, Peru's inclusion of a FET clause in Article 10.5 of the TPA manifests its clear intent, practice, and custom of treating foreign investors in accordance with contemporary iterations of the FET standard.

457. Accordingly, investment tribunal decisions are the most legitimate source for interpreting the content of customary international law *vis-à-vis* FET.

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[809] Schreuer I, ¶ 172.
[810] I. Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008), pp. 83, 85 (CL-0199) (*citing* C. Schreuer, "Investment Arbitration - A Voyage of Discovery," 5 TDM 9 (2005) (CL-0200)).
[811] Stephen Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law* (2004), pp. 29-30 (CL-0236).

c. Peru's Attempt To Distinguish FET And MST Is Unavailing

458. Peru argues that the Parties to the TPA "intended to draw a clear distinction" between the MST and FET.[812] Peru's argument, however, misses the mark.

459. **First**, Peru misinterprets Article 10.5 because, as Professor Schreuer explains, Article 10.5 emphasizes the link "between FET and customary international law" and "[u]nder Article 10.5(1), [FET] and customary international law are not distinct standards . . . FET is part of customary international law."[813] Further, Annex 10-A of the TPA expressly states that Article 10.5 refers to "***all customary international law principles*** that protect the economic rights and interests of aliens."[814] As Claimants will further establish below, the following elements of FET form part of customary international law: (i) legitimate expectations; (ii) arbitrariness; (iii) transparency; (iv) discrimination; and (v) good faith.[815]

460. **Second**, tribunals have determined that any distinction between FET and MST is immaterial and does not affect the outcome of the case.[816] For instance, the tribunal in *Peter Allard v. Barbados* found that the question of whether the FET standard corresponds to the minimum standard of treatment under customary international law was "not material for the outcome of the case."[817] Similarly, in *Biwater Gauff v. Tanzania*, the tribunal observed that "[a]s found by a number of previous arbitral tribunals and commentators . . . the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the

[812] Counter-Memorial, ¶ 600.
[813] Schreuer I, ¶¶ 147, 170.
[814] TPA, Annex 10-A (C-0001) (emphasis added).
[815] *See* Schreuer I, ¶ 194.
[816] *See Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, July 29, 2008, ¶ 611 (CL-0050) ("[F]or Respondent, the concept does not raise the obligation upon Respondent beyond the international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.").
[817] *Peter A. Allard v. The Government of Barbados*, Award, June 27, 2016, ¶ 192 (CL-0167).

minimum standard of treatment in customary international law."[818] Further, the tribunal in *CMS Gas Transmission v. Argentina* proclaimed "the Treaty standard of fair and equitable treatment . . . is not different from the international law minimum standard and its evolution under customary law."[819]

461. This near-consensus from modern tribunals is dispositive because, as Professor Schreuer explains:

> Once it is accepted that there is no material difference between the customary law minimum standard of treatment and fair and equitable treatment, it is possible to apply the rich repository of authorities on FET in cases governed by provisions offering 'treatment in accordance with customary international law, including fair and equitable treatment.'[820]

462. Professor Schreuer subsequently assessed decisions from the *Peter Allard*, *Merrill & Ring*, *Unión Fenosa*, *CMS*, *Occidental*, *Waste Management*, *Mondev*, and *Glamis Gold* cases to conclude that:

> These cases demonstrate that tribunals have not merely diagnosed an identity between the customary international minimum standard and FET in general terms but have actually applied the typical features of an FET analysis, such as legitimate expectations, reasonableness, the prohibition of arbitrary action and discrimination, due process, transparency, stability and predictability as well as the requirement of good faith as part of the international minimum standard.[821]

[818] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 592 (RL-0008); *see also CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 284 (CL-0023) ("[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.").
[819] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 285 (CL-0023).
[820] Schreuer I, ¶ 193.
[821] Schreuer I, ¶ 204.

463. Accordingly, under the current status of customary international law with respect to FET and MST, any alleged distinction between the two standards, which is precisely what Peru alleges here, "is of doubtful validity" according to Professor Schreuer.[822]

2. Peru's Arguments Concerning The Legal Standards For The Elements Of Legitimate Expectations, Arbitrariness, Transparency, Discrimination, And Good Faith Are Unsupported And Unpersuasive

464. As established in the prior section and explained by Professor Schreuer, the particular elements of FET, whether analyzed under customary international law or as an autonomous standard, are fundamentally the same. As demonstrated in their Memorial[823]—and as discussed above in **Section II**, *supra*, and will be explained further in **Section IV.A.3,** *infra*, Peru breached its FET obligations through the following seven (7) measures, as summarized below, that violated the legitimate expectations, arbitrariness, transparency, discrimination, and good faith elements of FET:

a. ***RGA Lawsuit***: The RGA Lawsuit constituted, as Peruvian outside counsel and government officials themselves admitted, a meritless strike suit that implicated the Project's environmental permits, and by extension, the Project's power-generation and transmission line concessions. As Claimants have established, the RGA Lawsuit violated Latam Hydro's legitimate expectations, was manifestly arbitrary, discriminatory, and lacked transparency and good faith in violation of Peru's FET obligations.[824]

b. ***AEP Criminal Investigation and Prosecution***: The AEP's criminal investigation and prosecution of CHM's legal representative, which is based principally on the same groundless theory as the since-withdrawn RGA Lawsuit, violates Latam Hydro's legitimate expectations, lacks transparency and good faith, and was initiated and continued arbitrarily and discriminatorily in violation of Peru's FET obligations.[825]

c. ***AAA's Wrongful Denial and Subsequent Issuance of a Defective CWA***: AAA violated Peru's FET obligations to Latam Hydro and its investment when AAA wrongfully denied CHM's CWA application after an unreasonably long delay and thereafter issued a materially defective CWA. AAA's conduct violated Latam

[822] Schreuer I, ¶ 205.
[823] Memorial, ¶¶ 288-355.
[824] Memorial, ¶¶ 288-308.
[825] Memorial, ¶¶ 309-320.

Hydro's legitimate expectations, lacked transparency and good faith, and was arbitrary.[826]

d. ***Lima Arbitration***: The Lima Arbitration was initiated while Claimants were subject to an agreement to postpone their commencement of this ICSID case pending negotiations with Peru through the Special Commission. MINEM's circumvention of the Parties' agreed dispute resolution forum and place of arbitration by commencing a surreptitious declaratory judgment action before the Lima Chamber of Commerce was another measure that deprived Latam Hydro of its legitimate expectations, lacked transparency and good faith, and was arbitrary in violation of Peru's FET obligations.[827]

e. ***MINEM's Denial of CHM's Third Extension Request***: As part of its December 2018 reversals of decisions toward the Mamacocha Project, MINEM denied CHM's Third Extension Request more than eleven (11) months after CHM had submitted its application, thereby leaving an impossibly *mere four days* for the Project development, financing, construction and operational testing to be accomplished before the COS date. MINEM's denial was part of its orchestrated strategy to destroy the Project in December 2018. MINEM's denial of the extension represented yet another breach of Peru's FET obligations because it deprived Latam Hydro of its legitimate expectations, lacked transparency and good faith, and was arbitrary.[828]

465. Claimants also demonstrated in their Memorial that in reliance on the RER Law, applicable Peruvian civil and administrative laws, and Peruvian government published reports and resolutions, Claimants held legitimate, investment-backed expectations when it invested in the Mamacocha Project.[829] Claimants summarized their legitimate expectations and the origins of those expectations in the Memorial,[830] as follows:

[826] Memorial, ¶¶ 321-333.
[827] Memorial, ¶¶ 334-344.
[828] Memorial, ¶¶ 345-355.
[829] Memorial, ¶¶ 258-259.
[830] In Section I, *supra*, Claimants set forth further express assurances from the Peruvian government that further support their legitimate expectations.

Legitimate Expectations Relating to Contractual Commitments		
No.	**Legitimate Expectation**	**Illustrative Sources**
1.	Peru would implement the RER Contract consistently, without discriminatory treatment, and in good faith	TPA, Arts. 10.4(1), 10.4(2), 10.5; Legislative Decree No. 1002, Preamble; Civil Code, Art. 1362; and Sosa Report
2.	CHM would receive a commercially bankable 20-year Guaranteed Revenue Concession as long as it performed diligently	RER Contract, Clause 1.4.37; Civil Code, Arts. 1328, 1314; and the Statement of Reasons (November 2018)
3.	Peru would not interfere with CHM's performance without compensating CHM or extending the relevant deadlines to account for its interference	TPA, Arts. 10.5, 10.7; Civil Code, Art. 1432; the Sosa Report; and the Statement of Reasons (November 2018)
4.	Peru would not change its interpretations of MINEM's authority to extend and modify the RER Contract after it had already authorized and executed two contract modifications	TPA, Art. 10.5; RER Contract, Clause 2.2; Civil Code, Art. 1362; and Sosa Report
5.	Peru would assist CHM to receive all permits, authorizations, and concessions necessary to advance the Project without undue delay	TPA, Art. 10.4(1), 10.4(2); RER Contract, Clause 4.3; GLAP, Arts. 55, 131, 142, 143; and Sosa Report
6.	MINEM had authority to execute Addenda 1-2 on behalf of Peru and these mutually executed contract modifications were fully in accordance with Peruvian law	TPA, Art. 10.5; RER Contract, Addenda 1-2, Clause 2.2; Ministerial Resolutions Nos. 320-2015-MEM/DM and 559-2016-MEM/DM; Sosa Report
7.	The mutually agreed suspensions of the RER Contract, Addenda 3-6, were lawful and afforded Peru time to overcome the RGA's obstruction of the Project	Addenda 3-6; Ministerial Resolutions Nos. 356-2017-MEM/DM, 543-2017-MEM/DM, 084-2018-MEM/DM, and 251-2018-MEM/DM; and Civil Code, Art. 1362
8.	Disputes valued at more than US $20 million would be resolved by arbitration seated outside Peru in a proceeding administered by ICSID	RER Contract, Clause 11.3(a); and Civil Code, Art. 1362

Legitimate Expectations Relating to Regulatory Performance		
No.	**Legitimate Expectation**	**Illustrative Sources**
1.	Peru was committed to ensuring the successful accomplishment of the permitting phase	RER Contract, Clause 4.3; Civil Code, Art. 1362; the Sosa Report; and the Statement of Reasons (November 2018)
2.	Peru's permitting agencies would adhere to the fixed review periods and other requirements in their TUPA	Report No. RER/MCCQ/10-01-12; Civil Code, Art. 1362; GLAP Arts. 55, 131, 142, 143
3.	CHM was only required to submit a DIA to secure its plant environmental permit	Report No. 0026-2012-MEM-AAE-NAE/MEM; Civil Code, Art. 1362; ARMA Resolution Nos. 110-2014-GRA/ARMA-SG and 158-2014-GRA/ARMA-SG
4.	ARMA's resolutions granting the Project's environmental permits were properly vetted, tested, and approved and would not be changed unilaterally	ARMA Resolution Nos. 110-2014-GRA/ARMA-SG and 158-2014-GRA/ARMA-SG; and Civil Code, Art. 1362
5.	AAA would grant CHM a CWA that was valid and free from defects	TUPA
Legitimate Expectations Relating to Due Process and Non-Discrimination		
No.	**Legitimate Expectation**	**Illustrative Sources**
1.	CHM would be treated in good faith and in a non-arbitrary manner	TPA, Art. 10.5; and Civil Code, Art. 1362
2.	CHM's legal representative would not face a criminal investigation or prosecution merely for submitting an application for reconsideration, particularly where the prosecutor was relying upon a retroactive application of the law	TPA, Art. 10.5; Constitution of Peru, Art. 20.2; and Civil Code, Art. 1362
3.	ARMA would not discriminate against CHM by challenging CHM environmental permits on patently meritless grounds while failing to challenge 109 similar resolutions for other projects	TPA, Arts. 10.5, 10.7; and Civil Code, Art. 1362

466. In its Counter-Memorial, Peru takes issue with the factual bases for all the measures highlighted above and feigns ignorance as to the genesis of Claimants' legitimate expectations. Peru also baselessly refutes their legitimacy.[831] Claimants will demonstrate in **Section IV.A.3,** *infra,* that Peru's factual contentions with respect to the measures are contradicted by the overwhelming evidentiary record, including numerous admissions and acknowledgements by the State that its acts were unlawful or unauthorized.

467. In this Section, Claimants will rebut Peru's objections concerning the legal standards for the legitimate expectations, arbitrariness, transparency, discrimination, and good faith claims under FET.[832]

a. Legitimate Expectations Play A Central Role Under FET

468. Claimants established in their Memorial that the protection of an investor's legitimate expectations is a fundamental element of the FET standard—a proposition that is in line with the *jurisprudence constante*.[833] Peru, however, contends in its Counter-Memorial that: (i) "one of the main distinctions between the minimum standard of treatment and an autonomous standard of fair and equitable treatment is that customary international law does not encompass legitimate expectations";[834] (ii) even if "legitimate expectations did form part of the minimum standard of treatment," that expectations must "(a) be legitimate and reasonable, (b) be based on conditions offered or commitments assumed by the State, and (c) have been taken into account by the investor when deciding whether or not to make the investment."[835] Peru's arguments fail as a matter of law for several reasons.

[831] Counter-Memorial, ¶¶ 656-755.
[832] Counter-Memorial, ¶¶ 611-655.
[833] Memorial, ¶¶ 273-278.
[834] Counter-Memorial, ¶ 612.
[835] Counter-Memorial, ¶ 619.

469. **First**, as established in **Section IV.A.1**, *supra*, the elements of FET under customary international law and the autonomous FET standard are indistinguishable in light of the contemporary evolution of customary international law. And, here, it is undisputed that the autonomous FET standard protects the legitimate expectations of foreign investors. Hence, these protections must also be present under the FET standard under customary international law.

470. **Second**, Peru's contention that "the minimum standard of treatment does not include the concept of legitimate expectations" is simply wrong. As Claimants proved in their Memorial, there is a wealth of case law that finds that FET under the MST includes the State's obligation to respect the legitimate expectations of foreign investors. For example, the *Waste Management II* tribunal held that for "the minimum standard of treatment of fair and equitable treatment" it is "relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[836] Similarly, in *RDC v. Guatemala*, which involved claims under DR-CAFTA—which contains nearly identical language as Article 10.5 of the TPA—held that FET under the MST is violated where there is a "breach of representations made by the host State which were reasonably relied on by the claimant."[837] And the tribunal in *Clayton/Bilcon v. Canada* held that the State can violate FET under the MST if it acts inconsistently or in contradictory fashion because such conduct is likely to breach the legitimate expectations of investors.[838]

471. **Third**, as noted above, while Peru contends that legitimate expectations are formed from express assurances by the State when the investment was made, arbitral case law confirms that an investor's legitimate expectations are formed based on the host State's legal

[836] *Compare* Counter-Memorial, ¶ 612 *with* Counter-Memorial, ¶ 591.
[837] *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 219 (CL-0049).
[838] *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 446-452 (CL-0020).

framework and on any undertakings and representations made explicitly or implicitly by the host State. The regulatory framework on which the investor is entitled to rely consists of legislation and treaties as well as of assurances contained in decrees, licenses, and similar executive statements.[839] In this same vein, the *Cavalum v. Spain* tribunal explained:

> 431. For legitimate expectations to operate, there must be a promise, assurance or representation of a specific character and content that is attributable to a competent organ or representative of the State, which may be explicit or implicit.
>
> 432. Explicit promises can be made through statutory commitments or through conduct, or in the legal or regulatory framework of the host State at the time the investor made its investment.
>
> 433. A reiteration of the same type of commitment in different types of general statements may amount to a specific behaviour of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.
>
> 434. A specific entitlement to incentives may give rise to a protected legitimate expectation.[840]

472. Tribunals analyzing Spain's renewable energy regime, which was designed to attract foreign investment much like Peru's RER Promotion, found that legitimate expectations arise from guarantees in the relevant legislation.[841] As the *LG&E v. Argentina* tribunal explained, by creating those legitimate expectations, a host State is bound by those obligations:

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[839] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 275 (CL-0023); *LG&E Energy Corp. and others v. Argentina*, ICSID Case No. ARB/02/1, Award, October 3, 2006, ¶ 133 (CL-0034); *PSEG Global Inc. and others v. Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, ¶ 250 (CL-0047); *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 303 (CL-0055); *BG Group v. Argentina*, Final Award, December 24, 2007, ¶ 310 (RL-0030); *National Grid v. Argentina*, UNCITRAL, Award, November 3, 2008, ¶¶ 177-179 (CL-0041); *Novenergia II v. Spain*, SCC No. 2015/03, Final Award, February 15, 2018, ¶¶ 662-667, 681, 697 (CL-0211); *Antin v. Spain*, Award, June 15, 2018, ¶¶ 532, 552 (RL-0112).

[840] *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, March 17, 2021, ¶¶ 431-434 (CL-0212).

[841] *Charanne v. Spain*, SCC Case No. V 062/2102, Award, January 21, 2016, ¶¶ 493, 499 (CL-0213); *Masdar v. Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, ¶¶ 520-521 (CL-0214); *RREEF v. Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, November 30, 2018, ¶¶ 320-321 (CL-0215); *Cube v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, February 19, 2019, ¶¶ 388, 397 (CL-0216) ; *NextEra v. Spain*, ICSID Case No. ARB/14/11, Decision on

> Having created specific expectations among investors, Argentina was bound by its obligations concerning the investment guarantees vis-à-vis public utility licensees, and in particular, the gas distribution licensees.[842]

473. Moreover, States create legitimate expectations to induce investment when they seek to attract investment based on specific promises, a contractual agreement (and concomitant contract negotiations), or a specific legal framework. According to the *9REN v. Spain* tribunal, legitimate expectations can arise from a State's legislative framework that seeks to attract foreign investment, such as Peru's RER Promotion:

> There is no doubt that an enforceable "legitimate expectation" requires a clear and specific commitment, but in the view of this Tribunal there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant.[843]

474. A State can also breach the investor's legitimate expectations when the State upends or destabilizes the legal framework under which the investments were predicated.[844] Lastly, and contrary to Peru's argument that legitimate expectations only arise at the decision to invest, investment tribunals have confirmed that "legitimate expectations may vary over time."[845] In *Tethyan Copper v. Pakistan*, the tribunal found that while legitimate expectations are determined as of the date of the investment decision, the State's conduct subsequent to the

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Jurisdiction, Liability and Quantum Principles, March 12, 2019, ¶¶ 587-596 (CL-0217); *9REN v. Spain*, ICSID Case No. ARB/15/15, Award, May 31, 2019, ¶¶ 292-299 (CL-0218); *SolEs Badajoz v. Spain*, Award, July 31, 2019, ¶ 313 (RL-0104); *InfraRed v. Spain*, Award, August 2, 2019, ¶¶ 366-367, 406-436 (RL-0016); *RWE v. Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, December 30, 2019, ¶¶ 453-462, 535-549 (CL-0219); *Watkins v. Spain*, ICSID Case No. ARB/15/44, Award, January 21, 2020, ¶¶ 495, 533 (CL-0220).

[842] *LG&E v. Argentina,* Decision on Liability, ICSID Case No. ARB/02/1, October 3, 2006, ¶ 133 (CL-0034).

[843] *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, May 31, 2019, ¶ 295 (CL-218).

[844] *See Murphy v. Ecuador (II)*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, ¶ 248 (CL-0040).

[845] *Tethyan Copper Company Pty Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 899 (CL-0062).

concession agreement was relevant to legitimate expectations because that conduct "encouraged [c]laimant to continue investing in the [Project]."[846] Therefore, legitimate expectations may evolve as the government makes further representations to the investor.

475. It is thus well-established, contrary to Peru's view, that legitimate expectations form a fundamental component of FET, and a reversal of express or implied assurances by the host State that have led to legitimate expectations will violate the host State's obligation to accord FET.[847] In **Section IV.A.3**, *infra*, Claimants will show that Peru routinely breached their legitimate investment-backed expectations.

b. Arbitrariness Is Prohibited Under FET And Does Not Carry A Heightened Threshold

476. Claimants established in their Memorial that State conduct is arbitrary when it: (i) has no rational relationship with the purported goal of that measure or is otherwise inconsistent, prejudicial or capricious; (ii) constitutes a willful disregard of the law or arbitrary application of the law; or (iii) is unreasonable or disproportionate in nature.[848] In its Counter-Memorial, Peru contends that the concept of arbitrariness under the MST is substantially higher threshold than the same concept under the autonomous FET standard. According to Peru, arbitrariness under the MST standard applies only to conduct that is "gross," "manifest," "complete," or such as to "offend judicial propriety."[849] Peru's standard is misplaced for several reasons.

[846] *Tethyan Copper*, Decision on Jurisdiction and Liability, ¶¶ 899-901 (CL-0062) ("[I]n light of the fact that Claimant incurred the major part of its exploration expenditures only after it had become party to the CHEJVA, the Tribunal considers that Peru's conduct in the years following the 2006 Novation Agreement has to be taken into account as well – to the extent that it encouraged Claimant to continue investing in the Reko Diq Project and thereby to repeatedly confirm its investment decision.").
[847] *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Award, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154 (CL-0059); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 450 (CL-0221); *Charanne v. Spain*, SCC Case No. V 062/2102, Award, January 21, 2016, ¶ 486 (CL-0213); *Devas v. India*, Award on Jurisdiction and Merits, July 25, 2016, ¶¶ 465-470 (CL-0129).
[848] Memorial, ¶ 280
[849] Counter-Memorial, ¶ 636 (*quoting Cargill v. Mexico*, Award, ¶ 285 (CL-0019)).

477. **First**, as established in **Section IV.A.1**, *supra*, this argument fails because there simply is no material distinction between the autonomous FET standard and the FET standard under the MST. Accordingly, the arbitrariness component under both is also materially similar if not identical.

478. **Second**, a showing of arbitrariness does not require a heightened threshold. As set forth below, a measure is arbitrary when it has no rational relationship with the purported goal of that measure or is otherwise inconsistent, unreasonable, prejudicial, or capricious. As laid out by the tribunal in *LG&E v. Argentina*, arbitrary measures are described as:

> [M]easures that affect the investments of nationals of the other Party without engaging in a rational decision-making process. Such process would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden on such investments.[850]

479. Similarly, the tribunal in *Plama v. Bulgaria* explained arbitrariness in terms of an absence of reason or fact:

> Unreasonable or arbitrary measures – as they are sometimes referred to in other investment instruments – are those which are not founded in reason or fact but on caprice, prejudice or personal preference.[851]

480. Apropos to the instant case, a State is also deemed to act arbitrarily if it places the investor on a proverbial "roller-coaster" of inconsistent and arbitrary decisions by governmental agencies or officers. Such was the case in *Crystallex v. Venezuela*, where the State issued a letter rescinding its prior decision that granted a crucial mining permit citing environmental concerns; and thus constituted an abrupt reversal of Venezuela's position that presented "significant

[850] *LG&E Energy Corp, LG&E Capital Corp., and LG&E Int'l Inc. v. Argentina*, ICSID Case No. ARB /02/1, Decision on Liability, October 3, 2006, ¶ 158 (CL-0034). Peru attempts to distinguish this case on pure *obiter dicta* where the tribunal was assessing the relevant jurisprudence, and for that reason, Peru's contention is wholly unavailing. *See* Counter-Memorial, ¶ 635.

[851] *Plama Consortium Limited v. Republic of Bulgaria*, Award, ICSID Case No. ARB/03/24, August 27, 2008, ¶ 184 (RL-0155).

elements of arbitrariness and evidences a lack of transparency and consistency."[852] The tribunal described arbitrary action in terms of discretion, prejudice or personal preference:

> In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.[853]

481. In summary, tribunals have found that an arbitrary measure is simply one that is not "founded on reason or fact,"[854] "without a rational decision-making process,"[855] or a legal proceeding initiated by the State that is commenced "under the cloak of formal correctness."[856]

482. Accordingly, Peru's argument that arbitrariness entails a high threshold is entirely without merit. In **Section IV.A.3**, *infra*, Claimants will show that Peru violated the element of arbitrariness on multiple occasions.

c. Transparency Is A Fundamental Component of FET

483. Claimants established in their Memorial that a State breaches its transparency obligation under the FET standard when it takes ambiguous or opaque administrative measures, keeps an investor "in contractual limbo" or reverses its prior assurances on unsubstantiated legal grounds.[857] Peru contends, with a broad brush that: (i) transparency is not reflected in "the requirements of the minimum standard of treatment"; and (ii) even if transparency were part of MST, transparency only suggests "that the legal framework for the investor's operations is

[852] *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 591 (CL-0026).
[853] *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 578 (CL-0026).
[854] *Plama Consortium Limited v. Republic of Bulgaria*, Award, ICSID Case No. ARB/03/24, August 27, 2008, ¶ 184 (RL-0155).
[855] *LG&E Energy Corp, LG&E Capital Corp., and LG&E Int'l Inc. v. Argentina*, ICSID Case No. ARB /02/1, Decision on Liability, October 3, 2006, ¶ 158 (CL-0034).
[856] *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 234 (CL-0049).
[857] Memorial, ¶¶ 279, 303-305, 318-319, 340-341, 350-351.

readily apparent and that any decision affecting the investor can be traced to that legal framework."[858] Peru's arguments are fundamentally incorrect for the following reasons.

484. **First**, Peru's first argument is beside the point because, as established above, and confirmed by Professor Schreuer, FET and MST have converged as substantively identical standards. Therefore, it is a mere pedantic point to object to transparency claims on grounds that they are not covered by MST, because they indisputably are covered by FET.

485. **Second**, Peru's defense must be rejected because the TPA, itself, ***expressly requires*** States to act with transparency. The Preamble of the TPA states that one of the Treaty's purposes is to:

> PROMOTE *transparency* and prevent and combat corruption, including bribery, in international trade and investment;[859]

486. The reference to transparency in the TPA's Preamble underlines its significance for the interpretation of Article 10.5.[860] As part of the TPA's object and purpose, it is thus clear that the Parties to the TPA intended to protect an investor and its investment's right to be dealt with transparently. In any event, as a well-established element of FET, tribunals have found that, even without specific mention in the relevant treaty, the obligation to provide a transparent regulatory framework was part of the FET standard.[861]

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[858] Counter-Memorial, ¶¶ 621-627.

[859] TPA, February 1, 2009, Preamble (C-0001) (emphasis added).

[860] Under Article 31 of the VCLT, the preamble of a treaty serves to interpret its provisions:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: …

[861] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, November 13, 2000, ¶ 83 (CL-0222); *LG&E v. Argentina*, Decision on Liability, October 3, 2006, ¶ 131 (CL-0034); *Cargill v. Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, February 29, 2008, ¶¶ 511, 515, 517 (CL-0223); *Plama v. Bulgaria*, Award, August 27,2008, ¶ 178 (RL-0155); *Nordzucker v. Poland*, Second Partial Award, January 28, 2009, ¶¶ 14, 84, 95 (CL-0224); *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 418 (CL-0147); *Levi v. Peru*, Award, February 26, 2014, ¶¶ 322, 327-328 (RL-0145); *Gold Reserve v. Venezuela,* Award, September 22, 2014, ¶ 570 (CL-0031); *Crystallex v. Venezuela*, Award, April 4, 2016, ¶ 579 (CL-0026); *Bear Creek v. Peru*, Award,

487. **Third**, while Peru contends that transparency means the legal framework is "readily apparent" and that a decision concerning the investment must comply with that framework, the FET element of transparency has been interpreted to carry further obligations. For instance, arbitral case law confirms that a State's proffered policies cannot derogate its obligation of transparency. In other words, the State cannot invoke domestic laws and regulations or its government structure to deny an investor its right to be dealt with transparently. For example, in *Crystallex v. Venezuela*, Venezuela denied the investor an environmental permit that would allow it to proceed with its mining operation. The tribunal held:

> There is no question that Venezuela had the right (and the responsibility) to raise concerns relating to global warming, environmental issues in respect of the Imataca Reserve, biodiversity, and other related issues. The Tribunal, however, believes that the way they were put forward by Venezuela in the Permit denial letter presents significant elements of arbitrariness and evidences a lack of transparency and consistency…. The Tribunal is unable to see how thousands and thousands of pages submitted by Crystallex, ensuing from years of work and millions of dollars of costs, could be so blatantly ignored in both the Romero Report and the subsequent Permit denial letter.[862]

488. The *Crystallex* tribunal found that Venezuela's denial of the permit was "tainted by a serious lack of transparency" and "Crystallex was subject to a 'roller-coaster' of contradictory and inconsistent statements from the Venezuelan authorities."[863] Further, in *Siemens v. Argentina*, the tribunal stated that "when a government awards a contract, which includes among its critical provisions an undertaking of that government to conclude agreements

November 30, 2017, ¶ 523 (CL-0016); *Olin v. Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, ¶ 320 (CL-0225); *InfraRed v. Spain*, Award, August 2, 2019, ¶¶ 372, 468-475 (RL-0016); *CMC v. Mozambique*, ICSID Case No. ARB/17/23, Award, October 24, 2019, ¶¶ 421-424 (CL-0226); *Watkins v. Spain*, ICSID Case No. ARB/15/44, Award, January 21, 2020, ¶¶ 590-594 (CL-0220); *Eskosol v. Italy*, ICSID Case No. ARB/15/50, Award, September 4, 2020, ¶¶ 416-422 (CL-0227).

[862] *Crystallex Int'l Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶¶ 591, 597 (CL-0026).

[863] *Crystallex Int'l Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶¶ 598-600 (CL-0026).

with its provinces, the same government cannot argue that the structure of the State does not permit it to fulfill such undertaking."[864] In this same vein, the *RDC v. Guatemala* tribunal explained that "the Government should be precluded from raising violations of its own law as a defense when, for a substantial period of time it knowingly overlooked them, obtained benefits from them, and it had the power to correct them."[865]

489. Furthermore, investment tribunals have also interpreted the transparency element to require consistent government conduct in order achieve legal certainty and stability. Whereas stability and predictability primarily relate to the quality of the host state's legal framework, consistency refers to the application of these legal rules by the administrative and judicial organs of the host State. For a foreign investor, it is important not only that the law displays a certain degree of transparency and stability, but also that such law is applied by the courts and administrative agencies in a predictable, coherent and consistent fashion. Contradictory and inconsistent action by State authorities undermines the ability of the investor to plan effectively and thus results in a lack of transparency.

490. In support of these propositions, the *Binder v. Czech Republic* tribunal emphasized that "[t]he elements of stability and predictability of the state's legal order go hand in hand with the need that the state act with reasonable consistency and transparency, as part of an overall aim of enhancing legal certainty."[866] And in the same vein, the tribunal in *EnCana v. Ecuador* said of the State's inconsistent action in the course of negotiations:

> In the Tribunal's view it could well be a breach of Article II of the BIT for a State entity such as Petroecuador, having negotiated the terms of an investment agreement on a certain basis, subsequently to deny the other party the right to renegotiate in accordance with

[864] *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 308 (CL-0057).
[865] *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 234 (CL-0049).
[866] *Rupert Binder v. The Czech Republic*, UNCITRAL, Final Award, July 15, 2011, ¶ 446 (CL-0246).

> the agreement in the event that the basis for it has been changed as a result of decisions of other State organs. Under standards such as those in Article II of the BIT the State must act with reasonable consistency and without arbitrariness in its treatment of investments. One arm of the State cannot finally affirm what another arm denies to the detriment of a foreign investor.[867]

491. As a further example, in *Gold Reserve v. Venezuela*, the tribunal found that the State's failure to sign a crucial document without any explanation, constituted a violation of the transparency requirement:

> Peru's failure to sign the Initiation Act despite Claimant's repeated requests without explaining the reasons for such inaction, rather reinforcing Claimant's expectation that such signature would be forthcoming once the proposed alternative access road had been accepted, amount to conduct evidencing (through acts and omissions) a lack of transparency, consistency and good faith in dealing with an investor.[868]

The *Gold Reserve* tribunal further held that the refusal to recognize the extension of a concession "was in serious violation of the standard of a fair, transparent and consistent behaviour due by the State."[869]

492. Accordingly, Peru's obligation to act transparently with respect to Latam Hydro's investment is unequivocally an element of FET under the TPA that preserves Claimants' right to legally consistent conduct by Peruvian State organs. In **Section IV.A.3**, *infra*, Claimants will show that Peru violated the element of transparency on multiple occasions.

d. Discriminatory Measures Violate FET And Do Not Require A Heightened Threshold

493. Claimants established in their Memorial that discrimination is also an element of FET that is breached when the State "unduly treats differently investors who are in similar circumstances" and that State intent is not determinative to an assessment of discrimination but,

[867] *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, Award, February 3, 2006, ¶ 158 (RL-0134).
[868] *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 591 (CL-0031).
[869] *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 662 (CL-0031).

rather the "impact of the measure on the investment."[870] Peru contends, however, that discrimination under an autonomous FET standard or the MST entails a high threshold of "extreme conduct" that prohibits according "less favorable treatment to a foreign investor as compared to a domestic investor in similar circumstances, and the absence of objective justification for such differentiated treatment."[871] Peru further contends that "state conduct is discriminatory *only* if the differentiated treatment is based on an investor's foreign nature."[872] For the reasons below, Peru misconstrues the relevant standard for discriminatory conduct.

494. **First**, as established above and confirmed by Professor Schreuer, FET and MST have converged as substantively identical standards. Hence, the discrimination component of FET under the MST is materially indistinguishable, if not identical, to the discrimination component of FET under the autonomous standard.

495. **Second**, Peru's argument that discrimination must be motivated or based upon nationality has been rejected by other investment tribunals. For instance, in *Ulysseas v. Ecuador,* the State, like Peru here, had contended that the only standard for discriminatory treatment was nationality.[873] The Tribunal rejected this argument and said:

> In the Tribunal's view, for a measure to be discriminatory it is sufficient that, objectively, two similar situations are treated differently. As stated by the ICSID tribunal in *Goetz v. Burundi*, "discrimination supposes a differential treatment applied to people who are in similar situations". As such, *discrimination may well disregard nationality and relate to a foreign investor being treated differently from another investor whether national or foreign in a similar situation*.[874]

[870] Memorial, ¶ 281.
[871] Counter-Memorial, ¶¶ 638-640.
[872] Counter-Memorial, ¶ 641.
[873] *Ulysseas v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, ¶ 292 (CL-0188).
[874] *Ulysseas v. Ecuador*, UNCITRAL, Final Award, 12 June 2012, ¶ 293 (CL-0188) (emphasis in original).

496. In any event, the State's intent or motivation is not what matters for finding discrimination; what matters is a measure's practical effect. The tribunal in *Siemens v. Argentina* observed that "intent is not decisive or essential" but the "impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment."[875] Furthermore, the *EDF v. Romania* tribunal enumerated categories of discriminatory conduct as, quoting Professor Schreuer's expert opinion in that arbitration:

> a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;
>
> d. a measure taken in willful disregard of due process and proper procedure.[876]

497. **Third**, the notion that a comparator must be materially the same—down to the "specific nature of the operations performed by each entity"—as Peru suggests,[877] is controverted by relevant arbitral case law. The tribunal in *Parkerings v. Lithuania* explained that alleged discriminatory measures are assessed on a case-by-case basis to find that the investor was treated differently than those in mere "similar circumstances":

> Discrimination is to be ascertained by looking at the *circumstances of the individual cases*. *Discrimination involves either issues of law*, such as legislation affording different treatments in function of citizenship, *or issues of fact where a State unduly treats differently investors who are in similar circumstances*. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on the subjective requirements such as the bad

[875] *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 321 (CL-0057); *see also LG&E v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, October 3, 2006, ¶ 146 (CL-0034) (Tribunal explaining that the "obligation thereunder not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect").
[876] *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶ 303 (CL-0228).
[877] Counter-Memorial, ¶ 649.

> faith or malicious intent of the State . . . to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it *must be inapposite or excessive to achieve an otherwise legitimate objective of the State*. . . . It would be necessary, in each case, to evaluate the exact circumstances and the context.[878]

498. In some cases, questions about the basis for a comparison never arose since the tribunals were able to pinpoint unjustifiable differential treatment among businesses within the same area of activity. For instance, in *Nycomb v. Latvia*, the investor in that case had undertaken to construct a power plant. In turn, a State entity had promised a higher than usual price for the electricity generated there. When the State entity refused to pay the agreed price, the claimant argued, *inter alia*, that it had been subject to discriminatory measures in light of the fact that the State entity had paid the higher price to two other electricity generation companies. The Tribunal found that this constituted a discriminatory measure and said the State carries the burden of showing that no discrimination is present:

> The *Arbitral Tribunal* accepts that in evaluating whether there is discrimination in the sense of the Treaty one should only "compare like with like". … [A]ll of the information available to the Tribunal suggests that the three companies are comparable, and subject to the same laws and regulations. … In such a situation, and in accordance with established international law, the burden of proof lies with the State to prove that no discrimination has taken or is taking place.[879]

499. Furthermore, tribunals have found that adverse action directed at a particular foreign investor's chosen activity is a form of targeted discrimination, even when a comparator is not present. This point is illustrated by the discussion of discrimination in the context of expropriation in *ADC v. Hungary.*[880] In that case, the State argued that there could not have been

[878] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, ¶ 368 (CL-0044) (emphasis added).
[879] *Nycomb v. Latvia*, SCC, Award, December 16, 2003, ¶ 4.3.2 (CL-0164) (emphasis added).
[880] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, October 2, 2006 (CL-0011).

discrimination since the claimant was the only foreign investor in its line of business. The Tribunal rejected this argument, saying:

> The Tribunal cannot accept the State's argument that as the only foreign parties involved in the operation of the Airport, the Claimants are not in a position to raise any claims of being treated discriminately.
>
> It is correct for the State to point out that in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties. However and unfortunately, the State misses the point because the comparison of different treatments is made here between that received by the State-appointed operator and that received by foreign investors as a whole.
>
> The Tribunal therefore rejects the contentions made by the State and concludes that the actions taken by the State against the Claimants are discriminatory.[881]

500. In summary, it follows from the above authorities that there is no legal basis for Peru's argument that discrimination entails a high threshold. Further, as established above, discrimination need not be based on an intention or motivation by the host State's authorities to discriminate against a foreign investor. *De facto* discrimination between parties in similar circumstances is enough. This means that the investor does not bear the burden of proof that the differential treatment was motivated by its foreign nationality. In **Section IV.A.3**, *infra*, Claimants will show that Peru discriminated against the Mamacocha Project on multiple occasions.

e. Good Faith Is Inextricably Linked With FET

501. Claimants also established that good faith is the very essence of FET and a State breaches its obligation to treat the investor and investment in good faith when it fails to act fairly

[881] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, October 2, 2006, ¶¶ 441-443 (CL-0011).

or reasonably.[882] Peru, however, contends in its Counter-Memorial that: (i) good faith is not a component of the MST; and (ii) an investor claiming violation of international responsibility for good faith, must bear the burden of proving bad faith.[883] Peru's arguments are incorrect and inconsistent with relevant precedent set forth by other investment tribunals.

502. **First**, as Claimants established above, there is no longer a substantive distinction between FET and MST. Consistent arbitral practice analyzing FET clauses has catalyzed the evolution of MST to such an extent they contain substantively identical protections, including the element of good faith.

503. **Second**, contrary to Peru's arguments, good faith forms the basis of FET and is an indelible element of the FET standard.[884] It is "the common guiding beacon" to the obligation under BITs, it is "at the heart of the concept of FET," and "permeates the whole approach" to investor protection.[885] Similarly, the *Devas v. India* tribunal put the element of good faith, inherent in FET, into the broader perspective of international law:

> If one searches for a general obligation of good faith under international law, one need not go further than the Vienna Convention on the Law of Treaties in which one can find no less than five mentions of the requirement of good faith. This principle of good faith is not only self-standing, but it also stems from the concept of FET.[886]

504. **Third**, although State action in bad faith is clearly a violation of the FET standard, *mala fides* is not a condition for such a violation. In other words, a claimant need not prove bad faith to pursue a claim for violation of the fair and equitable treatment standard.

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[882] Memorial, ¶ 282.
[883] Counter-Memorial, ¶¶ 653-654.
[884] *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 367 (CL-0229); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 450 (CL-0221).
[885] *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶¶ 297-299 (CL-0055).
[886] *Devas v. India,* PCA Case No. 2013-09, Award on Jurisdiction and Merits, July 25, 2016, ¶ 467 (CL-0129).

Tribunals have even said that bad faith is not required under Peru's restrictive MST standard. For instance, the *Lemire v. Ukraine* tribunal found that "administrative and legislative actions may amount to a violation of the customary minimum treatment even if the State did not act in bad faith or with willful neglect of duty."[887] Furthermore, the tribunal in *Azurix v. Argentina* concluded that "[the failure to treat investment fairly and equitably] is an objective standard 'unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.'"[888] And, in *Oostergetel v. Slovakia*, the Tribunal held:

> [T]he notion of good faith has been analyzed by investment tribunals as an element of the FET standard. Actions such as conspiracy of state organs to inflict damage on an investment, or the use of legal instruments for purposes other than those for which they were created, have been cited by tribunals as examples of actions performed in bad faith which may constitute a violation of the standard. This said, *it is clear that the FET standard may be violated even when the State does not act in bad faith*.[889]

505. It bears emphasizing that, while not necessary to constitute a breach of FET, a showing of bad faith will also establish a breach of FET.[890] Indeed, the *Frontier Petroleum v. Czech Republic* tribunal listed examples of bad faith conduct to include:

> Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created[,] . . a conspiracy by state organs to inflict damage upon or

[887] *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 249 (CL-0147).
[888] *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶ 372 (CL-0014) (*quoting CMS Gas Transportation Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 280 (CL-0023)); *see also Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 296 (CL-0019) (stating that the FET standard was "not so strict as to require 'bad faith' or 'willful neglect of duty.'"); *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 153 (CL-0059) (explaining that "bad faith from the State is not required for its violation" of the FET standard).
[889] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* Final Award, April 23, 2012, ¶ 227 (RL-0024) (emphasis added).
[890] *See UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, December 22, 2017, ¶ 839 (CL-0230).

> to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, [] expulsion of an investment based on local favouritism[,] . . . [and] [r]eliance by a government on its internal structures to excuse non-compliance with contractual obligations[.][891]

506. Accordingly, FET is inextricably linked with the principle of good faith and does not require a showing of bad faith in order to constitute a breach of FET. In **Section IV.A.3** *infra*, Claimants will show that Peru discriminated against the Mamacocha Project on multiple occasions.

f. Peru's "Margin Of Appreciation" Defense Is Irrelevant To This Tribunal's Considerations

507. As a final matter related to the applicable FET standard, Peru contends that "not every error" by the State results in a FET breach and that States are accorded a so-called "margin of appreciation" for public policy determinations.[892] As a matter of law, this argument fails because the concept of "margin of appreciation" is a human rights law concept with no relevance to investor-State arbitration.[893] On the facts, as Claimants demonstrate in **Section II**, Peru's argument is irrelevant because Peru never proffered a *bona fide* public policy, during the relevant times, as a basis for its measures that systematically unraveled the Mamacocha Project. Any

[891] *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, ¶ 300 (CL-0231).
[892] Counter-Memorial, ¶¶ 604-605.
[893] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶¶ 465-466 (CL-0018) (As to "margin of appreciation" . . . due caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. . . . [T]he Tribunal is not aware that the concept has found much support in international investment law. . . . [T]he Government has agreed to specific international obligations and there is no "margin of appreciation" qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine."); *Quasar de Valors SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. Russia*, SCC Case No. 24/2007, Award, July 20, 2012, ¶ 22 (CL-0208) ("For one thing, human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of "margins of appreciation, that apply to the former.").

defense alleged by Peru based on a so-called "margin of appreciation" should therefore be rejected.

508. Contrary to the human rights law Peru tries to invoke, this is a case about a series of actions and omissions by Peru and its governmental organs—not immaterial errors—that destroyed a promising hydroelectric project; and there are indeed several admissions of liability for that State conduct. Further, no rational public policy was ever offered to Claimants during the relevant times of the measures, and thus Peru's argument is simply a baseless attempt at an *ex post* justification and litigation posturing.

3. Through At Least Seven Measures, Peru Breached Its FET Obligation To Claimants Under The TPA

509. As Claimants established in their Memorial, and mentioned in the prior section, Peru carried out at least seven (7) measures that not only breached Claimants' legitimate expectations in violation of FET, but also were arbitrary, lacking transparency, discriminatory, and contrary the principle of good faith.[894] These measures are:

a. The RGA's commencement of the RGA Lawsuit, dated March 14, 2017, which sought to annul the environmental permits for the Mamacocha Project;
b. The AEP's commencement of an investigation and subsequent criminal proceeding, dated March 24, 2017, based entirely on the false allegations set forth in the subsequently withdrawn RGA Lawsuit;
c. AAA's issuance of a resolution, dated May 16, 2017, denying CHM's application for the critical CWA for the Mamacocha Project;
d. AAA's issuance of a materially defective CWA for the Mamacocha Project, dated July 5, 2017, which caused substantial further delay and required intervention from central government authorities to remedy the defect;
e. The AEP's decision, dated February 2, 2018, to "formalize and continue" the criminal proceeding and name CHM's legal counsel, [redacted], as a formal criminal suspect impacted the viability of the Project at a reputational, political, and economic level;
f. MINEM's commencement of the Lima Arbitration, dated December 27, 2018, which violated the dispute resolution agreement in the RER Contract and sought

[894] Memorial, ¶ 260.

to terminate the RER Contract by, *inter alia*, nullifying the prior extensions under Addenda 1 and 2 and declaring CHM in material breach; and

g. MINEM's baseless denial of CHM's Third Extension Request, dated December 31, 2018, which failed to acknowledge and provide a compensatory extension for Peru's interferences to the Mamacocha Project, including the mutually agreed 17-month suspension of all obligations under the RER Contract.

510. In its Counter-Memorial, Peru raises numerous unsubstantiated factual defenses to these measures.[895] As demonstrated below,[896] Peru's allegations are contradicted by the evidence on the record, and, thus, each measure constitutes a distinct breach of FET.

a. RGA Lawsuit Violated Claimants' Legitimate Expectations And Was Also Initiated Arbitrarily, Discriminatorily, Inconsistently, And Without Good Faith

511. Claimants established in their Memorial that the RGA Lawsuit breached Peru's obligation to accord Latam Hydro and its investments FET because the RGA Lawsuit violated Claimants' legitimate expectations, lacked good faith, was arbitrary, lacked transparency, and was discriminatory.[897] As explained fully below, Peru's defenses to this measure completely miss the mark.

512. **Alleged Mootness**. At the outset of its argument, Peru asks the Tribunal to ignore the RGA Lawsuit because "these claims have ceased to exist as a result of good faith on the part of the Peruvian State."[898] Peru seems to imply that the RGA Lawsuit is a moot issue because it was withdrawn and thus could not have had an impact on the Project. But Peru offers no proof to sustain this theoretical argument. Not only is it baseless, this mootness argument is wrong. Claimants' evidence establishes that the RGA Lawsuit had a direct and immediate impact on the Project, putting all attempts to achieve Financial Close and commence construction on an

[895] Counter-Memorial, ¶¶ 656-755.
[896] *See also* Section II, *supra*.
[897] Memorial, ¶¶ 284-308.
[898] Counter-Memorial, ¶ 659.

indefinite hold pending resolution of the RGA Lawsuit.[899] The impact of this interference was heightened by the "time was of the essence" nature of the RER Contract. It is undisputed that when the RGA Lawsuit was filed, CHM's lender, DEG, backed out of the financing negotiations and ARMA withheld authorization of the ITS Approval.[900]

513. Peru's mootness argument is also debunked by the approach adopted by other tribunals that found breaches of FET where the measures were later withdrawn and the State then argued a mootness defense. These tribunals held the State may not abuse its authority, whether through the courts or otherwise, to improperly pressure foreign investors,[901] even if a measure is later withdrawn.[902] In the case at bar, while the RGA Lawsuit was withdrawn, its direct harm to the Project was never abated because the 17-month time period of negotiations were never returned to the Project's timetable, as demonstrated by MINEM's denial of the Third Request for Extension.

514. **Legitimate Expectations**. Peru argues that the RGA Lawsuit did not frustrate Claimants' legitimate expectations because, according to Peru, it was not reasonable for CHM to expect that the Mamacocha Project would be classified as a Category I project or that the Project's environmental certifications would not be changed or subject to challenge.[903] These theoretical arguments are not based upon evidentiary submissions, nor properly apply Claimants' substantial proof of Claimants' legitimate expectations.

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[899] *See* Section II.B, *supra*.
[900] *See* Section II.B, *supra*.
[901] *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, October 31, 2012, ¶¶ 474-491 (CL-0232); *The Rompetrol Group N.V.* v. *Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶¶ 278-279 (CL-0233); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, ¶¶ 286-287 (CL-0058); *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 233 (CL-0049).
[902] *Windstream Energy LLC v. Canada,* PCA Case No. 2013-22, Award, September 27, 2016, ¶¶ 376-380 (CL-0066).
[903] Counter-Memorial, ¶¶ 660-668.

515. **First**, it is absurd for Peru to argue that Claimants had no legitimate expectation to rely on the resolutions and permits that ARMA issued in 2014. ARMA was the regional authority on environmental matters when it came to the Mamacocha Project. Those permits were issued after ARMA conducted detailed technical reviews of the Project's designs and visited the Project site to assess the Project's expected economic impact. Moreover, as proved in the Memorial, ARMA's classification of the Project under Category I is consistent with the January 2012 guidance from MINEM that stated that run-of-the-river, small-hydro projects located in the mountains (*e.g.*, the Project) should be classified under Category I.[904] For these reasons alone, it is completely untoward for Peru to argue that Claimants should have been skeptical of these permits.

516. **Second**, as explained fully in **Section II.B**, *supra*, all the environmental and technical studies that have been undertaken by independent consultants have unanimously concluded that the Project's environmental impact would not have been significant. Conversely, there is no evidentiary support for Respondent's suggestion that the Projects' classification under Category I was wrong. To the contrary, Peru's own exhibit, the Morón Report, concludes that such classification "***was indeed duly grounded***," that the RGA had not substantiated its allegations that the Project's expected environmental impact would be significant, and that any irregularities with ARMA's decision to classify the Project under Category I were immaterial and could not serve as a legal basis for overruling this classification.[905] Similarly, the head of ARMA stated in a press interview in July 2017 (just months after the filing of the RGA Lawsuit) that the allegations in the Lawsuit about the Project's expected environmental impact were

[904] Memorial, ¶¶ 42-44.
[905] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).

completely groundless and had not been substantiated.[906] Also, the RGA's Attorney General divulged in a December 2017 report that it had not seen any evidence that substantiated the RGA's allegation that this classification was wrong.[907]

517. **Third**, Peru's hypothetical argument that a concessionaire must "reasonably expect" that every administrative decision may be subject to challenge both at the agency and in an administrative challenge in court until the expiration of all applicable statutes of limitation is not supported by Peruvian law. And if it were, then no investor would have had a reasonable expectation that any of the RER Projects could have been completed before time ran out on the COS milestone and the period of validity. Peru's argument positing that every concessionaire had to assume that no administrative decision was binding and final until the three- or four-year statutes of limitations ran on internal and external appeals, would be an extreme breach of Claimants' legitimate expectations.[908] This conclusion is all the more salient under the current circumstances where: (i) Peru argues that the same agency that made the decision can challenge its own decisions up to four years after the decision is rendered, thereby undermining any reasonable confidence in the finality of agency decision making; (ii) Peru has submitted no evidence that the RGA decision to challenge the ARMA re-classification determination by filing the RGA Lawsuit was made in good faith (in fact, Claimants establish on the basis of direct evidence that the decision to commence the RGA Lawsuit was made in bad faith and was not based on any scientific analysis); and (iii) "time was of the essence" in the RER Contract and it is undisputed that the required milestone deadlines could not have accommodated a four-year

[906] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[907] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[908] *See also* Section V.D.3, *infra*.

delay for administrative appeal for each of the dozen or so administrative approvals or permits required to advance the Project.

518. In any event, by filing the RGA Lawsuit, Peru breached Claimants' legitimate expectations that: (i) the Mamacocha Project was a Category I project; (ii) ARMA had competence and authority to grant the environmental permits for the Mamacocha Project; (iii) ARMA's resolutions granting the Project's environmental permits had been vetted, tested, and approved by ARMA and were not subject to change; (iv) the RGA would not commence or continue for nearly a year a baseless lawsuit that brought the Project to a halt; and (v) MINEM would partner with CHM to protect the Project from the RGA government's delays and help ensure the validity of the Project's permits.

519. As laid out by the *Antaris v. Czech Republic* tribunal, to prevail on a legitimate expectations claim, the investor need only "establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state."[909] Peru's expectations were first formed on the basis that the RER Contract incorporated a Sovereign commitment to pay the Guaranteed Revenue in return for the investor's investment in building a hydro plant. The RER Contract contained an express incorporation of all Peruvian laws, including the administrative and civil law commitments that the government would respect and not interfere with the progress of its counterparty.[910] Furthermore, CHM had a reasonable expectation that ARMA would issue its environmental approval in accordance with science, evidence presented by CHM and its expert

[909] *Antaris Solar GmbH and Dr. Michael Göde* v. *Czech Republic*, PCS Case No. 2014-01, Award, May 2, 2018, ¶ 360 (CL-0108).
[910] *See* Section II.A, *supra*.

consultants, the TUPA and other Peruvian laws. In any event, Claimants did not and could not reasonably have anticipated that the RGA would engage in a secret review of the Project, without involving CHM or any scientists, hydrologists or environmentalists, which review arbitrarily concluded that Project would have a "significant" environmental impact. Claimants also could not have reasonably expected that the RGA would file a meritless strike suit against ARMA's environmental approvals issued three years earlier and outside the applicable statute of limitations. The impact of this Lawsuit on the Project, however, doomed the prospect of finalizing US $60 million in loans to a project subject to challenge in a regional court by the very agency that had issued the Project's critical environmental permits.

520. Even if ARMA had improperly granted the Project's environmental permits—which Peru does not prove, nor could it—tribunals, such as *RDC v. Guatemala*, have indeed held that a State cannot invoke violations of its own law to the detriment of the investor's legitimate expectations concerning the contractual and legal framework.[911] The *RDC* tribunal found that "the Government should be precluded from raising violations of its own law as a defense when, for a substantial period of time it knowingly overlooked them, obtained benefits from them, and it had the power to correct them."[912] Further, in *Tethyan Copper v. Pakistan*, the tribunal found that the government "created legitimate expectations on Claimant's part that it would be entitled to convert its exploration license into a mining lease 'subject only to compliance with routine Government requirements'" and breached that expectation when the regional regulatory authority denied the license by applying a separate set of requirements.[913]

[911] *See RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 234 (CL-0049).
[912] *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 234 (CL-0049).
[913] *Tethyan Copper v. Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, November 10, 2017, ¶ 1264 (CL-0062).

521. In this case, the RGA Lawsuit attempted to change the long-held requirements for the Project's environmental permit. After years of laws, resolutions, and reports that had affirmed the legality of the Project's permits, the RGA Lawsuit baselessly sought to revoke these permits based on different rules that had never before been applied to the Project, nor any other RER project. Importantly, this measure came after Claimants had reasonably formed the legitimate expectation that its permits were secure and had invested millions of dollars in reliance on that expectation.

522. **Good Faith and Arbitrariness**. Peru alleges that the RGA Lawsuit was neither arbitrary nor brought in bad faith and that the Morón Report shows that the RGA Lawsuit was not initiated intentionally to destroy the Project.[914] As established above, a showing of bad faith is not necessary for a violation of good faith under FET. Further, tribunals have held that improper harassment or coercion by the State constitute breaches of good faith. Indeed, the *Waste Management v. Mexico II* tribunal held that "a basic obligation of the State under Article 1105(1) . . . to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."[915] The tribunal in *Oostergetel v. Slovakia* likewise referred in this context to:

> Actions such as conspiracy of state organs to inflict damage on an investment, or the use of legal instruments for purposes other than those for which they were created . . . as examples of actions performed in bad faith which may constitute a violation of the standard.[916]

523. The RGA's decision to launch the meritless RGA Lawsuit violated the principle of good faith and the TPA's protection against arbitrary conduct because: (i) the RGA's Attorney

[914] Counter-Memorial, ¶¶ 669-674.
[915] *Waste Management, Inc. v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 138 (CL-0065).
[916] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* Final Award, April 23, 2012, ¶ 227 (RL-0024).

General advised against filing the Lawsuit because it lacked merit; (ii) Regional Council members admitted that 109 similar permits for other projects may have had identical irregularities but were not challenged; (iii) the Regional Council's Report lacked any basis in scientific or environmental studies; and (iv) the Lawsuit was filed after the applicable statute of limitations had expired.[917] As Claimants have demonstrated, the RGA Lawsuit completely lacked any evidentiary support and Peru does not seriously challenge this conclusion.[918] When viewed under the circumstances of the Regional Attorney General acknowledging that it was specious, stating her opposition to its filing, and advising the Governor that members of the Regional Council should be investigated for approving the lawsuit, an inference of a lack of good faith can be drawn.[919] In fact, under the circumstances of also learning that a distinguished outside counsel to the government had carefully evaluated the RGA Lawsuit and concluded that it had no merit and would not succeed, an inference of actual bad faith could also be drawn.[920] When evaluated in the light of all evidence presented, there could have been only one purpose for secretly investigating and then commencing the strike suit; namely, to put an end to the Mamacocha Project. Thus, the RGA Lawsuit is a clear example of Peru wielding a "legal instrument" for "purposes other than those for which [it was] created."[921]

524. Peru also contends that, based on a 2012 MINEM report, "it is possible that some investment projects might be given a classification other than that stated in such report."[922] This argument is wholly hypothetical ("it is possible…") and not supported by any evidentiary proof.

[917] *See* Section II.B, *supra*.
[918] *See* Section II.B.2, *supra*.
[919] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[920] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[921] *Jan Oostergetel and Theodora Laurentius* v. *The Slovak Republic,* Final Award, 23 April 2012, ¶ 227 (RL-0024).
[922] Counter-Memorial, ¶ 673.

The only project that matters is the Mamacocha Project and the 2012 MINEM report recommendation for it to be classified as a Category I project was accurate when circulated by MINEM.[923] And MINEM's recommendation was confirmed upon careful examination and a site-visit by ARMA upon reclassification.[924]

525. In any event, Peru has not established that the decision to launch the RGA Lawsuit was made in good faith. The evidence before the Tribunal establishes, without doubt, that the RGA Lawsuit was merely a pretext to stop the Project from proceeding. The tribunal in *British Caribbean Bank Ltd. v. Belize* found that FET would be violated through arbitrary action directed at an improper purpose:

> Conduct that is motivated by an improper purpose, by a purpose with no relation to the means adopted, or by no purpose whatsoever is difficult to characterize as either fair or equitable, whatever the actual effects may be.[925]

526. In an analogous, but far less severe, case of abusive government conduct, the tribunal in *RDC v. Guatemala*—applying Article 10.5 of CAFTA—found that the nullification of a concession because the it was "*lesivo*" (injurious to the state), was not only arbitrary and abusive but also used as a mere pretext:

> In the circumstances of this case, the *lesivo* remedy has been used under a cloak of formal correctness allegedly in defense of the rule of law, in fact for exacting concessions unrelated to the finding of *lesivo*. … the Government should be precluded from raising violations of its own law as a defense when, for a substantial period of time it knowingly overlooked them, obtained benefits from them, and it had the power to correct them.
>
> In the Tribunal's view, the manner in which and the grounds on which Peru applied the *lesivo* remedy in the circumstances of this case constituted a breach of the minimum standard of treatment in

[923] MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).
[924] Bartrina I, ¶ 37; Report No. 009-2014-GRA/ARMA-SG-EA-E, February 17, 2014 (C-0185).
[925] *British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize*, PCA Case No. 2010-18, Award, December 19, 2014, ¶ 282 (CL-0234).

> Article 10.5 of CAFTA by being, in the words of Waste Management II, "arbitrary, grossly unfair, [and] unjust."[926]

527. As in *RDC v. Guatemala*, ARMA could have challenged its reclassification decision, but did not do so. Instead, the statute of limitations ran on its right to challenge its own reclassification decision. As in *RDC v. Guatemala*, "for a substantial period of time it knowingly overlooked [the reclassification], obtained benefits from [CHM's continued development activities], and it had the power to correct [the decision]," but failed to do so.[927] Further, the tribunal noted that the *lesivo* process, much like the RGA Lawsuit here, "has characteristics which may be easily abused by the Government" because "'illegality' having equal status with *lesividad* means that an extraordinary remedy may become routine once any 'illegality' of a Government act has been identified by the Government itself."[928]

528. Furthermore, in *Crystallex v. Venezuela*, the Tribunal described arbitrary action in terms of discretion, prejudice or personal preference:

> In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.[929]

529. In that case, the government made an abrupt change in position and issued a letter denying a crucial permit, and thus the tribunal found that Venezuela's conduct contained "significant elements of arbitrariness and evidences a lack of transparency and consistency."[930]

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[926] *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶¶ 234-235 (CL-0049).
[927] *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 234 (CL-0049).
[928] *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 233 (CL-0049).
[929] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, para. 578 (CL-0026).
[930] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, para. 591 (CL-0026).

This reversal of position, without a reasonable basis, is comparable to what happened in this case.

530. As established in **Section II.B**, *supra*, the RGA Lawsuit relied exclusively on the baseless Regional Council Report which was written by politicians who publicly opposed the Project. Further, the Morón Report concluded that the bases for the RGA Lawsuit lacked any merit whatsoever and any abnormalities or defects that had occurred were attributable to ARMA; and the Morón Report further concluded that the RGA Lawsuit was legally untenable.[931] Following the Morón Report, the Regional AG Report, dated December 21, 2017, recommended to Governor Osorio to urge the Regional Council to "provide support for and defend the validity" of the findings in the Regional Council Report, "which it has not done thus far."[932] The Regional AG also recommended that the Governor investigate the Councilmembers for the RGA Lawsuit:

> It should also be mentioned that this Office is aware that the complaint in question is based on the Final Report issued by the Regional Council's Special Investigation Commission in charge of scrutinizing the issue of Regional Sub-Management Resolutions No. 0110-2014-GRA/ARMA-SG, No. 158/2014/ARMA-SG and others issued by the Regional Environmental Authority – ARMA; because a complaint was filed based on such recommendations, *it is our view that it is the Regional Council that should provide support for and defend the validity of its Report, which it has no done thus far* and, as is evident from previous documents (Official Notice No. 1630-2017-GRA/CR), such Council has merely stated that it is a duty of the Regional Executive to take any necessary measures; SUCH EVASIVE POSITION SHOULD BE ASSESSED BY YOUR OFFICE IN DUE COURSE.[933]

531. On December 30, 2017, Governor Osorio withdrew the RGA Lawsuit because, as she admitted in an interview, the Lawsuit exposed the RGA and the Peruvian State as a whole to

[931] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).
[932] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[933] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095). (emphasis in original)

criminal and civil liability. Accordingly, the RGA Lawsuit was initiated on pretextual legal grounds and was an arbitrary exercise of State power in violation of FET. It is a glaring example of State conduct cloaked in formal correctness that sought to, and did, thwart the Mamacocha Project.

532. **Transparency**. Peru contends that the RGA Lawsuit did not exhibit a drastic reversal in policy, was not baseless, and did not violate the transparency element of FET.[934] Peru is wrong on all counts. The tribunal in *Lauder v. Czech Republic* acknowledged that a host State engaging in inconsistent conduct may violate the stability and transparency obligation contained in FET. The tribunal said (apparently approvingly restating the Claimant's submission):

> The State bound by the Treaty must indeed pursue the stated goal of achieving a stable framework for investment. The minimum requirement is that the State not engage in inconsistent conduct, e.g. by reversing to the detriment of the investor prior approvals on which he justifiably relied.[935]

533. In addition, the *Crystallex* tribunal said that "[l]inked to the notion of transparency is the concept of consistency, which requires that '[o]ne arm of the State cannot . . . affirm what another arm denies to the detriment of a foreign investor.'"[936] Inconsistent host state action was a central element in the Tribunal's finding of a violation of FET in *MTD Equity v. Chile*. The tribunal found a violation of the FET standard because the host state had initially approved a real estate development project that turned out to be against its own zoning rules. Under these circumstances, the tribunal found a violation of the FET standard:

> What the Tribunal emphasizes here is the inconsistency of action between two arms of the same Government vis-à-vis the same

[934] Counter-Memorial, ¶ 675.
[935] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, September 3, 2001, ¶ 290 (CL-0172).
[936] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 579 (CL-0026).

> investor even when the legal framework of the country provides for a mechanism to coordinate.[937]

534. The RGA Lawsuit is a six-page document containing only conclusory allegations without citing to any policy changes, environmental studies, or evidentiary documents that supported the argument that the Project should have used an EIA (appropriate for Category III projects), instead of a DIA (appropriate for Category I projects), to secure these permits. The only purported basis for this Lawsuit was an internal, *ex parte* "investigation" by the Regional Council in which Claimants were not invited to participate. Far from being transparent, the Regional Council never disclosed the findings of this "investigation" nor the legal bases that justified bringing the Lawsuit in the first place. Even the RGA's lawyers were unable to obtain this basic level of transparency from the Regional Council, as confirmed by the Regional AG Report and the Regional Attorney General's threat of investigating the Regional Council members.

535. Furthermore, States may be held liable for measures that are withdrawn but leave the investor in contractual limbo. Such was the case in *Windstream v. Canada* when Canada imposed a moratorium on offshore development, which had the effect of canceling claimant's offshore wind energy project. Although Canada lifted the moratorium, the government did not "address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium."[938] In particular, the tribunal found that the government had failed to clarify the situation by either reactivating Windstream's contract or terminating the contract outright.[939]

536. The RGA Lawsuit similarly put the Mamacocha Project in contractual limbo. The Project was on the cusp of achieving Financial Close and beginning construction with the

[937] *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶ 163 (CL-0039).
[938] *Windstream v. Canada*, PCA Case No. 2013-22, Award, September 27, 2016, ¶ 379 (CL-0066).
[939] *Windstream v. Canada*, PCA Case No. 2013-22, Award, September 27, 2016, ¶ 380 (CL-0066).

belief that its environmental permits were safe. Once the RGA Lawsuit commenced, however, there was mass confusion as to the viability of the environmental permits, leading to the indefinite cancellation of the financial negotiations and suspension of the RER Contract. The Regional Council's failure to substantiate this facially inconsistent measure only stoked this confusion, which ultimately resulted in a year-long delay that foreshadowed, and indeed ultimately caused, the end of the Mamacocha Project.

537. **Discrimination**. Peru argues that the RGA Lawsuit was not discriminatory because Claimants have not identified a comparator in like circumstances and other RER projects cannot serve as a basis for that comparison.[940] This defense is meritless. As established in **Section IV.A.2**, the tribunal in *Siemens v. Argentina* found that "intent is not decisive or essential" but the "impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment."[941] Establishing discrimination merely requires a showing that an investor received disparate treatment and that disparate treatment had an impact on the investment.

538. The RGA Lawsuit was directly targeted at the Mamacocha Project and had a disparate impact, as proven by the evidence introduced by Claimants. The Mamacocha Project was the ***only*** hydroelectric project in the RER Promotion that was sued by the government for being approved for a DIA (Classification I), rather than an EIA (Classification III). ***Every other hydroelectric project had received an environmental approval for a DIA***. Indeed, Regional Council members admitted in public press interviews that the Regional Council's challenge to

[940] Counter-Memorial, ¶ 676.
[941] Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 321 (CL-0057); *see also LG&E v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, Award, October 3, 2006, ¶ 146 (CL-0034) (Tribunal explaining that the "obligation thereunder not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect").

the authority of ARMA officials to issue the Project's environmental permits was the first time that this authority had ever been challenged, notwithstanding that ARMA had previously issued ***109 environmental permits for other projects*** without its authority ever being challenged. Peru has no answer for these facts.

b. The AEP's Criminal Investigation And Prosecution Is Based Wholly Upon The Since-Dismissed RGA Lawsuit And Constitutes A Further Breach Of FET

539. Claimants established in their Memorial that the AEP's criminal investigation and subsequent proceedings brought against Claimants' outside legal representative, [redacted], breached Peru's obligation to accord Latam Hydro and its investments FET because it violated Claimants' legitimate expectations, lacked good faith, was arbitrary, lacked transparency, and was discriminatory.[942] Peru contends in its Counter-Memorial that the AEP criminal investigation and proceeding did not violate the above elements of FET. According to Peru, the AEP's criminal proceedings had a legitimate basis under Peruvian law and there was reason to believe that [redacted] "fraudulently collaborated" with ARMA to issue an illegal environmental certification.[943] In further support of its arguments, Peru alleges that it enjoys the "sovereign right" to conduct meritorious criminal proceedings and enforce environmental regulations.[944] These arguments are meritless and contrary to the evidence.

540. **First**, the AEP pursued and continues to pursue criminal charges against [redacted] based ***solely*** on the bare evidence that he signed and filed a motion for reconsideration in his capacity as outside counsel to CHM.[945]

[942] Memorial, ¶¶ 309-320.
[943] Counter-Memorial, ¶¶ 686-706.
[944] Counter-Memorial, ¶ 681.
[945] *See* Section II.D, *supra*.

541. **Second**, Peru has not presented any proof that [redacted] violated Peruvian law, which is remarkable as the investigation has been ongoing for over three years and the AEP still has not uncovered ***any*** evidence of "willful collaboration" or any other offense.[946] The AEP, to this day, has not established that its investigation of the ARMA officials is grounded in law or evidence.

542. **Third**, Peru did not raise in this arbitration a defense based on illegality in the operation of Claimants' investment. If Peru believed it could prove that CHM had committed an illegal act through its legal representative, it would have raised an illegality defense before this Tribunal. Peru's failure to do so leads to the reasonable inference that Peru knows that there is no substance to any such allegation.

543. **Fourth**, the AEP's criminal prosecution of CHM's lawyer had a direct adverse impact on the Project. As established in **Section II.D**, the AEP's criminal proceeding: (i) jeopardized DEG's commitment to the Project due to the "reputation" concerns that it raised; (ii) diminished the financial value of the Project by decreasing its marketability to potential investors; and (iii) undermined the ability of the Project's expert Peruvian energy attorney from serving the Project, particularly in the role of representing CHM before relevant Peruvian government agencies.[947]

544. Investor-State jurisprudence establishes that the commencement or maintenance of a criminal investigation against a foreign investor or its representatives can serve as a FET violation. In *Rompetrol v. Romania,* for example, the tribunal found:

> . . . a State may incur international responsibility for breaching its obligation under an investment treaty to accord fair and equitable treatment to a protected investor by a pattern of wrongful conduct during the course of a criminal investigation or prosecution, even

[946] *See* Section II.D, *supra*.
[947] *See* Section II.D.1, *supra*.

> where the investigation and prosecution are not themselves wrongful. The provisos are however that the pattern must be sufficiently serious and persistent, that the interests of the investor must be affected, and that there is a failure in these circumstances to pay adequate regard to how those interests ought to be duly protected.[948]

545. Further, in *Al-Warraq v. Indonesia*, the tribunal held that the manner in which the host state had conducted criminal proceedings constituted a violation of FET. It specifically mentioned the lack of proper notification of criminal charges against the investor, the trial and conviction *in absentia*, the lack of notification of the sentence, as well as the impossibility to appoint legal counsel and to appeal the sentence.[949]

546. Tribunals have had no trouble finding that baseless criminal investigations support a finding of an FET violation. For example, in *Swisslion v. Macedonia*, the tribunal rebuked the State for resorting to the inflammatory and disparaging tactic of bringing a criminal proceeding against the claimant and its representatives in order to undermine the project in question.[950] The tribunal found that such behavior is grossly unfair and entirely inconsistent with the good-faith component of FET.[951] Each of these authorities supports Claimants position that the AEP's commencement and continued pursuit of a baseless criminal investigation (and later proceedings) against the Project's legal representative constitutes a breach of FET obligation because it directly impacted the goodwill of Claimants and prevented Financial Close.

547. In its Counter-Memorial, Peru fails to address or refute that the AEP's criminal proceedings are based entirely on the same meritless allegations as those raised in the RGA

[948] *The Rompetrol Group N.V. c. Rumania*, Caso CIADI No. ARB/06/3, Award, May 6, 2013 (Berman, Donovan, Lalonde), ¶ 278 (RL-0169).
[949] *Hesham Talaat M. Al-Warraq* v. *The Republic of Indonesia*, Final Award, December 15, 2014, ¶ 621 (CL-0235).
[950] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, ¶ 296 (CL-0058).
[951] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, ¶ 288 (CL-0058).

lawsuit. Peru also fails to introduce any evidence establishing a reasonable basis for the AEP not closing down the investigation when the Morón Report concluded that the RGA Lawsuit was meritless and would not succeed. Peru also fails to bolster a reasonable basis for the AEP not terminating the criminal investigation when the RGA Lawsuit was withdrawn. It is not enough to say that the AEP has independent authority and thus, did not need to follow the actions of the Regional Council, the Governor, or the Regional Attorney General. Peru has failed to establish that the AEP's independent decision was reasonable under the circumstances.

548. Further, Peru fails in its burden to establish, in response to Claimants' evidence, that the AEP's criminal investigation was not beset with due process vulnerabilities that themselves constitute breaches of FET. As Claimants demonstrate in greater detail in **Section II.D.3**, *supra*, [redacted] was not notified of the legal or factual basis for the investigation or the detailed charges he faced before the AEP closed its investigation. And then, when finally notified, the AEP's Criminal Information, dated October 18, 2019, is bereft of specificity or evidence. It did not provide a sufficient basis for him to present a defense. The Criminal Information states that [redacted] is being charged with a crime for having "submitted documents in clear violation of the laws in force, collaborating with the public servants and officials at the ARMA in the issuance of their decisions and authorizations, which were favorable to the project, in clear violation of the laws and in serious breach of their functional duties." Missing entirely from the Criminal Information are ***specific*** allegations and proof demonstrating that [redacted] had ***any*** communications with the accused ARMA officials beyond filing the public application that he signed in his capacity as CHM's counsel. Filing an application for reclassification, a legally authorized and routine submission, hardly amounts to "collaboration" with government officials. To this day, Peru has not identified any documentary

or other evidence in support of this false accusation. Needless to say, [redacted] deserves his day in court, which he had not yet been provided notwithstanding the fact that this black cloud of suspicion and innuendo have been hanging over his head and the Project's for over three years.

549. Given Peru's inability to substantiate the AEP's investigation and proceedings, the AEP's conduct violated Claimants' legitimate expectations that: (i) the Mamacocha Project was a Category I project and, consequently, CHM required only a DIA to secure its plant environmental permit; (ii) ARMA had authority to grant the environmental permits for the Mamacocha Project; and (iii) ARMA's resolutions granting the Project's environmental permits had been vetted, tested, and approved by ARMA and not subject to change. As established previously, the *RDC v. Guatemala* tribunal indeed held that a State may violate the investor's legitimate expectations when the State wields its legal system on the pretext of illegality.[952] Like Guatemala in *RDC*, Peru here takes the position that perfectly legal and innocuous activity can be belatedly declared illegal. Such conduct upended Claimants' legitimate expectations.

550. Contrary to Peru's assertions, the AEP's investigation and commencement of the criminal proceeding deprived Claimants of their legitimate expectations; and, furthermore, violated Peru's obligations under FET because it lacks good faith and transparency and is arbitrary and discriminatory.

c. <u>After An Inexplicable And Unreasonable Delay, AAA Wrongfully Denied And Later Issued A Materially Defective CWA In Violation Of FET</u>

551. Claimants established in their Memorial that AAA's unreasonable delays, wrongful denial, and subsequent issuance of an obviously defective CWA breached Peru's

[952] *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 235 (CL-0049).

obligation to accord Latam Hydro and its investments FET because it violated Claimants' legitimate expectations, lacked good faith, was arbitrary, and lacked transparency. Peru strains to rehabilitate AAA for its conduct.

552. **Legitimate Expectations**. In the context of AAA's conduct, Peru tries to disparage Claimants' case law authority on the grounds that the cases allegedly involved the autonomous FET standard and not FET under MST.[953] As demonstrated above in **Section IV.A.1**, however, Peru's argument is not sustained by the legal authorities. Legitimate expectations are a fundamental component of FET under customary international law. Peru's primary legal defense, therefore, is inapt and irrelevant.

553. Peru further contends that Claimants' expectation that it would receive the CWA within the statutorily mandated time period is unreasonable and Claimants could not expect that the CWA would be free from defects.[954] This argument, too, lacks foundation in the law or facts.

554. As established in **Section IV.A.2**, *supra*, legitimate expectations arise from the existing legal and contractual framework, which, in this context, are the TUPA regulations that required AAA to issue the CWA within 30 days. Claimants reasonably expected that AAA would adhere to the TUPA review periods, as such periods are fixed and binding. In any event, Peru cannot reasonably expect foreign investors to subscribe to the notion that they should expect to receive materially defective permits. And, in this case, AAA compounded its unlawful conduct by taking over six (6) months to correct its errors in issuing a defective permit. An investor can hardly be expected to consider this type of government conduct to be within its reasonable expectation when it invests in reliance on a government incentive program, like the RER Law.

[953] Counter- Memorial, ¶¶ 710, 712, 716.
[954] Counter- Memorial, ¶ 712.

555. In a case similar to the one at bar, *Tethyan Copper v. Pakistan*, the tribunal concluded that a State's denial of a mining permit breached the investor's legitimate expectations because the investor had reasonably relied (i) on the longstanding regulatory framework for the mining industry and (ii) the good faith conduct of government officials who would review claimant's mining project. In reasonable reliance on these expectations, the *Tethyan Copper* investor had diligently made investments to advance its project.[955] That tribunal found the State breached FET where, as here, it failed to grant a license although, again like the case at bar, the investor had complied with straightforward government requirements.[956]

556. **Arbitrariness**. Peru's only defense against AAA's arbitrary conduct with respect to the CWA is that the "act of making a mistake (which was later corrected) is not necessarily unreasonable."[957] Peru attempts to bolster its defense by pointing to the original denial on May 16, 2017, which stated that CHM had failed to submit information required under TUPA. But, as explained by Mr. Bartrina in his Second Witness Statement, there simply was no need for additional information in order for AAA to grant the permit.[958] It had all the information it needed after the conclusion of the marginal strip determination process. AAA's decision to dither for months was arbitrary because it was unfounded and unnecessary. Peru's defense, therefore, is not supported by the record. In addition, AAA's issuance on July 5, 2017 of a defective permit was also unreasonable and Peru fails to introduce any evidentiary proof that this was harmless error.[959] The defective permit failed to identify all structures and had the wrong

[955] *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability, ¶ 958 (CL-0062).
[956] *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability, ¶ 1264 (CL-0062).
[957] Counter- Memorial, ¶ 724.
[958] Bartrina II, § IV.
[959] *See* Section II.E, *supra*.

term date, thus rendering it unusable by CHM. ANA confirmed both of these defects when it ordered AAA to re-issue the permit on December 20, 2017.

557. AAA's "roller-coaster" regulatory conduct toward CHM is similar to the administrative decision making that an investor-State panel found to be "arbitrary" in *Crystallex v. Venezuela*. As briefed above, this case arose from a mining project in which the investor had applied for a mining permit. Over many months, the State in that case engaged in a series of flip-flopping measures that culminated in denial of the permit. The tribunal found that the agency's constantly changing positions cannot be rooted on a rational basis and amounted to arbitrary conduct violative of FET. While Peru attempts to distinguish that case on the facts, the *ratio decidendi* of that decision stands for the proposition that inconsistent treatment devoid of legal basis in relation to a critical permit violates the FET protections against arbitrary conduct.

558. **Transparency**. Peru wrongly contends that Peru satisfied its transparency obligation under FET merely by disclosing the relevant legal framework that would apply to issuance of the CWA.[960] As Claimants established in **Section IV.A.2**, *supra*, transparency also relates to the treatment Peru must accord to Latam Hydro and its investments, not simply disclosure of the relevant law. It is undisputed that AAA took nearly a year and a half to finally issue a legally sound CWA.[961] During that period, CHM sought in good faith to collaborate with AAA in order to timely receive the CWA. CHM frequently requested updates on status—only to be faced with administrative silence, followed by a blanket denial that was later reversed by the ANA, and then, reversed again with issuance of a materially defective permit that unreasonably took months to correct. AAA's process was anything but transparent.

[960] Counter- Memorial, ¶ 718.
[961] *See* Section II.E, *supra*.

559. **Good Faith**. Peru falsely asserts that Claimants' arguments concerning AAA's lack of good faith with respect to the CWA is based on nothing more than a conspiracy theory that the RGA Lawsuit caused delays to the CWA.[962] This is untrue and Peru does not provide any proof of this allegation. As Mr. Bartrina explains in his Second Witness Statement, the grounds for establishing AAA's lack of good faith is based upon AAA's bad faith conduct, including asking CHM for several rounds of unnecessary information not required by TUPA and then, premising its denial of the permit on May 19, 2017, on a bogus claim that it lacked certain technical information that was neither requested nor required under TUPA.[963] Claimants rely upon AAA's bad faith conduct that reasonably can be construed as a pretextual delay strategy.

d. The Lima Arbitration Violated Several Elements Of FET

560. Claimants established in their Memorial that Peru's commencement of the Lima Arbitration breached Peru's obligation to accord Latam Hydro and its investments FET because it violated Claimants' legitimate expectations, lacked good faith, was arbitrary, lacked transparency, and was discriminatory.[964] Peru attempts to refute these claims but, in so doing, Peru makes a series of misrepresentations.

561. **Legitimate Expectations**. Peru contends that Claimants did not have a legitimate expectation that Addenda 1-2 "would be" properly executed under Peruvian law and then proceeds to claim that "critical dates under the RER Contract . . . were unchangeable."[965] This argument is illogical. Peru wants the Tribunal to defer to Peruvian law when it argues that the critical dates allegedly could not be changed, but then it refuses to acknowledge the application of Peruvian law when it argues that Claimants had no reasonable expectation to expect that

[962] Counter- Memorial, ¶ 726.
[963] Bartrina II, § IV.
[964] Memorial, ¶¶ 334-344.
[965] Counter- Memorial, ¶ 744.

Addenda 1-2 were compatible with Peruvian Law when two separate contract modifications were executed by the governmental counterparty. Peru's response also mischaracterizes the basis for Claimants' legitimate expectations. It is not a matter of whether Claimants expected that Addenda 1-2 "would be" executed properly under Peruvian law, but rather that, if MINEM modifies a contract, as it did with Addenda 1-2, it is objectively reasonable for Claimants to assume and rely upon the legal validity of each of those modifications.

562. Clause 12.3 of the RER Contract provides an evidentiary basis for Claimants' reasonable expectation. Clause 12.3 provides: "[a]mendments and clarifications to the agreement will only be valid when they are agreed upon in writing and signed by representatives of the Parties with sufficient power and if they comply with the relevant requirements of the Applicable Laws."[966] MINEM had a contractual duty to live up to its representation through Clause 12.3 that its executed amendments "compl[ied] with the relevant requirements of the Applicable Laws." Claimants reasonably relied on this representation.

563. **Transparency.** Peru argues that "CH Mamacocha should have known that the extensions granted by means of Addenda 1 and 2 were contrary to applicable law" and thus it was foreseeable that those Addenda would be subject to legal challenge.[967] Peru's argument has nothing to do with Peru's obligation to treat Latam Hydro and its investments with transparency. Indeed, it is patently unfair for Peru to approve two sets of extensions following rigorous and costly administrative reviews and then years later announce, without forewarning or explanation, that those extensions were illegal. If they were illegal as signed, then their illegality was hidden

[966] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014 (C-0002).
[967] Counter- Memorial, ¶ 734.

from Claimants, who reasonably relied upon MINEM's good faith and transparency in entering into the contract amendments.

564. **Arbitrariness.** Peru falsely represented in the Lima Arbitration and again, here, that Addenda 1 and 2 should have been annulled because they were approved by the government relying upon faulty information submitted by CHM.[968] Peru does not prove this allegation in this case, nor did it present any such proof in the Lima Arbitration. It is entirely false and Peru's restating of this allegation in this arbitration is another instance of bad faith advocacy.[969] While the Lima Arbitration never reached the merits as it was dismissed preliminarily on jurisdictional grounds, Peru's bad faith allegations are contradicted by the legal reports that MINEM and OSINERGMIN issued at the time when the two amendments were entered into.[970] Both affirm that these governmental entities independently assessed and approved the extension requests. In fact, in one instance, MINEM's independent assessment of Addendum 1 concluded that CHM should have received ***more*** time than had been requested. MINEM's commencement of the Lima Arbitration on the basis of this demonstrably false allegation of fact demonstrates that the decision to commence the Lima Arbitration was arbitrary.

565. **Good Faith**. Peru asserts that the Lima Arbitration was brought in good faith "because such proceeding is justified by a legitimate exercise by MINEM of its right to correct" Addenda 1 and 2.[971] Not only is Peru improperly attempting to relitigate the basis of the Lima Arbitration, which has since been dismissed, but the timing of the Lima Arbitration evinces Peru's motives in initiating the Lima Arbitration. Peru does not dispute that, at the time Peru

[968] Counter- Memorial, ¶ 735.
[969] *See* Section IV.D, *infra*.
[970] *See* Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009); *see also* Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).
[971] Counter- Memorial, ¶ 741.

commenced the Lima Arbitration, Peru and Claimants had been involved in protracted settlement negotiations to resolve the disputes that Claimants had noticed under the TPA and the RER Contract. As part of these negotiations, Claimants had agreed not to file their ICSID claims until *after* April 1, 2019, as a good-faith gesture to provide the Parties sufficient time to reach a resolution.[972] At no point during these negotiations and the corresponding suspension of obligations, did Peru ever notify Claimants that MINEM would not respect the suspension that was in effect until April 1, 2019. MINEM's clandestine filing of the Lima Arbitration, in a clear effort to forum shop and circumvent the dispute settlement agreement in the RER Contract, is an archetypal example of bad faith action by a government body.

e. MINEM's Denial Of The Third Extension Request Violated Claimants' Legitimate Expectations, Was Arbitrary, And Lacked Transparency And Good Faith

566. Claimants explained in their Memorial that Peru's denial of CHM's Third Extension Request breached Peru's obligation to accord Latam Hydro and its investments FET because it violated Claimants' legitimate expectations, lacked good faith, was arbitrary, and lacked transparency. In its Counter-Memorial, Peru raises several fruitless arguments in an attempt to defend itself from this breach of FET.

567. **Legitimate Expectations**. Peru argues that Claimants could not have a legitimate expectation that the Third Extension would be granted because "it was contrary to the rules in force."[973] This argument is unsupported and factually inaccurate.

568. The Echecopar Reports: (i) confirmed that MINEM had a legal obligation under the existing legal framework to extend the Termination Date and COS deadline in instances of government interference or misconduct; and (ii) cautioned MINEM that any interpretation to the

[972] *See* Section II.F.2, *supra*.
[973] Counter- Memorial, ¶ 745.

contrary would be unconstitutional because it would create new restrictions and obligations that ran directly counter to the RER Law's mandate.[974] These Reports also recommended that MINEM amend the existing RER Regulations to make it expressly clear that RER concessionaires should receive extensions to the Termination Date and COS deadline if delayed by government interference.[975] Peru's argument that the Third Extension Request was "contrary to the rules in force" is contradicted by the Special Commission's own outside legal expert who opined that a compensatory extension would be required to ensure that MINEM's actions did not create a new unconstitutional restriction that ran counter to the investment-friendly goals of the RER Law.

569. Moreover, MINEM determined on more than one occasion that the Mamacocha Project should be held harmless from instances of government interferences. Indeed, those were the precise words that MINEM used when it extended the RER Contract deadlines via Addenda 1-2.[976]

570. **Transparency**. Peru contends that it dealt with the Third Extension Request transparently and consistently because Peru allegedly had rejected both the Termination Date and COS deadline extension requests in 2016, prior to the issuance of Addendum 2.[977] This argument is contrary to the facts and controverted by arbitral precedent.

571. **First**, as to the facts, Peru did not reject CHM's COS extension request in 2016. To the contrary, via Addendum 2, MINEM approved CHM's request for an extension of the COS deadline to a date (March 14, 2020) that exceeded the date set forth in the RER Regulations

[974] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[975] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[976] *See* Section II.A, *supra*.
[977] Counter- Memorial, ¶ 751.

and the RER Contract. Therefore, despite Peru's attempt to characterize its denial of the Third Extension Request as being consistent with MINEM's approval of the Second Extension Request, the two are horses of a different color. Addendum 2 extended the COS deadline and allowed the Project to proceed, while MINEM's denial of the Third Extension Request less than fourteen (14) months before the COS deadline rendered the Project impossible to complete and put an end to any economic viability of the Project.

572. As the tribunal in *Micula v. Romania I* determined, whether a government's decision is transparent and consistent must be "assessed in light of all of the factual circumstances surrounding such conduct."[978] In a case involving Romania's withdrawal of tax incentives for the investor to invest in an underdeveloped region, the Tribunal's detailed examination of the facts led it to its conclusion that "the manner in which Romania carried out that termination was not sufficiently transparent to meet the fair and equitable treatment standard."[979] Specifically, the Tribunal held:

> . . . [O]nce it became clear to Romania that the incentives would have to be abolished (…), Romania should have made PIC [Permanent Investor Certificate] holders aware of this fact.
>
> Thus, the Tribunal finds that Romania should have alerted PIC holders reasonably soon after it became clear that the EGO 24 incentives would be abolished. . . .
>
> As a result, the Tribunal finds that the Respondent breached the fair and equitable treatment obligation by failing to inform PIC holders in a timely manner that the EGO 24 regime would be ended prior to its stated date of expiry (…).[980]

[978] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶ 533 (CL-0089)
[979] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶ 864 (CL-0089).
[980] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶¶ 866, 869, 870 (CL-0089).

573. The timing and manner in which Peru rejected CHM's Third Extension Request likewise confirmed that the measure was devoid of any transparency. As has established in greater detail in **Section II.F.1**, MINEM's stated reasons for denying the extension represented a complete reversal of its prior legal positions – identified below -- that had been communicated to CHM:

a. July 2015: MINEM decides (via MR 320 and Addendum 1) that CHM should be held harmless from delays caused by government agencies and agrees to extend the Works Schedule by 705 days;[981]

b. October 2016 – January 2017: MINEM decides (via the Sosa Report, MR 559, and Addendum 2) that CHM should be held harmless from delays caused by government agencies and agrees to extend the Works Schedule by 462 days;[982]

c. July 2017: MINEM reaffirms (via Legal Report No. 122-2017-MEM/DG) MR 559's findings that compensatory extensions to the COS deadline are proper in instances where CHM's counterparty interfered with the Project and concludes that if, because of such interferences, the RER Contract is suspended, then the suspended time "should be, in due course, added to the current works schedule" by way of an extension;[983]

d. April 2018: MINEM's outside counsel concludes (via the Echecopar Reports) that extensions to the Termination Date and Works Schedule are legally required when government agencies are responsible for these delays and that any interpretation to

[981] Addendum 1 to the RER Contract, July 22, 2015 (C-0008).
[982] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[983] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).

the contrary is unconstitutional because it would violate the express objectives of the RER Law;[984] and

e. July 2018: MINEM offers to grant the Third Extension Request in part, such that CHM would receive an 18-year term of validity (which would have included multi-year extensions to both the Termination Date and COS deadline).[985]

574. Contrary to Peru's unsubstantiated allegation, MINEM did not transparently communicate to CHM that it planned to reverse its prior position that, consistent with the Peruvian Constitution and the RER Law, compensatory extensions would be approved if delays were caused by the government. To the contrary, MINEM throughout 2017 and 2018 represented to CHM on many occasions that it would receive compensatory extensions if the government was at fault. In fact, MINEM publicly had expressed this position merely weeks before its 180 degree pirouette when it published a "Statement of Reasons" for the proposed Supreme Decree.[986] This document justified the new Supreme Decree on the ground that Peru had obligations under Peruvian and international law to grant extensions to mitigate the harm caused by government interferences. MINEM gave the investor no forewarning that it would execute a complete *volte face* on risk allocation under the RER Promotion when it issued its decision denying the Third Extension Request in December 2018.

575. **Arbitrariness**. Peru contends that it rejected the Third Extension Request in compliance with the law and, thus, its decision was not arbitrary.[987] But for Peru to approve Addenda 1 and 2 only to later deny the same type of request later is arbitrary conduct on its

[984] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).
[985] Sillen II, ¶¶ 82-85; Email from A. Holstein (DEG) to S. Sillen et al., January 29, 2019 (C-0244); Email from S. Sillen to E. Powers, October 23, 2018 (C-0243).
[986] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-0018).
[987] Counter-Memorial, ¶ 752.

face.[988] Indeed, from February 2014 to December 2018, all parties to the RER Contract "indisputably" believed, and Claimants' reasonably relied on, a consistent line of government decisions reflected in an uninterrupted course of dealing between the contract parties supporting the conclusion that CHM did not assume the risk of government interference or the risk of its counterparty breaching its obligations under the contract, under Peruvian law or the Treaty. Peru notably has completely failed to introduce any contemporaneous evidence from 2014 up to December 2018 establishing that MINEM had legal authority to reverse its prior positions and reject CHM's Third Extension Request.[989]

576. Furthermore, as will be explained in **Section V**, *infra*, it is well-settled under Peruvian law that a party to a contract cannot use its own malfeasance to deny the contractual benefits of its counterparty. Yet, that is precisely what Peru did here.

577. **Good Faith**. Peru reiterates its incorrect standard concerning good faith under FET.[990] While a breach of good faith does not require a showing of bad faith, the denial of the Third Extension Request rises to the level of bad faith. While Peru asserts that the Third Extension Request denial was in accordance with the applicable framework, the denial cannot be reconciled with MINEM's prior extensions under Addenda 1 and 2, nor with their related government reports confirming that compensatory extensions were required under the RER Law and international law.[991] The context of the denial is important because mere days before CHM's Third Extension Request was denied—and evidently part of an overall tactical assault on the Project—Peru commenced its baseless Lima Arbitration to annul Addenda 1 and 2.[992] The

[988] *See* Section II.F.1, *supra*.
[989] *See* Section II.I, *supra*.
[990] Counter-Memorial, ¶ 755.
[991] *See* Section II.F.1, *supra*.
[992] *See* Section II.F.2, *supra*.

only reasonable inference that can be drawn is that the denial of the Third Extension Request was part of Peru's bad faith campaign to reverse its prior policies and terminate the Mamacocha Project.

* * *

578. In light of the foregoing, the Tribunal must reject Peru's meritless attempt to transpose an inapplicable MST standard for the well-established protections afforded to Claimants under the current FET standard recognized under customary international law. Professor Schreuer and relevant investment treaty authorities make clear that legitimate expectations, arbitrariness, transparency, discrimination, and good faith are applicable protections for investors and investments under customary international law. Further, Peru breached each of these protections in violation of its FET obligation and is thus liable to Claimants under the TPA.

B. Peru Indirectly Expropriated The Mamacocha Project In Violation Of Article 10.7 Of The TPA

579. As Claimants demonstrated in their Memorial, Respondent effected an indirect expropriation of Latam Hydro's rights in the Mamacocha Project starting when the RGA commenced the meritless RGA Lawsuit in March 2017, and culminating with MINEM's strategic decisions in December 2018 to deny CHM's Third Extension Request and commence the Lima Arbitration for the purpose of annulling all past extensions granted to the Project.[993] In other words, the Mamacocha Project was indirectly expropriated through three principal and interrelated measures: (i) the RGA Lawsuit; (ii) denial of the Third Extension Request; and (iii) the Lima Arbitration.[994]

[993] Memorial, ¶¶ 356-358; 363-364.
[994] These measures are described in greater detail both in the Memorial and in this Reply. *See* Section II, *supra*; Memorial, §§ II.I, II.O.

580. A substantial deprivation of the economic value of Latam Hydro's investment occurred initially in March 2017 when the RGA Lawsuit prevented Latam Hydro from achieving Financial Close. That substantial deprivation culminated in an effective total deprivation of value in December 2018, when MINEM effected a dual-prong strategy effectively to terminate the Project by: (i) refusing to grant CHM's Third Extension Request to the RER Contract that would have compensated for the harm suffered and delays that resulted from the RGA Lawsuit; and (ii) commencing the Lima Arbitration to annul Addenda 1 and 2 to the RER Contract. These dual actions in December 2018 made it impossible for the Project to proceed. At that point, the Mamacocha Project was effectively rendered worthless.[995]

581. Viewed on the alternative legal ground of a "creeping expropriation," the series of measures, including all seven (7) government actions from March 2017 through December 2018, cumulatively impaired the value of the Mamacocha Project such that it was rendered effectively worthless.[996]

582. Peru purports to defend itself against Claimants' indirect expropriation claim by alleging, falsely, that Claimants "mistak[e]" or "confus[e]" the relevant standards for an indirect expropriation.[997] In fact, Peru applies a standard it has created out of whole cloth, whereby, according to Peru, an indirect expropriation only occurs when "the value of [the] investments was radically affected by the measure challenged so much so that such radical impact is equal to a deprivation of their property."[998] As will be shown in **Section IV.B.1.a**, *infra*, it is well-

[995] Indeed, after Peru's December 2018 measures, the Mamacocha Project only had nominal value. *See* BRG Report II, ¶¶ 175-181.
[996] *See* Section IV.B.2, *infra*.
[997] Counter-Memorial, ¶¶ 760, 762.
[998] Counter-Memorial, ¶ 777.

established in investment arbitration jurisprudence that a "substantial deprivation" in value of the investment constitutes an indirect expropriation.

583. Peru also alleges that the "character of the government action" could not have led to an indirect expropriation because the measures only relate to Peru's "capacity as a contracting party" to the RER Contract.[999] As demonstrated in **Section IV.B.1.b**, *infra*, by pursuing this defense, Peru blatantly contradicts its own argument that only MINEM was a party to the RER Contract,[1000] and, in any event, Peru's argument is incorrect in light of arbitral precedent.

584. Peru further contends that Claimants have failed to "establish a causal link between the alleged impairment and the measures" because the alleged impairment must be an "automatic consequence" of the measures taken.[1001] In **Section IV.B.1.c**, *infra*, and further elaborated upon in **Section VII**, Claimants will demonstrate that the proper standard for causation is a "logical link" between the measure and alleged impairment, and, in any event, that Peru's measures directly resulted in a substantial deprivation. And in **Section IV.B.1.d**, Claimants will show that an indirect expropriation occurred notwithstanding the continued validity of the Final Concession after December 2018.

585. Finally, Peru attempts to minimize the common understanding that a "creeping" expropriation is a well-established type of indirect expropriation. Peru also argues that Peru's seven (7) measures are not "sufficiently inter-connected" or establish a "behavioral pattern."[1002] Claimants will establish in **Section IV.B.2**, *infra*, that the common denominator for Peru's seven (7) measures was the RGA Lawsuit. Accordingly, there is sufficient inter-connection between

[999] Counter-Memorial, ¶ 786.
[1000] *See also* Section V.B.2, *infra*.
[1001] Counter-Memorial, ¶¶ 780, 782.
[1002] Counter-Memorial, ¶¶ 761-762, 792.

Peru's measures that resulted in a "creeping" expropriation such that Claimants were substantially deprived of the economic value of the Mamacocha Project.

1. Peru Effected An Indirect Expropriation When It Commenced The RGA Lawsuit And Crystallized The Expropriation When Peru Failed To Grant An Extension To The RER Contract To Account For The Delays Caused By The RGA Lawsuit And Commenced The Lima Arbitration

586. Claimants established in their Memorial that the plain language of Article 10.7(1) of the TPA broadly prohibits Peru from adopting measures that deprive a U.S. investor of the economic value of its covered investments without adequate compensation. Article 10.7(1) provides in full that:

> Article 10.7: Expropriation and Compensation
>
> 1. 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.[1003]

587. Annex 10-B of the TPA provides additional clarity as to what measures amount to an expropriation under Article 10.7(1), as well as a non-exhaustive list of three (3) factors for assessing an indirect expropriation. Annex 10-B provides:

> **Annex 10-B Expropriation**
>
> The Parties confirm their shared understanding that:

[1003] United States-Peru Trade Promotion Agreement, February 1, 2009, Art. 10.7(1) (C-0001).

> 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
>
> 2. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
>
> 3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the *economic impact* of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action *interferes with distinct, reasonable investment-backed expectations*; and
>
> (iii) the *character* of the government action.[1004]

588. In light of the "fact-based inquiry" requirement under Annex 10-B, as well as the three (3) relevant (but non-exhaustive) factors listed in Annex 10-B, Claimants demonstrated in the Memorial that Peru's measures indirectly expropriated Latam Hydro's investment when: (i) Peru substantially deprived Latam Hydro of the economic value of its investment; (ii) Peru interfered with Latam Hydro's legitimate expectations upon which it had made its investments; and (iii) Peru's measures constituted wrongful government action without a *bona fide* public purpose.[1005] In its Counter-Memorial, Peru only seriously disputes the first (economic impact)

[1004] United States-Peru Trade Promotion Agreement, February 1, 2009, Annex 10-B (C-0001) (emphasis added).
[1005] Memorial, ¶¶ 361-375.

and third (character of the government action) factors, which will be addressed below.[1006] Consequently, with respect to the second factor in Annex 10-B, interference with "distinct, reasonable investment-backed expectations," Claimants hereby refer the Tribunal to **Sections IV.A.2-IV.A.3**.[1007]

a. A Substantial Deprivation Of Value Is The Proper Standard For An Indirect Expropriation

589. With respect to the first factor in Annex 10-B of the TPA (economic impact of the government action), Claimants demonstrated in the Memorial that an indirect expropriation occurs when the State takes measures that "substantially deprive" an investor of the value of its investment.[1008] In response, Peru baselessly attempts to interpose a higher threshold standard for an indirect expropriation. It argues that an indirect expropriation occurs only when "the value of [the] investments was radically affected by the measure challenged so much so that such radical impact is equal to a deprivation of their property."[1009] Peru thus alleges that Claimants must prove that "their investment was radically affected or effectively destroyed."[1010] In other words, in Peru's retelling, a deprivation of value of an investment that is "substantial" but not a complete or radical deprivation or effective destruction would not constitute an indirect expropriation. That is not the accepted standard for an indirect expropriation. But in any event, Respondent's attempt to pick a fight over the standard is truly beside the point. Peru's actions

[1006] Counter-Memorial, ¶¶ 769-777, 783-786.
[1007] While Peru attempts to refute Latam Hydro's legitimate investment-backed expectations in the expropriation context, Peru's arguments are fundamentally the same as those in Section V.A.2 of its Counter-Memorial. In addition, Peru attempts to distinguish the legal standard for legitimate expectations under FET and expropriation. (*See* Counter-Memorial, ¶ 794). However, the standard put forth in *Rios v. Chile*, which Peru cites, is fundamentally the same standard for legitimate expectations under FET. Claimants have thoroughly demonstrated Latam Hydro's legitimate expectations and need not repeat their contentions here. (*See* Section IV.A, *supra*; Memorial, § IV.A).
[1008] Memorial, ¶ 363.
[1009] Counter-Memorial, ¶ 777.
[1010] Counter-Memorial, ¶ 769.

would more than qualify as an indirect expropriation under any of the standards, including the unsupported restrictive standard proposed by Peru in the Counter-Memorial.

590. Tribunals have routinely confirmed and applied the "substantial deprivation of value" standard.[1011] For example, the tribunal in *Burlington Resources v. Ecuador*, a case Peru endorses,[1012] accurately described the "substantial deprivation of value" standard:

> When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a ***substantial deprivation***, is the ***loss of the economic value or economic viability of the investment***. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. ***What matters is the capacity to earn a commercial return***. After all, investors make investments to earn a return. ***If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment***.[1013]

591. Accordingly, the determinative criterion for a substantial deprivation is whether there is a "loss of economic value," "loss of capacity to earn a commercial return," "loss of economic use," or "loss of the economic viability" of the investment.[1014] And Claimants have satisfied this standard here because they have proven that Peru's measures made it impossible for CHM to finance or construct the Project, much less bring the Project into commercial operation. Claimants, thus, have no "capacity to earn a commercial return" because they lost "the economic use of their investment," which was to profit off of the "Guaranteed Revenue" streams they expected to receive over a 20-year period during the commercial operation phase of the Project.

[1011] *See Alpha v. Ukraine*, Award, ¶ 408 (CL-0012); *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, February 17, 2000, ¶ 77 (CL-0081); *Vivendi v. Argentina (II)*, Award, ¶ 7.5.11 (CL-0064); *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Interim Award, June 26, 2000, ¶ 102 (RL-0149).
[1012] *See* Counter-Memorial, ¶ 774.
[1013] *Burlington Resources. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012, ¶ 397 (CL-0080) (emphasis added).
[1014] *Burlington Resources. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012, ¶ 397 (CL-0080).

592. In an attempt to refute the common understanding that "substantial deprivation" is the proper standard, Peru argues for a more restrictive standard that is unsupported even in the case law on which Peru principally relies.

593. For instance, Peru relies on *Electrabel v. Hungary*, to support its more restrictive "radically affected or effectively destroyed" standard. But *Electrabel* does not support Peru's trumped-up standard. Rather, the *Electrabel* tribunal held, just like almost every other investor-State tribunal has held, that an indirect expropriation occurs when there has been a "substantial . . . deprivation" of the investment. Peru's arguments to the contrary rely on a cherry-picked version of the *Electrabel* award, where Peru selectively quotes from *dicta* that identified other types of deleterious effects on an investment that could ***also*** amount to an indirect expropriation. Nothing in *Electrabel*, however, provides that the measure in question must have "radically affected or effectively destroyed" an investment in order to constitute an indirect expropriation, as Peru falsely suggests. Nor does the *Electrabel* award change the well-settled meaning of "substantial deprivation" as set out in *Burlington Resources*. Peru's reliance on that award is, therefore, misplaced.

594. Peru also mistakenly asserts that *IMFA v. Indonesia* supports its contrived, restrictive standard.[1015] But, again, Peru misapplies and mischaracterizes that decision. The *IMFA* tribunal applied the widely recognized "substantial deprivation of value" standard and also explained that the *Electrabel* tribunal likewise supports the same standard:

> [T]he Tribunal recalls that it is well established that an indirect expropriation can occur when there is a *substantial deprivation of the value* [of] [*sic*] the investment or when the investor loses control over the investment due to the host state's actions. This was

[1015] Counter-Memorial, ¶ 770.

> adequately summarised by the tribunal in the *Electrabel SA v. Hungary* case[.][1016]

The *IMFA* case thus does not support Peru's "radically affected or effectively destroyed" standard.

595. Next, Peru also selectively quotes the *Isolux v. Spain* Award in support of its improperly restrictive standard,[1017] but that tribunal explained immediately before the excerpt Peru cites:

> [T]he position adopted both by the tribunal in the *Electrabel* case and by many international arbitral tribunals in this regard, is very clear and reflects the common conviction that illegal direct or indirect expropriation can affect both the investment and its control, and that *the impact must be substantial*[.][1018]

596. Further, the *El Paso v. Argentina* case cited by Peru also does not advance its argument for a more restrictive standard. Peru cites to this case for the proposition that "a mere loss in value of the investment, even an important one, is not an indirect expropriation."[1019] But this contention misses the point. Claimants are not basing their indirect expropriation claim on the basis that Peru's measures caused a "mere loss in value" to their investments under the Project. To the contrary, Claimants base their indirect expropriation claim on the basis that those measures substantially deprived Claimants of the value of those investments. That is the proper and well-settled standard for indirect expropriation in investor-State jurisprudence. And nothing cited by Respondent is to the contrary.

597. Ultimately, Peru's attempts to heighten the canonical "substantial deprivation" standard for indirect expropriation into something else is not only unfounded but, also, beside the

[1016] *Indian Metals & Ferro Alloys Ltd v. Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, March 29, 2019, ¶ 305 (RL-0014).
[1017] Counter-Memorial, ¶ 772.
[1018] *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain*, SCC Case No. V2013/153, Award, July 17, 2016, ¶ 839 (RL-0017).
[1019] Counter-Memorial, ¶ 771.

point. As Claimants have proven, this is not a case where the State measures in question merely frustrated the project or eliminated only one of its components. Rather, the measures in question here made it impossible for the Project to be built, thus, effectively destroying the value of their investments.[1020] This substantial (and even radical) deprivation of the value of Claimants' investments occurred nearly overnight in March 2017 when the RGA filed the RGA Lawsuit.[1021] Although Peru insists that a mere lawsuit could not realize this type of harm, that superficial defense is not supported by the evidentiary record.

598. Quite to the contrary, the record evinces that the Lawsuit, by itself, sent shockwaves throughout the region that the RGA had turned on the Project and was actively trying to destroy it.[1022] As Peru concedes, this fact alone "triggered" the AEP to file a criminal investigation against the Project and caused regional permitting agencies like ARMA to deny critical permits or refuse to grant them in a timely manner because, as they put it, the Project was now "*judicializado*," *i.e.*, under judicial challenge.[1023] As a direct result, DEG went from being willing to loan the Project US $60 million to not being willing to loan any amount.[1024] And Innergex, a prominent hydropower company with a keen eye for renewable energy projects went from being willing to acquire a 70% stake in this Project to walking away completely.[1025] In other words, the RGA Lawsuit was an existential threat to the Project and nothing Peru has cited or submitted to the record is to the contrary.

599. When the dust settled, it became clear to Claimants that they could not achieve Financial Close, much less construct the Project, unless and until they could arrive at a "political

[1020] *See* Section II, *supra*.
[1021] *See* Section II.B, *supra*.
[1022] *See* Section II.B, *supra*.
[1023] *See* Section II.B.1, *supra*.
[1024] *See* Section II.H.1, *supra*.
[1025] *See* Section II.H.1, *supra*.

solution" with the RGA.[1026] Peru also shared this sentiment at the time. MINEM agreed to suspend the RER Contract, and all of CHM's responsibilities under it, to give Claimants the necessary time and space to achieve this solution.[1027] And the Special Commission did its part by convincing the RGA that it was in everyone's best interests to cease the proverbial fire and withdraw the RGA Lawsuit.[1028]

600. Peru cites to the fact that the RGA withdrew its Lawsuit to argue that it "was not a permanent measure" and therefore, does not qualify as an expropriatory act.[1029] But this defense misses the point because what is at issue here is the longevity of the RGA Lawsuit's harm to the Project, not the longevity of the measure itself. Indeed, though the RGA Lawsuit was eventually withdrawn, it deprived the Project of a full calendar year, which in itself was fatal given that under the RER Contract ***every day mattered*** because missed deadlines could lead to excessive penalties, the termination of the RER Contract, and the forfeiture of the performance bond. The only way to prevent this harm from being permanent was for MINEM to extend the RER Contract to account for those delays. But, on December 31, 2018, MINEM refused to issue such extensions and instead opted to file the Lima Arbitration to undo prior extensions so that it could terminate the RER Contract and collect on the US $5 million performance bond.[1030] These measures ensured the permanency of the harm the RGA Lawsuit caused to the Project.[1031]

601. As part of its defense, Peru also cites *Glamis Gold* for the proposition that a less than total loss of value cannot constitute an indirect expropriation.[1032] As shown above, this would be a misreading of the applicable standard. But in any event, in *Glamis Gold*, the

[1026] *See* Sections II.C, II.F, *supra*.
[1027] *See* Section II.C, *supra*.
[1028] *See* Section II.C, *supra*.
[1029] Counter-Memorial, ¶ 800.
[1030] *See* Section II.F, *supra*.
[1031] Jacobson II, § IV.C.
[1032] *See* Counter-Memorial, ¶ 773.

reduction in value of the investment was merely sixty (60) percent, whereas in this case, the loss in value was complete (but for nominal value).

602. As Claimants establish in **Section VII**, *infra*, the measures highlighted above caused a substantial deprivation of value, indeed a complete loss in economic value of Claimants' investment, except for inconsequential nominal value.[1033] Accordingly, Claimants are entitled to the full amount of damages they seek as a result of Peru's indirect expropriation of their investment.

b. Peru Was Not Acting Merely As A Contracting Party When It Indirectly Expropriated The Mamacocha Project

603. With respect to the third factor in Annex 10-B of the TPA (character of the government action), Claimants demonstrated that Peru's measures from March 2017 through December 2018 were not *bona fide* government measures but, rather, arbitrarily and discriminatorily targeted the Mamacocha Project.[1034] Failing to rebut Claimant's arguments head-on, Peru argues that the "character of the government action" could not have led to an indirect expropriation because the measures only relate to Peru's "capacity as a contracting party" to the RER Contract.[1035] Peru appears to believe that because it was a counterparty to the RER Contract, it somehow was shielded from liability for indirectly expropriating the Mamacocha Project. This defense misses the mark.

604. **First**, it cannot be overlooked that Peru's argument implicitly concedes that Peru executed the RER Contract in its sovereign capacity. Peru's concession is striking because it devotes a significant portion of the Counter-Memorial arguing that the State was not a party to the RER Contract. In **Section V**, Claimants establish why, as a matter of Peruvian law, the

[1033] *See* Section VII, *supra*.
[1034] Memorial, § IV.B, ¶¶ 374, 377-379.
[1035] Counter-Memorial, ¶ 786.

sovereign State of Peru was indeed a Party to the RER Contract. Peru disagrees, except in the Section V.B.1.c of its Counter-Memorial where it tries to avoid liability for expropriation by claiming that Peru was acting solely in its capacity as a contracting party. Peru cannot have it both ways. On this basis alone, the Tribunal should reject Peru's argument.

605. **Second**, the identified expropriatory measures were plainly carried out in Peru's capacity as a sovereign authority. In *Crystallex v. Venezuela,* the tribunal rejected a similar contention by Venezuela in which the State argued that its actions were contractual and thus, could not have resulted in a treaty breach.[1036] Dismissing Venezuela's defense, the tribunal found that "all of the acts which throughout the years implicated several governmental organs" and thus the tribunal arrived at "the conclusion that the true nature of the act, howsoever expressed, was one of exercise of sovereign authority."[1037] The tribunal determined in that case that "the termination" of the concession "was not due to a *bona fide* dispute about the Parties' obligations under the [Mine Operation Contract] or its performance by Crystallex. It was devised to give effect to the Peru's unconcealed political agenda in respect of mining generally, and the Las Cristinas mine in particular."[1038]

606. Similar to the *Crystallex* case, Peru's actions in the instant case exemplify regulatory opportunism and a concerted effort by Peru to terminate the Mamacocha Project without any *bona fide* justification.[1039] These actions were perpetrated in Peru's sovereign

[1036] *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 700 (CL-0026).
[1037] *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 700 (CL-0026).
[1038] *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 705 (CL-0026).
[1039] For the avoidance of doubt, Claimants do not allege that MINEM's breaches of contract resulted in an expropriation, but rather that the commencement of the RGA Lawsuit and the later denial of compensatory extensions and commencement of the Lima Arbitration crystallized Peru's indirect expropriation, which substantially deprived Claimants of the value of its investment in the Mamacocha Project.

capacity, not merely in MINEM's capacity as a signatory to the RER Contract.

c. Peru's Measures Resulted In An Indirect Expropriation Regardless Of Whether The Final Concession Remained In Effect

607. Peru inaccurately contends that because the "Final Concession" was not revoked in December 2018, the Mamacocha Project could have proceeded to "generate electricity and sell electricity in the spot market or in the wholesale market."[1040] Relying upon this canard, Peru argues there was no expropriation at all of Latam Hydro's rights.[1041] Peru's argument fails on several grounds.

608. **First**, as established in Claimants' Memorial and in this Section, an indirect expropriation need only result in a "substantial deprivation" of the value of an investment. The fact that Peru's measures left Claimants with a scrap of paper granting them worthless concessions to operate a hydroelectric plant and transmission line, does not rebut Claimants' proof that a substantial deprivation of the value of their investment occurred when the RGA Lawsuit was filed and further compounded as a result of Peru's December 2018 measures.[1042] The concessions only had value if the Project's development had not been interrupted and the Project had been built and operated in accordance with the plans.[1043] The concessions could not be used for any other project and therefore, had no market value once the Mamacocha Project became impossible to construct in December 2018. The fact that Peru's December 2018 measures left the concessions in place—until they expired by their own terms—did not leave Claimants with an asset of value.

[1040] Counter-Memorial, ¶ 818.
[1041] Counter-Memorial, ¶ 818.
[1042] *See* Sections II.B, II.F, *supra*.
[1043] *See* Section VII, *infra*.

609. **Second**, as proven by Claimants in this Reply, without the RER Contract and the Guaranteed Revenue streams it provided, there would have been no Mamacocha Project. They were the *sine qua non* for providing the economic incentive and viability for building the Project. Peru does not prove otherwise. Dr. Whalen provides his independent opinion that the RER Promotion incentives were essential to attracting and implementing the Mamacocha Project, as follows:

> The Mamacocha Project was intrinsically conceived of in the context of the RER Program and based on the RER Contract. As identified by the World Bank in 2008 (working in cooperation with the MINEM), a Peruvian small-scale hydroelectrical project was unlikely to be an attractive opportunity [because] "an adequate tariff is an essential ingredient of a successful renewable energy program."[1044]

610. Without the RER Contract, the Project would not have been "bankable" nor the development attempted.[1045] Further, the economics of the Project was premised on attracting non-recourse financing and on the Sovereign guarantee of a twenty-year Guaranteed Revenue stream.[1046] As Mr. Jacobson explains in his Second Witness Statement, he "invested in the Mamacocha Project because the regulatory framework that Respondent designed to incentivize and facilitate foreign investments in its renewable energy resources expressly guaranteed my investments would be protected and safeguarded under Peruvian and international law."[1047] Peru's hypothetical argument that the Project could have relied on the spot-market alone is contradicted by the evidence and testimony of financial experts and investors.

611. **Third**, even on the granular economic level, Peru's defense is unsustainable. The project would not have been valued at anywhere close to economic viability in December 2018

[1044] Whalen I, ¶ 7.5.3.
[1045] Whalen I, ¶ 4.3.8; Jacobson II, ¶ 10.
[1046] Jacobson II, ¶¶ 10-13.
[1047] Jacobson II, ¶ 61.

when Peru's actions finally made the RER Contract impossible to complete.[1048] In late 2018, spot market electricity prices had plummeted to record lows, to approximately US $10 per megawatt hour.[1049] Per the terms of the RER Contract, Claimants had been guaranteed the opportunity to sell the Awarded Energy at the Award Fee (*i.e.*, monomic price) of US $62 per megawatt hour, more than six times the price of the spot market in December 2018.[1050] Peru does not introduce any evidence to prove that the Project could have been profitable at that extremely low and volatile price level. By contrast, Dr. Santiváñez and Dr. Whalen confirmed that it could not.[1051] As Dr. Whalen states:

> In addition to being subject to the volatility of Peru's electricity spot market prices, without the RER Contract any equity investor or lender to the Mamacocha Project would not have the benefit of:
>
> (I) committed long-term offtake,
>
> (II) guaranteed revenue from the government of Peru,
>
> (III) priority dispatch status and compensation for non-dispatch for reasons outside of the control of the power producer, and
>
> (IV) government commitments to support access to third parties' facilities and to use best endeavors to support permits and authorizations. . . .
>
> While at some point very early in the financing process, the Mamacocha Project theoretically could have been able to be restructured to be based upon a bilateral PPA in Peru's medium- to long-term supply contracts market, this arrangement would have been a fundamental reconceptualization of the Mamacocha Project that would have been stripped of most of the attributes of the RER Contract. This approach would have made little sense, however, in light of the available incentives provided by the RER Contract. . . .

[1048] Whalen I, ¶¶ 6.5.1-6.5.4.
[1049] Santiváñez I, ¶¶ 65-78.
[1050] RER Contract, February 18, 2014, Clause 1.4.45 (C-0002). The monomic price consists of a price for energy plus a price for capacity.
[1051] Santiváñez I, ¶¶ 65-78; Whalen I, ¶¶ 6.5.1-6.5.4.

> In my opinion, there was no realistic financing alternative available to the Claimants following the Peruvian government entity actions starting March 2017[.][1052]

612. **Fourth**, Peru's argument fails as a matter of law. In *Copper Mesa v. Ecuador*, an imminent revocation of a mining concession, although not yet formally rescinded, was considered an indirect expropriation.[1053] The tribunal held that Ecuador's conduct reduced "the Claimant's subsidiary" merely to "the concessionaire of the [mining] concession in name only." Due to the impending rescission, the tribunal held that "Claimant could not use, enjoy, or dispose of the economic benefit [o]f its interest in the [mining] concession."[1054] The same conclusion must be drawn here. The concessions and the RER Contract were rendered useless and essentially valueless when MINEM refused to provide compensatory extensions to allow the Project to be completed before the COS deadline. Whatever hope remained from the withdrawal of the RGA Lawsuit was eliminated when MINEM denied CHM's request for compensatory extensions. Contrary to Peru's speculative argument, it makes no material difference that the concessions or the RER Contract had not been formally terminated in December 2018, because when the measures of that fateful month went into effect the Mamacocha Project was rendered impossible to perform. Nothing of non-nominal value remained.[1055]

613. Accordingly, in the absence of Peru providing adequate and effective compensatory extensions, the above-mentioned measures from March 2017 to December 2018 resulted in the demise of the Mamacocha Project and a permanent deprivation of any economic enjoyment of Latam Hydro's investment.

[1052] Whalen I, ¶¶ 7.5.4-7.5.6.
[1053] *Copper Mesa v. Ecuador*, UNCITRAL Case No. PCA Case No. 2012-2, Award, March 15, 2016, ¶ 6.123 (CL-0025).
[1054] *Copper Mesa v. Ecuador*, UNCITRAL Case No. PCA Case No. 2012-2, Award, March 15, 2016, ¶ 6.125 (CL-0025).
[1055] *See* BRG Report II, ¶¶ 175-181.

2. In The Alternative, Peru's Wrongful Measures Cumulatively Amounted To A "Creeping Expropriation" That Destroyed The Mamacocha Project

614. As previously mentioned, Peru accuses Claimants of confusing an indirect expropriation with a "creeping" expropriation. As shown in the previous Section, Claimants demonstrate that a "creeping expropriation" is merely a form of indirect expropriation and Claimants have more than satisfied their burden of proving that Peru's measures effected an indirect expropriation of Claimants' investments. But even if the concept of a "creeping" expropriation were analyzed separately, Claimants prove, in the alternative, that the following seven (7) measures amounted to a "creeping" expropriation:

a. The RGA's commencement of the RGA Lawsuit, dated March 14, 2017, which sought annulment of the environmental permits for the Mamacocha Project;
b. The AEP's commencement of an investigation and subsequent criminal proceeding, dated March 24, 2017, based on the allegations set forth in the RGA Lawsuit;
c. AAA's issuance of a resolution, dated May 16, 2017, that denied CHM's application for the critical CWA for the Mamacocha Project;
d. AAA's issuance of a materially defective CWA for the Mamacocha Project, dated July 5, 2017, which caused further delay and required intervention from central government authority to remedy its many defects;
e. The Arequipa Environmental Prosecutor's decision, dated February 2, 2018, to "formalize and continue" the criminal proceeding and name CHM's legal counsel, [redacted], as a formal criminal suspect based on the same allegations that the RGA and the Special Commission had already deemed meritless;
f. MINEM's commencement of the Lima Arbitration, dated December 27, 2018, which sought to terminate the RER Contract by, *inter alia*, nullifying the prior extensions under Addenda 1 and 2 and declaring CHM in material breach; and
g. MINEM's rejection of CHM's Third Extension Request, dated December 31, 2018, and its refusal to provide compensatory extensions of the work schedule to account for Peru's interferences with the Mamacocha Project and the 17-month suspension period under the RER Contract.

a. The Standard For A "Creeping" Expropriation

615. As Claimants explained in their Memorial,[1056] a "creeping expropriation is a particular type of indirect expropriation, which requires an inquiry into the particular facts" and the use of "creeping" used to "describe this type of expropriation indicates that the entirety of the measures should be reviewed in the aggregate to determine their effect on the investment rather than each individual measure on its own."[1057] The *Crystallex* tribunal articulated the proper standard for a "creeping" expropriation as follows:

> [T]he expression "creeping expropriation" is used to refer to a specific form of expropriation that results from a series of measures taken over time that cumulatively have an expropriatory effect, rather than from a single measure or group of measures that occur at one time.[1058]

616. The tribunal in *Crystallex* identified three broad groups of actions that it concluded amounted to a "creeping" expropriation of the claimant's rights: (1) the denial of a critical permit by Venezuela; (2) a number of statements made by high-level Venezuelan government officials targeting and gradually devaluing Claimant's investment, which led to the Mining Operation Contract's rescission; and (3) the rescission of the Mining Operation Contract.[1059] The tribunal found that the various expressions of Venezuela's conduct were sufficiently inter-connected because they evinced a political agenda against the claimants' mining project. The series of acts undertaken by Peru, as established below, are even more inter-connected and show a systematic unraveling of the Mamacocha Project in comparison to those in *Crystallex*.

[1056] Memorial, ¶ 365.
[1057] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina*, ICSID Case No. ARB/09/01, Award, July 21, 2017, ¶ 948 (CL-0082).
[1058] *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, Award, ¶ 667 (CL-0026).
[1059] *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, Award, ¶¶ 666-672 (CL-0026).

617. In a further analogous decision finding a "creeping" expropriation, the *Siemens v. Argentina* tribunal found that, over the course of two years, the government undertook a series of measures that postponed and suspended the subsidiary's operations, resulting in fruitless contractual renegotiations and eventual cancellation of the project.[1060]

b. Peru's Measures Resulted In A "Creeping" Expropriation

618. In its Counter-Memorial, Peru contends that the seven (7) measures identified above do not constitute a "creeping" expropriation because the measures are not "sufficiently inter-connected."[1061] In building this defense, Peru relies upon a litany of false factual misrepresentations, which Claimants rebut in **Section II**, above. In this Section, Claimants demonstrate that the seven measures establish a pattern of inter-connected conduct because each measure arises from or is related to the groundless RGA Lawsuit and the Regional Government's political opposition to the Project.

619. **First**, as demonstrated above, the RGA Lawsuit followed from a surreptitious *ex parte* investigation that failed to review any scientific or expert reports, but concluded, nonetheless, that the Project posed a "significant" environmental threat and should have been classified in Category III. The RGA Lawsuit attempted to nullify ARMA's reclassification of the Project into Category I, although it was justified by the evidence and was carefully reviewed and decided by ARMA. The RGA Lawsuit was an outgrowth of the opposition by Regional politicians in Arequipa, including the Governor of Arequipa.

620. **Second**, the Arequipa Environmental Prosecutor's criminal investigation arose from the very same false allegations that were included in the complaint commencing the RGA Lawsuit. This fact is not in dispute. Indeed, Peru concedes in its Counter-Memorial that the

[1060] *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007, Award, ¶¶ 81-97 (CL-0057).
[1061] Counter-Memorial, ¶ 792.

RGA Lawsuit "triggered" this criminal proceeding because the allegations the AEP appeared to be investigating were the same allegations filed in the RGA Lawsuit.

621. **Third**, the Arequipa-based AAA played political football with the Project's CWA for over ***one year***.[1062] As Mr. Bartrina explains, AAA should have issued the CWA by January 2017, but the political environment surrounding the Project had devolved once the Regional Council made it known in the RGA in late 2016 that it had recommended the filing of the RGA Lawsuit to stop the Project from advancing.[1063] Mr. Bartrina also explains that, around the time of the RGA Lawsuit, AAA had appointed Mr. Isaac Martinez (a political ally of Mr. Medina, who was a Regional Councilmember that had forcefully opposed the Project) as AAA's manager. As Mr. Bartrina has testified—without any challenge from Peru—the RGA Lawsuit emboldened Mr. Martinez to take CHM through a regulatory rollercoaster where AAA sat on CHM's CWA application for months, then denied the application outright, only to reverse itself weeks later and issue a defective CWA that it inexplicably refused to fix for months. And, notably, when the RGA agreed to withdraw its Lawsuit in late 2017, AAA suddenly issued the CWA days later. This timing is not a coincidence. AAA's delays were always an unfortunate outgrowth of the RGA Lawsuit.

622. **Fourth**, the final measures in December 2018 were part of a litigation strategy by MINEM to end the economic viability of the Project. Under this multi-prong litigation strategy, MINEM: (i) revoked the proposed Supreme Decree that would have given the Project a lifeline by establishing a process to extend the COS and Term Date deadlines for cases, like here, where the project was delayed by "unjustified actions or omissions attributable to an entity belonging to

[1062] *See, supra*, Section II.E.
[1063] Bartrina II, ¶ 46.

the State";[1064] (ii) denied CHM's Third Extension Request in its entirety, thereby rejecting CHM's request for compensatory extensions to make up for the delays caused by the RGA Lawsuit and the four suspensions of the RER Contract milestone deadlines caused by the RGA Lawsuit; and (iii) decided to go on the offense by commencing an arbitration before the Lima Chamber of Commerce in violation of the Parties' mutual agreement to resolve all claims before ICSID in Washington, D.C., and with the specific intent of annulling prior extensions granted by MINEM under Addenda 1-2, and thereby, rendering the Project absolutely impossible to complete, as it would have moved the COS deadline to a date only four days after the Lima Arbitration request for arbitration was filed.

623. The history of these measures recounted—and proven—in the Memorial and in this Reply,[1065] reflect a linked, cumulative effort to stop, stall and eventually destroy the Project. The systematic unraveling of the Mamacocha Project had an effect tantamount to expropriation. In violation of its international law and treaty obligations, Peru has not tendered prompt, adequate and effective compensation for this expropriation.

3. Peru Has Failed To Meet Its Burden Of Showing That Its Indirect Expropriation Of The Mamacocha Project Was Lawful

624. Claimants established in their Memorial that Peru's indirect expropriation of Latam Hydro's covered investments is not "lawful" because it does not fall within the stated exceptions under Article 10.7.1 of the TPA.[1066] Article 10.7(1) excuses expropriatory conduct when it is "(a) for a public purpose [in accordance with customary international law]; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation;

[1064] Statement of Motives from the Ministry of Energy and Mines, November 11, 2018, p. 3 (C-0018).
[1065] *See* Section II, *supra*.
[1066] Memorial, ¶ 376.

and (d) in accordance with due process of law and Article 10.5."[1067] Notably, every element in Article 10.7.1 must be met in order to be considered lawful. Claimants observe that Peru has not even attempted to prove that the indirect expropriation of the Mamacocha Project was lawful pursuant to the elements identified under the TPA. Accordingly, it remains undisputed that: (i) the Mamacocha Project was rendered effectively worthless without a valid public purpose; (ii) Peru's measures were discriminatory on their face because the measures specifically targeted the Mamacocha Project; (iii) Peru has not offered any compensation to Claimants for the demise of the Mamacocha Project; and (iv) Peru has not conferred any process, let alone due process, for redressing its indirect expropriation.

C. Peru Breached The Most-Favored-Nation Provision Of The TPA When It Accorded More Favorable Treatment To Other Foreign Investors

625. Claimants established in the Memorial that Peru violated the most-favored-nation ("**MFN**") clause contained in Article 10.4 of the TPA.[1068] In particular, Peru breached Article 10.4 when it: (1) conferred on Paraguayan investors the more favorable right to necessary permits and to otherwise ensure performance of its approvals and facilitate the permitting process under Article 3(2) of the Peru-Paraguay BIT; but it then (2) thwarted CHM's attempt to acquire permits and approvals for the Mamacocha Project.[1069] Further, Claimants demonstrated that Peru's breaches of the RER Contract, which will be addressed further in **Section V**, constituted violations of the TPA because Claimants are entitled to import an umbrella clause contained in other treaties concluded by Peru,[1070] namely the Thailand-Peru BIT (1991), Netherlands-Peru BIT (1994), and United Kingdom-Peru BIT (1993).[1071]

[1067] United States-Peru Trade Promotion Agreement, February 1, 2009, Art. 10.7.1 (C-0001) (emphasis added).
[1068] Memorial, ¶¶ 383-398.
[1069] Memorial, ¶¶ 388-394.
[1070] Memorial, ¶¶ 395-398.
[1071] Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Peru for the Promotion of Investments (1991), Art. 4(2) (CL-0069) ("Each Contracting Party shall observe any

1. Peru's Arguments That An MFN Clause Cannot Import Substantive Protections Or An Umbrella Clause Are Misguided

626. Peru broadly asserts that the "MFN Clause under the Treaty does not enable other standards of protection not included in the Treaty to be imported."[1072] Peru's submission, however, is not supported by applicable general principles of international law concerning MFN clauses, the TPA, and prior investment tribunal's decisions. Claimants note that Peru even failed to address the principle laid out by the ILC in its Draft MFN Articles, which establish that the beneficiary of an MFN clause—here, Latam Hydro—allows it to acquire "rights which fall within the subject matter of the clause."[1073] The MFN clauses in Articles 10.4(1) and 10.4(2) of the TPA are unambiguous and require Peru to accord Latam Hydro and its investments treatment no less favorable than third-party investors in the "establishment, acquisition, expansion, management, conduct, operation, and sale" of the Mamacocha Project. The text of Article 10.4 makes clear that the TPA intends to broadly encompass treatment accorded to investors and investments throughout the life of the investment. As a result, Claimants are entitled to import substantive rights contained in other treaties concluded by Peru that relate to the broad subject matter contained in Article 10.4.

627. In its decision to import an umbrella clause through the MFN provision, the tribunal in *EDF v. Argentina* summarily rejected the very type of defense Peru raises in this case, explaining that while the jurisprudence is varied with respect to importing procedural rights, such

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obligation, additional to those specified in this Agreement, into which it may have entered with regard to investments of nationals or companies of the other Contracting Party."); Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Republic of Peru (1994), Art. 3(4) (CL-0096) ("Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party."); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru for the Promotion and Protection of Investments (1993), Art. 2(2) (CL-0097) ("Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.").

[1072] Counter-Memorial, ¶¶ 836-842.

[1073] International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses*, in *Report of the International Law Commission on its Thirtieth Session*, (1978) 2 YBILC 8, (pt. 2) (U.N. Doc. A/33/10), Art. 9 (CL-0073).

as dispute resolution clauses, the MFN clause is intended to permit the importation of substantive rights not accorded in the applicable treaty.[1074] The tribunal said:

> There is nothing mysterious about the fact that the same [State] acts may constitute both a contractual breach and a violation of relevant treaty obligations. This Tribunal's competence rests on the alleged violation of the "umbrella clause" in the relevant investment treaties as incorporated through the MFN clause in the Argentina-France BIT.[1075]

628. Contrary to Peru's argument, the *Arif v. Moldova* tribunal acknowledged that substantive rights, such as an umbrella clause, may be imported through an MFN clause and found that the claimant could invoke an umbrella clause contained in other treaties concluded by the State:

> Both Parties agree that an MFN clause applies to substantive obligations. The MFN clause in Article 4 is broadly drafted and does not restrict its application to any particular kind of substantive obligation under the BIT. Therefore, the Tribunal finds that the MFN clause of the BIT can import an "umbrella" clause (which is substantive in nature), from either the Moldova-UK or Moldova-USA BIT, thereby extending the more favourable standard of protection granted by the "umbrella" clause in either one of these BIT's into the BIT at hand. Respondent's arguments to the contrary are rejected. The Tribunal therefore has jurisdiction over Claimant's "specific commitments" claim via the MFN clause of Article 4.[1076]

629. Likewise, the *Abaclat v. Argentina* tribunal expressly endorsed the view that umbrella clauses may be imported from other treaties when the applicable treaty does not include such a provision. The tribunal explained:

> [A] BIT sometimes provides for a so-called "Umbrella Clause," which requires a State to observe any obligation arising from particular commitments it has entered into with regard to investments. Under a broad - and not undisputed - interpretation of these clauses as adopted by some arbitral tribunals and scholars, a

[1074] *See EDF v. Argentina*, ICSID Case No ARB/03/23, Award, June11, 2012, ¶¶ 935-936 (CL-0027).
[1075] *EDF v. Argentina*, ICSID Case No ARB/03/23, Award, June11, 2012, ¶ 931 (CL-0027).
[1076] *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶ 396 (CL-0109).

> State's breach of contract with a foreign investor or breach of an obligation under another treaty or law becomes, by virtue of an Umbrella Clause contained in the relevant BIT, a breach of the BIT actionable through the mechanism provided in such treaty, i.e., through ICSID arbitration. The present Argentina-Italy BIT does not contain such Umbrella Clause. Nevertheless, Claimants contend that, based on the MFN clause of Article 3 of the BIT, they are entitled to invoke and rely on the Umbrella Clause contained in the subsequent Argentina-Chile BIT.[1077]

630. Raising another defense to importation of the umbrella clause through the MFN clause, Peru contends that invoking protections under other treaties is not possible because Claimants have not identified another investor "in like circumstances."[1078] As established by the annulment committee in *EDF v. Argentina*, it is sufficient to show that a certain protection is not accorded in the treaty applicable to the dispute and that investors of third States enjoy the protection. The committee endorsed the underlying tribunal's decision concerning the importation of an umbrella clause, explaining:

> If German investors in Argentina have the benefit of a treaty provision requiring the Host State to honour commitments undertaken (or entered into) in relation to their investment, then they are being accorded a form of treatment which is not expressly granted to French investors by the Argentina-France BIT. . . . [T]he umbrella clause is part of the same *genus* of provisions on substantive protection of investments as the fair and equitable treatment clause and other similar provisions which feature in the Argentina-France BIT.[1079]

631. Finally, the *Hochtief v. Argentina* decision referred to by Peru adds nothing to its defense because that tribunal dealt with an entirely different issue, namely whether an MFN clause can be employed to provide an investor claiming under one BIT the benefit of a more

[1077] *Abaclat and others v. The Argentine Republic*, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 317 (CL-0099).
[1078] Counter-Memorial, ¶¶ 841-842.
[1079] *EDF International S.A. and others v. Argentina*, ICSID Case No. ARB/03/23, Award, June 11, 2012, ¶ 237 (CL-0027).

generous arbitration provision incorporated in another BIT.[1080] The *Hochtief* tribunal decided solely the question whether an additional procedural right is capable of importation, not whether a substantive protection can be imported. Therefore, the *Hochtief* award is inapt to this Tribunal's consideration.

632. Based upon the weight of authority identified in its Memorial and above, Claimants are permitted to import Article 3(2) of the Peru-Paraguay BIT and the umbrella clause contained in either the Thailand-Peru BIT (1991), Netherlands-Peru BIT (1994), or United Kingdom-Peru BIT (1993). Claimants are therefore entitled to rely on these provisions as the basis for further breaches of the TPA.

2. Peru Breached Article 3(2) Of The Paraguay-Peru BIT

633. As mentioned above, Articles 10.4(1) and 10.4(2) of the TPA relate to, *inter alia*, the establishment, management, conduct, and operation of foreign investments in Peru.[1081] Article 3(2) of the Peru-Paraguay BIT expressly refers to a State's obligations during the establishment, management, conduct, and operation of the investment to further grant all necessary permits and ensure performance of licensing agreements, as follows:

> A Contracting Party which has admitted an investment in its territory *shall grant the permits necessary in relation to such investment*, *including the performance of licensing agreements and technical, commercial or administrative assistance*. . . .[1082]

The treatment afforded by Peru to Paraguayan investors in accordance with Article 3(2) of the Peru-Paraguay BIT must be accorded "no less favorably" to United States investors in Peru.

[1080] *See* Counter-Memorial, ¶¶ 839-840; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, October 24, 2011, ¶ 56 (RL-0126) ("The Claimant considers that the MFN provision in Article 3 of the BIT entitles it to rely upon the more liberal provisions on dispute settlement in the Argentina-Chile BIT. The Respondent, in contrast, considers that the Article 3 MFN provision applies only to 'substantive' rights, which in its view do not include the dispute settlement provisions, under the BIT.")

[1081] United States-Peru Trade Promotion Agreement, February 1, 2009, Arts. 10.4(1)-10.4(2) (C-0001).

[1082] Agreement between the Republic of Peru and the Republic of Paraguay for the Promotion and Reciprocal Protection of Investments (1994), Art. 3(2) (CL-0068) (emphasis added).

And this protection includes Peru's obligation to grant all necessary permits and to perform its commercial agreements with the investor entities.

634. Claimants established in their Memorial that the following measures, among others, negatively affected the Mamacocha Project's permits and approvals in violation of the TPA:

- **First**, Peru breached its obligation to grant all necessary permits for the Mamacocha Project when it commenced the RGA Lawsuit, and sought to annul the Project's environmental permits, which had been granted years earlier;
- **Second**, Peru breached its obligation to grant all necessary permits when the AEP commenced a criminal investigation and proceeding that attempted to cast doubt on the validity of the Project's environmental permits;
- **Third**, Peru breached its obligation to grant all necessary permits when it arbitrarily denied the Project's CWA; and
- **Fourth**, Peru further breached its obligation to grant all necessary permits when it issued a materially defective CWA and failed to fix it for over six (6) months thereby causing the Project to lose precious time and compounding the negative effects of the RGA Lawsuit.[1083]

635. In its Counter-Memorial, Peru responds that: (i) the CWA was eventually approved and thus it complied with its obligation; (ii) the RGA Lawsuit was not frivolous; and (iii) the AEP's investigation and criminal proceeding "did not affect any qualifying permit."[1084]

636. Peru's defenses are groundless and are based upon factual arguments that have been thoroughly rebutted in **Section II**, *supra***.** Claimants have proved that: (i) the year-long delays in issuing the CWA constituted a debilitating breach of AAA's duties to issue in due time an accurate and complete CWA;[1085] (ii) from the outset, the RGA Lawsuit was baseless and non-meritorious, and its attempt to nullify the Project's environmental permits was a direct breach of

[1083] Memorial, ¶¶ 391-394.
[1084] *See* Counter-Memorial, ¶¶ 847-857.
[1085] *See* Section II.E, *supra*.

Peru's obligation to issue all necessary permits for the Project;[1086] and (iii) the AEP investigation and proceeding is premised on the false allegation that the ARMA officials improperly reclassified the Project and approved the environmental permits for the Project.[1087] The AEP is now attempting to hold CHM's legal representative criminally responsible for the alleged breach of duty by the ARMA officials in approving CHM's permits. The question of whether ARMA lawfully granted the permits appears to be the question being explored in the criminal proceeding. Peru has failed to prove that the permits themselves would not be annulled or affected if the prosecutor prevails in its case. In any event, under Article 3(2) of the Peru-Paraguay BIT, the investor is protected from government misfeasance or malfeasance in approving or denying permits necessary for the Project. Accordingly, Claimants have established, and Peru has not effectively rebutted, that each of the measures regarding permitting breached Peru's obligations to Claimants to grant and maintain all permits necessary for the Project, by dint of the importation of these obligations from the Peru-Paraguay BIT.

3. Peru's Breaches Of The RER Contract Triggered Liability Under The Treaty As A Result Of The Umbrella Clauses Imported Through The TPA's MFN Clause

637. As shown above, Claimants are entitled to rely on the umbrella clause contained in either Article 4(2) of the Thailand-Peru BIT (1991), Article 3(4) of the Netherlands-Peru BIT (1994), and Article 2(2) of the United Kingdom-Peru BIT (1993). Peru opposes Claimants' reliance on these umbrella clauses on the basis that Latam Hydro was not a party to the RER Contract and thus, allegedly cannot assert contractual breaches or breaches of Peruvian law. According to Peru, to allow Latam Hydro "to assert protections under the umbrella clause and

[1086] *See* Section II.B, *supra*.
[1087] *See* Section II.D, *supra*.

hold Peru liable under international law for breach of the RER Contract . . . would be contrary to the privity requirement."[1088] Peru's defense is not sustained by applicable authorities.

638. By consenting to Article 4(2) of the Thailand-Peru BIT, Peru is bound to "observe any obligation, additional to those specified in this Agreement, into which it may have entered *with regard to investments of nationals or companies of the other Contracting Party*."[1089] The tribunal in *Supervision v. Costa Rica* expressly found that an umbrella clause that includes the phrase "in relation to the investments of investors of the other Contracting Party" is broad in scope; and, accordingly, a parent company, here Latam Hydro, may bring contractual obligations entered into by the State and a local subsidiary, here CHM, "under the scope of protection of the Treaty."[1090]

639. The *Enron v. Argentina* tribunal interpreted an umbrella clause in the Argentina-United States BIT that is nearly identical to the three BITs relied upon by Claimants. The tribunal determined that, according to the text of that umbrella clause, "the phrase 'any obligation' refers to obligations regardless of their nature" and noted "[t]ribunals interpreting this expression have found it to cover both contractual obligations . . . as well as obligations assumed through law or regulation."[1091] In other words, the *Enron* tribunal unequivocally found that the umbrella clause protected both contractual rights and rights under applicable domestic law.

[1088] Counter-Memorial, ¶ 861.
[1089] Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Peru for the Promotion of Investments (1991), Art. 4(2) (CL-0069) ("Each Contracting Party shall observe any obligation, additional to those specified in this Agreement, into which it may have entered with regard to investments of nationals or companies of the other Contracting Party.") (emphasis added).
[1090] *Supervision v. Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 287 (CL-0237).
[1091] *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶¶ 273-274 (RL-0139) (*citing Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, March 9, 1998, ¶ 29 (CL-0244); *Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003, ¶ 166 (CL-0245)).

640. Furthermore, the *Enron* tribunal found Argentina breached its obligations to Enron's local subsidiary, TGS, through its series of acts resulting in the "obliteration of [its] commitments" that were "undertaken both under contract and law and regulation in respect of the investment."[1092] As such, in light of the principles handed down by the *Enron* tribunal, the umbrella clauses contained in the above-mentioned treaties permit Claimants to assert claims—both under the RER Contract and Peruvian law—as breaches of the TPA.

641. As will be established in **Section VI**, Peru has committed multiple breaches of the RER Contract and Peruvian law.

D. Peru Is Estopped From Claiming That Addenda 1 And 2 To The RER Contract Were Improperly Granted

642. In its Counter-Memorial, Peru repeated claims that Addenda 1 and 2 are unauthorized and contrary to Peruvian law. But Peru, through its representative MINEM, signed these contract amendments and represented that they complied with Peruvian law. Under established international law principles of estoppel, waiver and good faith, these arguments must be rejected as Peru is estopped from denying and in any event has waived any rights to deny the validity of these contract amendments.

1. The Customary International Law Standard For Estoppel

643. The customary international law principle of estoppel prohibits a State from taking actions or making representations that are contrary to or inconsistent with actions or representations that it had previously made or issued. According to Professor Schreuer, "[e]stoppel obliges a state to be consistent with regard to a factual or legal situation."[1093]

[1092] *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶¶ 276-277 (RL-0139).
[1093] Schreuer I, ¶ 42.

644. The International Court of Justice has identified the circumstances under which the international law principle of estoppel will apply: "a statement or representation made by one party to another and reliance upon it by that party to his detriment or to the advantage of the party making it."[1094]

645. The principle was further elaborated in the Separate Opinion of Judge Alfaro in the Temple of Preah Vihear (*Cambodia v. Thailand*) case:

> Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). . . . *A fortiorí*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. . . . the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right[.][1095]

646. Scholars recognize that estoppel under customary international law is rooted in precepts of good faith and requires a State to act consistently regarding both factual and legal issues:

> Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation. Such a demand may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct. It may be, and often is, grounded on considerations of good faith.[1096]

[1094] Land, Island and Maritime Frontier Dispute (*El Salvador v. Honduras*), 1990 I.C.J. 92, 118 (Sept. 13) (CL-0238).
[1095] Temple of Preah Vihear (*Cambodia v. Thailand*), 1962 I.C.J. 6, 40 (June 15) (Separate Opinion of Judge Alfaro) (CL-0239).
[1096] I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L.Q. 468 (1958), pp. 468-469 (CL-0240).

647. Investment tribunals have found that mere inconsistent behavior and positions by the State may give rise to estoppel, especially when it affects the investor's rights. In *CME v. Czech Republic*, for example, the tribunal held that the respondent was estopped from claiming that a memorandum of understanding that defined licensing conditions for broadcasting was illegal under domestic law.[1097] In that case, the State withdrew the investor's exclusive license under the memorandum of understanding through an administrative procedure.[1098] The *CME* tribunal condemned the State's reversal of its prior legal position, holding:

> [t]his change of the legal position of the host State towards the foreign investor is in the eyes of this Tribunal unacceptable and cannot be given credence or effect. It cannot be easily reconciled with the principle that a party cannot be heard to deny that which it has previously affirmed and on which the other party has acted in reliance.[1099]

648. Likewise, the *ADC v. Hungary* case upheld the proposition that a prior ratification of an agreement by the State prevents the government from arguing the agreement's invalidity under domestic law as a defense in arbitral proceedings. In that case, Hungary entered into agreements with the investor "with the full approval of the Respondent which formed part of a complex structure of agreements."[1100] Indeed, under circumstances similar to the instant case, the *ADC* tribunal found:

> Even if the Respondent was correct in any of its submissions . . . they would nevertheless fail on them simply because they have rested on their rights. These Agreements were entered into years ago and both parties have acted on the basis that all was in order. Whether one rests this conclusion on the doctrine of estoppel or a waiver it matters not. Almost all systems of law prevent parties from blowing hot and cold. If any of the suite of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian

[1097] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, ¶ 488 (CL-0021).
[1098] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, ¶ 488 (CL-0021).
[1099] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, ¶ 488 (CL-0021).
[1100] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 474 (CL-0011).

> Government or its entities to have declined to enter into such an agreement. However when . . . Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation. They cannot succeed because Hungary entered into these agreements willingly, took advantage from them and led Claimants over a long period of time, to assume these Agreements were effective. Hungary cannot now go behind these Agreements. They are prevented from so doing by their own conduct. In so far as illegality is alleged, they would in any event be seeking to rely upon their own illegality.[1101]

649. The tribunal further added that to permit a State to challenge the legality of such agreements years after their conclusion would be an "unconscionable" result.[1102]

2. The Principle Of Estoppel Prevents Peru From Now Alleging That Addenda 1 And 2 Are Invalid

650. In this case, Peru may not, as a matter of customary international law, contend that Addenda 1 and 2 of the RER Contract are invalid. Peru, through its representative, executed the Addenda, thus creating an expectation of validity that induced Claimants to invest further in the Mamacocha Project. Peru cannot in good faith argue that those Addenda were improperly granted years after MINEM assented to the extensions.

651. It is relevant to note that Peru started the Lima Arbitration with the goal of nullifying these two Addenda, but its claims were dismissed for lack of jurisdiction. While Peru had an opportunity to raise counterclaims in this ICSID arbitration, and the procedural schedule even accommodated this possibility, Peru decided not to do so. Therefore, in accordance with the international law principle of estoppel, the contractual and Peruvian law principle of waiver

[1101] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 475 (CL-0011).
[1102] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 475 (CL-0011).

and by dint of its own conduct in this arbitration, the Tribunal must reject Peru's various arguments in this arbitration concerning the alleged invalidity of Addenda 1 and 2.

E. The Amparo Action Is A Red Herring And Not A Valid Basis For Peru's Causation Defense As A Matter Of International Law

652. Peru argues that the RGA Lawsuit and AEP criminal prosecution could not have caused the Mamacocha Project to fail because, at the time of both proceedings, an Amparo Action had been filed by a private citizen, P.J. Begazo López .[1103] As was clarified in **Section II.H.4** of this Reply,[1104] the Second Witness Statement of Ms. Benzaquén,[1105] and in this Section, the private lawsuit that Peru now raises had no impact on the Project as a matter of fact or law at any point in time before the Project was destroyed by Peru's internationally wrongful measures and contractual breaches.[1106] Accordingly, Peru's attempt to break the chain of causation is misguided.

653. **First**, by Peru's own admission, the Amparo Action is a red herring.[1107] Indeed, MINEM and ARMA, which were defendants to that Action, argued that the Action's allegations about the Project's environmental impact were meritless and that Mr. Begazo López had brought his complaint before an improper forum.[1108] Further, it is undisputed that this Action was dismissed ***on two separate occasions*** in the relevant period and was mired in appeals until more than a year after Peru's measures destroyed the Project.[1109] For these reasons, every party that studied this Action during the relevant period came to the conclusion that its chances to succeed were remote and that it was nothing more than a nuisance suit without any visible, much

[1103] Counter-Memorial, ¶¶ 1132-1136.
[1104] *See* Section II.H.4, *supra*.
[1105] *See also* Benzaquén II, ¶¶ 25-38.
[1106] For the avoidance of doubt, Claimants do not allege that either of these court proceedings, which were initiated by private citizens in Arequipa courts, constitute breaches of the TPA or international law.
[1107] *See* Section II.H.4, *supra*.
[1108] *See* Section II.H.4, *supra*; Benzaquén II, ¶¶ 31-33.
[1109] *See* Section II.H.4, *supra*.

less material, impact on the Project.[1110] Whatever impact the Amparo Action might have had as a result of the January 2020 and February 2021 decisions that reinstated Mr. Begazo López 's claims and found them to be valid, occurred ***after*** the Project was terminated through Peru's wrongful measures. In sum, the Amparo Action is merely a sideshow that has no effect on the claims at issue in this case.

654. **Second**, according to general principles of international law, the fact that the Amparo Action resulted in an adverse judgment against a dead Project in 2021 does not break the chain of causation for wrongful measures that occurred between March 2017 and December 2018. This case turns on how the Project was affected by government measures beginning in March 2017 and culminating in December 2018. The fact that the Amparo Action reached a conclusion ***after*** Peru's measures at issue and *after* Claimants were fully damaged as a result establishes that the Amparo Action is wholly irrelevant to the claims and defenses in this case as a matter of international law.

655. Applying Article 14(1) of the ILC Articles,[1111] the tribunal in *Mondev v. United States* held that it was "not necessary to consider any issues of attribution or causation" with respect to a civil lawsuit decided in 1994, which was subsequent to the events giving rise to an alleged FET breach and expropriation in 1991.[1112] It thus follows, in light of the *Mondev* decision, that the Amparo Action, which was decided after the completed measures that

[1110] *See* Section II.H.4, *supra*.
[1111] Article 14(1) of the ILC Articles on State Responsibility ("ILC Articles"), provides: "The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue." International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, T'L L. COMM'N (2001), VOL. II, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (CL-0072).
[1112] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 61-63 (CL-0158).

constituted a breach of FET or expropriation under the TPA, is irrelevant to this Tribunal's consideration.

656. Other investment tribunals have likewise found that events that post-date a breach are irrelevant.[1113] Thus, according to the tribunal in *Infinito Gold v. Costa Rica*, internationally wrongful measures are considered complete at the point in time when the State action or actions constitute a breach of the applicable treaty.[1114] It follows that a breach of FET occurs on the date of the measure and, in the indirect expropriation context, a breach occurs when the measure or measures results in a substantial deprivation.

657. In light of the above, the Tribunal must reject Peru's attempt to artificially inflate the importance of the Amparo Action either as a matter of legal significance or as a matter of causation.

[1113] *See EuroGas Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, August 18, 2017, ¶ 455 (CL-0241); *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, October 25, 2016, ¶ 246 (RL-0070); *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, May 31, 2016, ¶¶ 212, 215 (CL-0242).
[1114] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, June 3, 2021, ¶ 235 (CL-0243).

V. PERU'S DEFENSES TO CHM'S RER CONTRACT CLAIMS ARE GROUNDLESS ON THE EVIDENCE AND UNDER PERUVIAN LAW

A. Peru Misrepresents The Legal Principles That Apply To The Interpretation Of The RER Contract

1. Peru's Contention That Peru's Internal Laws Do Not Apply Is Unsupported, Internally Inconsistent, And Contradicted By Applicable Peruvian Law Principles

658. In their Memorial, Claimants demonstrated that all internal Peruvian laws and regulations govern the interpretation of the RER Contract. This position is supported by Clauses 1.2 and 1.4.30 of the RER Contract, which expressly provide that the RER Contract is "govern[ed]" by "the domestic law of Peru" including "***all*** binding legal laws and Court precedents that comprise the Internal Laws of Peru":

> **1.2.** This Contract has been drafted and signed in accordance with the domestic law of Peru, ***which shall govern its content, performance and any other consequences arising from this Contract***.
>
> **1.4.30. "Applicable Laws"** means ***all binding legal laws and Court precedents that comprise the Internal Laws of Peru***, which may be amended or supplemented by Government Authorities from time to time.[1115]

659. Applying the unambiguous language of these broad governing law provisions, it is straightforward that the General Law on Administrative Procedure ("**GLAP**") and Civil Code are "applicable laws" because they "comprise [part of] the Internal Laws of Peru" which were meant to interpret the RER Contract. This self-evident conclusion is material to the issues in this case for two reasons. **First,** these laws embody critical Peruvian law principles designed to interpret the rights and obligations under the RER Contract. By way of example and not limitation: (i) Articles 168-170 of the Civil Code set forth norms to apply when interpreting

[1115] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002) (emphasis added).

contracts; (ii) Articles 1314 and 1317 of the Civil Code establish that when a party acts with the required ordinary diligence, the party cannot be held responsible for the non-performance of his contractual obligations; and (iii) Article 1328 of the Civil Code provides that a contract cannot be interpreted in a manner that would immunize a party's breach.

660. **Second**, these bodies of law impose independent legal standards that, if violated by a contract party, may result in an independent breach of the RER Contract. By way of example and not limitation: (i) Article 1362 of the Civil Code provides that a contract must be executed in good faith; (ii) Article 1432 of the Civil Code provides that a party cannot make it impossible for its counterparty to perform; (iii) the *actos propios* doctrine under Article IV, paragraph 1.8 of the GLAP provides that an administrative authority may not contradict its own acts; (iv) the *confianza legítima* doctrine under Article IV, paragraph 1.15 of the GLAP provides that an administrative authority may not deprive a private party of its legitimate expectations; and (v) Articles 55(7), 131, 142, and 143 of the GLAP provide that an administrative authority must adhere to the review periods that correspond to its administrative acts.

661. In its Counter-Memorial, Peru rejects the above principles and takes a different tack. According to Peru, the RER Contract sets forth a hierarchy of governing laws. Atop this hierarchy are the RER Contract, the RER Law, and the RER Regulations. The Electricity Concessions Law, the GLAP, and "[o]ther sources of Administrative Law" apply "[s]econdarily," meaning they apply "to the extent they do not distort or skew the purpose of the RER Scheme."[1116] And other "[g]eneral law principles, such as the Peruvian Civil Code" apply "residually," meaning they apply "in the event of persisting lack of sources."[1117] Based on this

[1116] Counter-Memorial, ¶ 869.
[1117] Counter-Memorial, ¶ 869.

hierarchy, Peru argues it is entirely possible if not probable that the Civil Code and GLAP will not apply at all to the issues in this case. Peru's arguments fail for several reasons.[1118]

662. **First**, Peru creates this "hierarchy" argument out of whole cloth. There simply is no textual basis for this construction. Peru relies exclusively on Mr. Monteza's expert report for this argument. It is noteworthy that Mr. Monteza's report does not cite to ***any*** language in the RER Contract or ***any*** legal sources to back up his novel construction. Rather, Mr. Monteza's report set out his "opinion,"[1119] without reference to any textual basis, legal support, or precedent.

663. By contrast to Mr. Monteza's unsupported "opinion," the RER Contract's governing law clauses quoted above (Clauses 1.2 and 1.4.30), by their plain language, establish that ***all*** domestic and internal laws apply without any reference to Peru's so-called "hierarchy." Peru, in crafting its unsupported "hierarchy" argument, fails to address Clauses 1.2 and 1.4.30, much less demonstrate why the actual unambiguous governing law clauses should be interpreted in the manner Peru baselessly claims. Accordingly, Peru fails in its burden of establishing that the RER Contract's unambiguous governing law clauses must be ignored and the Civil Code, GLAP, and other internal Peruvian laws not applied, except in the arbitrary manner espoused by Mr. Monteza in his expert report.

664. **Second**, Peru's so-called "hierarchy" would be unconstitutional if applied to this case. Article 51 of the Peruvian Political Constitution sets forth the actual hierarchy of Peruvian laws. As Dr. Quiñones explains, Article 51 provides that constitutional principles prevail over laws and in turn, laws prevail over regulations.[1120] Article 51 exposes the unconstitutionality of

[1118] Counter-Memorial, ¶¶ 870-871.
[1119] Expert Report of Carlos Javier Monteza Palacios ("**Monteza Report**"), ¶ 233.
[1120] Quiñones II, ¶ 257.

Peru's proposed "hierarchy."[1121] As an initial matter, Peru's "hierarchy" does not even take into account Peru's constitutional law principles which, as established in the constitution itself, are preeminent and at the top of any hierarchy of laws.[1122] This omission is significant because these constitutional principles ***include administrative law principles contained in the GLAP***, such as the principles of good faith, *actos propios*, and *confianza legítima* (Articles 1.8 and 1.15 of the GLAP) that Peru contends should not be applied to interpret the RER Contract. As Dr. Quiñones explains, the Constitutional Tribunal has long-recognized that Articles 3 and 43 of the Political Constitution incorporate these administrative law principles, given that these articles prohibit the State from acting "arbitrarily and unfairly" and without good faith.[1123]

665. Peru's failure to include constitutional principles in its "hierarchy" is dispositive because another constitutional principle, enshrined in Article 103 of the Political Constitution, has been recognized and applied by MINEM, itself, in analogous circumstances. On October 28, 2014, MINEM issued Legal Report No. 026-2014-EM-DGE, which held concessionaire Hidráulica Selva S.A. should be held harmless from government-caused delays to its RER project (the "**Selva Report**").[1124] In so holding, the Selva Report found that, if MINEM refused to extend projects under these circumstances, such a decision would amount to an "abuse of rights."[1125] And MINEM found that Article 103 of the Political Constitution, which is binding on any interpretation of the RER Contract, specifically protects private parties from any "abuse of rights" by the State.[1126] Peru's efforts to ignore Article 103 and other constitutional principles through its proposed "hierarchy" is, thus, unconstitutional.

[1121] Quiñones II, ¶ 257.
[1122] Monteza Report, ¶ 235.
[1123] Quiñones II, ¶ 94.
[1124] Legal Report No. 026-2014-EM-DGE, October 28, 2014 (C-0212).
[1125] Legal Report No. 026-2014-EM-DGE, October 28, 2014, pp. 6-7 (C-0212).
[1126] Legal Report No. 026-2014-EM-DGE, October 28, 2014, pp. 6-7 (C-0212).

666. **Third**, to the extent Peru argues the RER Law created its own hierarchy of laws that is different from the hierarchy contained in Article 51 of the Political Constitution, that argument also fails. Under the Peruvian Constitution, the RER Law is inferior to the Political Constitution and, accordingly, cannot modify or supplant the hierarchy of laws set out in Article 51 of the Political Constitution.[1127] In any event, Peru does not point to any plain language in the RER Law or legislative history that supports its invented "hierarchy."

667. **Fourth**, Peru's proposed "hierarchy" is unconstitutional because it would effectively place the RER Law and the RER Regulations on equal footing. But Article 51 of the Political Constitution provides that laws always predominate over regulations.[1128] This Article 51 principle is embodied in the actual text of the RER Law, which provides that the RER Regulations exist only to ensure the "proper application" of the RER Law.[1129] They cannot conflict with the RER Law.

668. In other words, the RER Regulations may not be read to create new rights, obligations, or restrictions that were not otherwise contained in or consistent with the RER Law. As explained in **Section II.A**, *supra*, this fundamental constitutional precept was reaffirmed in the Echecopar Reports, the legal reports authored by MINEM's outside counsel in April 2018.[1130] In the Echecopar Reports, MINEM's outside counsel determined that it would be unconstitutional to interpret the RER Regulations in a way that allocates the risk of government interference to the concessionaire because such allocation is contrary to the express mandates and objectives of the RER Law.[1131]

[1127] Quiñones II, ¶ 207.
[1128] Legal Report No. 026-2014-EM-DGE, October 28, 2014, pp. 6-7 (C-0212).
[1129] Legislative Decree No. 1002, May 1, 2008, Supplementary Provisions (C-0007).
[1130] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235).
[1131] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § A (C-0235).

669. **Fifth**, both Mr. Monteza and Peru's other legal expert, Mr. Claudio Lava, stray from this invented "hierarchy" when convenient to their arguments. Mr. Monteza, for example, deviated from his "opinion" that the RER Contract provisions sit atop his legal "hierarchy" when he refused to give legal effect to Addenda 1-2, which were mutually agreed modifications of the RER Contract.[1132] As for Mr. Lava, his expert report is replete with instances where he refers directly to the Civil Code to interpret a contract provision. According to Dr. Benavides, Mr. Lava cites to the Civil Code ***more than 136 times*** in his expert report.[1133] His extensive reliance on the Civil Code shows that Mr. Lava does not agree with Mr. Monteza's "opinion" that the Civil Code only applies "residually" and should not be applied to determine the main issues in this arbitration.

670. **Sixth**, Peru does not identify what portions of the Civil Code or GLAP it contends are in conflict with the RER Contract, RER Law, or the RER Regulations. As explained above, Peru's "hierarchy" argues that the GLAP and Civil Code apply under the RER Promotion, but only where they are in conflict with the RER Contract, RER Law, or the RER Regulations.[1134] Entirely missing from the Counter-Memorial or the expert reports from Messrs. Monteza or Lava is even ***one example*** where applying these allegedly "secondary" or "residual" sources of law would result in such a conflict. Similarly, the Counter-Memorial and expert reports entirely fail to come up with even ***one exampl***e where the Civil Code should not apply (even residually) because the RER Promotion had already filled the gap that the Civil Code was intended to fill.

671. Peru's failure to identify any such conflicts is unsurprising. The Civil Code simply is not in conflict with the RER Law or RER Regulations because those instruments do not

[1132] Monteza Report, ¶¶ 101-115.
[1133] Benavides II, ¶ 37.
[1134] Monteza Report, ¶ 235.

contain a customized set of norms for interpreting RER Contracts. Dr. Benavides explains that this gap in the RER Law and RER Regulations suggests the legislature intended for the Civil Code to be used to interpret the RER Contracts, just as the Civil Code is applied to all other commercial and administrative contracts:

> By a criterion of economy and specialty, the general rules applicable to all contracts are contained in the Civil Code and those rules apply to administrative, commercial, corporate, labor contracts, etc., as long as they are compatible with their nature. In a contract, be it private or administrative, there are mechanisms, remedies, defenses, etc. that are of common application and that already have a broad development in the doctrine, jurisprudence and the legislation itself. The Civil Code regime is not, therefore, just a supplementary regime, but the general contracting regime.
>
> If the legislator had wanted, for example, in relation to force majeure, remedies for non-compliance, standards of accountability, absence of fault, contractual termination, etc., a different regime applied to an RER contract of the one foreseen in the general contracting regime, then they would have established it in the RER Regulation, since in Administrative Law there is no special regulation for such aspects. But it has not done so, precisely because the intention is for the general regime to apply.[1135]

672. **Seventh**, contrary to Peru's after-the-fact arguments in this arbitration, MINEM repeatedly applied the Civil Code, GLAP, and other bodies of Peruvian law that, according to Peru, are "secondary" or "residual" to the RER Promotion and should not apply in this case. Below is a non-exhaustive list of examples:

a. **October 28, 2014**: MINEM issued the Selva Report, which, among other things, concludes that the Grantor under the RER Contract had an obligation under Article 1314 of the Civil Code to not punish a contract party that acts with the required ordinary diligence.[1136]

[1135] Benavides II, ¶¶ 43-44.
[1136] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0212).

b. **July 3, 2015**: MINEM issued MR 320, which, among other things, concludes that the Grantor had an obligation under Article 1314 of the Civil Code to not punish a contract party that acts with the required ordinary diligence.[1137]

c. **October 6, 2016**: MINEM issued the Sosa Report, which, among other things, concludes that: (i) the application of the Civil Code "is justified" under Clauses 1.2 and 1.4.30 of the RER Contract; and (ii) the Grantor must adhere to the legal principles found under Articles 1314, 1315, 1316, 1317, 1498 of the Civil Code.[1138]

d. **December 29, 2016**: MINEM issued MR 559, which, among other things, concludes that the Grantor had an obligation under Article 1362 of the Civil Code to interpret the RER Contract in accordance with the principle of good faith.[1139]

e. **June 28, 2017**: MINEM issued Legal Report No. 122-2017-MEM/DGE, which, among other things, concludes that: (i) the application of the Civil Code "is justified" under Clauses 1.2 and 1.4.30 of the RER Contract; and (ii) the Grantor must adhere to the legal principles found under Articles 1314, 1315, 1316 of the Civil Code.[1140]

f. **April 5 and 17, 2018**: MINEM's outside counsel issued the Echecopar Reports, which, among other things, conclude that the Grantor must adhere to the legal principles found under Articles 1314 and 1315 of the Civil Code.[1141]

673. **Eighth**, Peru essentially asks this Tribunal to adopt an exceptional interpretation of the Civil Code, GLAP, and Peruvian Constitutional law, which fundamentally is at odds with prior determinations by MINEM throughout the period of the Project. Peru is estopped from changing its mind now.

674. For these reasons, Peru's proposed "hierarchy of laws" should be rejected and the Civil Code, GLAP, and other internal laws should be applied to interpret the RER Contract, in conformity with Clauses 1.2 and 1.4.30 and the actual hierarchy of laws set out in Article 51 of the Political Constitution.

[1137] Addendum 1 to the RER Contract, July 22, 2015, p. 8 (C-0008).
[1138] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).
[1139] Addendum 2 to the RER Contract, January 3, 2017, p. 8 (C-0009).
[1140] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[1141] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).

B. Peru Misrepresents The Nature Of The RER Contract

1. The RER Contract Is Not A "*Contrato Normado*" That Can Impose One-Sided Terms And Conditions

675. In their Memorial, Claimants demonstrated the RER Contract is a public-private agreement in which the Parties collaborated to provide the public service of supplying renewable energy to Peru. In this respect, Peru and CHM were partners under the RER Contract to carry out the goals of the RER Law. And, as with any partnership, the Parties agreed to allocate risks and responsibilities to achieve their mutual goal.

676. In its Counter-Memorial, Peru argues the RER Contract is not a public-private partnership agreement because CHM assumed ***all risks and responsibilities*** while Peru assumed none. Peru argues the RER Contract is a "regulated contract" (*contrato normado*) under which the State may impose one-sided rules and limitations that further the public interest.[1142] Claimants address Peru's risk-allocation arguments in the next Section but, here, address Peru's contention that the RER Contract is a "regulated contract" under Peruvian law.

677. Regulated contracts are specific types of contracts under Peruvian law that allow the State to impose inflexible conditions that its counterparty cannot ignore or modify.[1143] It is undisputed that these contracts are governed by Article 1355 of the Civil Code, which provides:

> **Article 1355.- Rules and Limitations on Contracting**
>
> The law, for reasons of social, public or ethical interest, can impose rules or set limits to the contents of the contracts.[1144]

678. Peru contends the RER Contract fits this description and that the temporal restrictions in Clauses 1.4.22 and 8.4 (which provide the Term Date and COS deadline,

[1142] Counter-Memorial, ¶ 905.
[1143] Benavides II, ¶¶ 55-57.
[1144] Peruvian Civil Code of 1984, Art. 1355 (CL-0149).

respectively, cannot be extended for "any reason")[1145] are inflexible "rules or set limits" that are commonplace in regulated contracts. But this argument fails for three reasons.

679. **First**, the RER Contract cannot be a *contrato normado* because only ***private contracts*** can be characterized as regulated contracts under Article 1355 of the Civil Code, and the RER Contract is not a private contract.[1146] As Dr. Benavides explains, regulated contracts are limited to unique situations where the State attempts to regulate the contents of private contracts in order to protect or serve a public interest.[1147] In Dr. Benavides's words:

> The RER Contract is not a regulated contract. In the first place, because the concept of a regulated contract is used by the Civil Law doctrine to describe the phenomenon of interventionism or contractual management in the field of private contracting. That is, there are only regulated contracts, in the field of private law contracts. This category cannot be used for administrative contracts, such as the RER Contract.
>
> In effect, the phenomenon of the regulated or directed contract arises when the State begins to rigidly regulate the content of private contracts in which the need to protect a weak party or to safeguard the interest of the consumer or the sectors that are less-favored and more vulnerable, imposing, through legislation, an important part of the content of the contract. This was the case in the legislation of several countries with contracts for the supply of public services, with telephone contracts, with certain banking services, with the sale of products and basic services, etc.[1148]

680. This requirement is dispositive here because the RER Contract is not a private contract, *i.e.*, a contract executed between two private parties. Rather, the Parties are in complete agreement that the RER Contract is an administrative contract because one of the contract Parties is a public entity. In the words of Peru's administrative law expert, Mr. Carlos Monteza, "[t]here

[1145] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).
[1146] Benavides II, ¶¶ 58-61.
[1147] Benavides II, ¶¶ 58-61.
[1148] Benavides II, ¶¶ 58-59.

is no questioning that the RER Contract is an administrative contract by nature" and, thus, not a private contract.[1149]

681. **Second**, the RER Contract cannot be a *contrato normado* because its contents were not predetermined by legislation.[1150] Dr. Benavides explains that another unique aspect of regulated contracts is that they include boilerplate language taken wholesale from legislation enacted by the State:

> As we have explained in previous lines, regulated contracts are those regulated in detail by law. Its clauses are the subject of a previous regulation, so that the parties do not have space to be able to negotiate the content of the contract.[1151]

682. This fact is dispositive here because neither the RER Law nor its progeny contain any boilerplate language that had to be added to the RER Contract. Instead, as Dr. Benavides confirms, the RER Law allowed a contract party, the State, to draft the RER Contract as it saw fit:

> The RER Law does not predispose the content of the RER contract. As we have explained in paragraph 41 of this Report, from a reading of the RER Law and the RER Regulation, it is noted that these regulations do not impose a content on the RER Contract, but rather leave a wide space that the Grantor, the Peruvian State, to use in the drafting of the contractual clauses of the RER Contract.[1152]

683. **Third**, even if the RER Contract was deemed to be a *contrato normado* (which it was not), its allegedly inflexible terms and conditions must further an express public interest set forth in the RER Law or its progeny. Peru's civil law expert, Mr. Claudio Lava, to whom Peru cites in support of its argument the RER Contract is a *contrato normado*, does not identify any such public interest, much less one that would be furthered by Peru's inflexible and rigid

[1149] Monteza Report, ¶ 236.
[1150] Benavides II, ¶¶ 62-64.
[1151] Benavides II, ¶ 63.
[1152] Benavides II, ¶ 63.

interpretation of the temporal limitations set forth in Clauses 1.4.22 and 8.4 of the RER Contract.[1153]

684. To the extent Peru argues the "public interest" served by its interpretation is the interest of limiting the amount of premiums that consumers would pay over the life of the RER Promotion—as suggested by Peru's other legal expert, Mr. Monteza, who, notably, does ***not*** argue the RER Contract is a *contrato normado*[1154]—that argument fails because that interest is found nowhere on the face of the RER Law or RER Regulations. Rather, as explained in **Section II.A** *supra*, the undisputed "public interest" codified under the RER Law and flowed down to the RER Regulations and the RER Contract is the public's interest in promoting, protecting and incentivizing RER projects.[1155] Because that interest would be undermined by imposing inflexible and rigid restrictions on concessionaires whose projects were delayed through no fault of their own, Peru's interpretation must be rejected.

2. Peru, Not MINEM, Is The Grantor Under The RER Contract

685. The Parties disagree on a fundamental element of the RER Contract, namely, who is the Grantor. Claimants explained in the Memorial that the Peruvian State was the Grantor and MINEM only executed the RER Contract as the State's designated representative. Peru, however, argues MINEM was the Grantor under the RER Contract in its individual capacity and ***not*** as a representative of the State.[1156]

686. This disagreement is fundamental to many issues in dispute. If, as Claimants have proven, the State was the Grantor, then ***all*** government measures that adversely affected the Project (*e.g.*, the RGA Lawsuit and AAA's delays) must be imputed to the Grantor under the

[1153] Expert Report of Claudio Lava Cavassa ("**Lava Report**"), ¶¶ 2.25-2.26.
[1154] Monteza Report, ¶ 255.
[1155] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).
[1156] Counter-Memorial, ¶¶ 880-892.

RER Contract. Under Article 43 of the Peruvian Constitution, the Peruvian State is "unitary and indivisible."[1157] The State is, thus, responsible for the actions of its state agencies, like MINEM, and sub-state entities, like the RGA, both of whose actions are at issue in the instant case. Conversely, if MINEM was the Grantor under the RER Contract in its individual capacity—which it was not—then interferences by government agencies other than MINEM may not be imputed to the Grantor and, hence, would not constitute contractual breaches.

687. In this Section, Claimants demonstrate that the plain language, context, and goals of the RER Contract unambiguously provide that CHM's counterparty is the entire State of Peru and not just MINEM.

a. Applicable Canons Of Contract Interpretation Under Peruvian Law Confirm The State Is The Grantor Under The RER Contract

688. To determine the meaning of the term "Grantor" in the RER Contract, the relevant contractual provisions must be interpreted in accordance with applicable canons of contract interpretation under Peruvian law, which all Parties agree, are embodied in Articles 168-170 of the Peruvian Civil Code.

689. As shown below, the Peruvian Civil Code identifies a three-step process for contract interpretation. **First**, Article 168 provides that contractual language must be interpreted in accordance with its plain language and the principle of good faith.[1158] **Second**, Article 169 provides that if any doubts remain, the context and language of other provisions must be reviewed. This second step is referred to as a "systematic" interpretation.[1159] **Third**, as a final resort, Article 170 provides that if the first two rules result in the potential for several

[1157] Quiñones II, ¶ 55.
[1158] Benavides II, ¶ 215.
[1159] Benavides II, ¶ 215.

interpretations, then the alternative is chosen that has the "most appropriate meaning" based upon "the nature and purpose" of the contract.[1160]

> **Article 168.** The contract must be interpreted in accordance with what has been expressed in it and in accordance with the principle of good faith.
>
> **Article 169.** The contract clauses are interpreted one through the other, attributing to the unclear ones the meaning that results from the set of all.
>
> **Article 170.** The expressions that have several meanings must be interpreted in the most appropriate meaning to the nature and purpose of the contract.

690. Peru noticeably fails to apply these canons of contract interpretation when analyzing the contract provisions that are relevant to the identity of the contract parties. Instead, Peru resorts to cherry-picking contractual language to suggest the Parties intended for MINEM to act as Grantor under the RER Contract in its individual capacity. However, when read in conformity with Peruvian law canons of contract interpretation, it is indisputable that the Parties intended for the entire State, and not solely MINEM, to assume this role under the RER Contract.

(1). *Claimants' Interpretation Is Supported By Application Of Article 168 And The Plain Language Of The RER Contract*

691. Claimants' interpretation is supported by the plain language text defining the contract parties. For example, as demonstrated below, the Minutes to the RER Contract and the Minutes to each of its six (6) separately negotiated and executed Addenda, define "Grantor" as the Peruvian State. As confirmed by Dr. Benavides, these Minutes became binding terms under the RER Contract when signed and executed by the Parties.[1161]

> Minutes to RER Contract: *You are hereby requested to issue, in our Registry of Public Records, a public record which contains*

[1160] Benavides II, ¶ 215.
[1161] Benavides II, ¶ 104.

> *record of the Concession Agreement for the Supply of Renewable Energy to the National Interconnected Electrical Grid (hereafter referred to as the Concession Agreement) entered into by the first party,* ***the State of the Republic of Peru (hereafter referred to as the Grantor)***, acting via the Ministry of Energy and Mines . . . .
>
> Minutes to Each Addendum to the RER Contract: *You are hereby requested to issue, in your Registry of Public Records, a public record which contains record of [this] Addendum [to] the Concession Agreement for the Supply of Renewable Energy to the National Interconnected Electrical Grid (hereafter referred to as the Concession Agreement) entered into by the first party,* ***the State of the Republic of Peru (hereafter referred to as the Grantor)***, acting via the Ministry of Energy and Mines.[1162]

692. The Chapeau to the RER Contract is similarly explicit, clarifying that the State was the Grantor and MINEM would serve as its designated representative:

> The Concession Contract for the Supply of Renewable Energy (the "Contract") is made and entered into by and between ***the Peruvian State, herein represented by the Ministry of Energy and Mines (the "Grantor")***, and the Concessionaire Company, subject to the following terms and conditions:[1163]

693. This explicit text must be accorded its common-sense meaning. As confirmed by Dr. Benavides, Article 1361 of the Civil Code prohibits parties from interpreting the contract in a manner that disavows or ignores words on the page.[1164] Yet that is precisely what would happen if the Tribunal adopted Peru's interpretation that MINEM was the Grantor in its individual capacity, as depicted below.

[1162] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Minutes (C-0002).
[1163] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Preamble (C-0002).
[1164] Benavides II, ¶ 112.

Conste por el presente documento, el Contrato de Concesión para el Suministro de Energía Renovable (en adelante, Contrato), que celebran el Estado de la República del Perú, que actúa a través del Ministerio de Energía y Minas (en adelante, el Concedente), y la Sociedad Concesionaria; en los términos y condiciones siguientes:

"1.4.31 Ministerio: Es el Ministerio de Energía y Minas, que en representación del Estado firma el Contrato"

694. Peru fails to give any meaning to the above or to explain why it should be disavowed. Peru instead ignores this text altogether and cites Clauses 2.2.1, 1.4.34, and 1.4.35 as "confirm[ation]" that Claimants' interpretation is wrong. These clauses provide that the "Ministry" is authorized "to act as Grantor" and a "Party" under the RER Contract:

> **2.2.1.** The Ministry is duly authorized under the Applicable Laws to act as Grantor of this Contract. The execution, delivery and performance hereof by the Ministry shall fall within its powers, are consistent with the Applicable Laws and have been duly authorized by the Government Authority.
>
> **1.4.34. "Party"** means, as the case may be, the Ministry or the Concessionaire Company.
>
> **1.4.35. "Parties"** means, together, the Ministry and the Concessionaire Company.[1165]

695. But Peru's interpretation is misleading because the term "Ministry" as used in those definitions does not stand for MINEM in its individual capacity, as Peru suggests without any evidentiary support. Rather, "Ministry," as defined in the RER Contract, means MINEM in its capacity as a representative of the "Government," *i.e.*, the Peruvian State:

> **1.4.31. "Ministry"** means the Ministry of Energy and Mines, ***which enters into this Contract on behalf of the Government***.

[1165] Counter-Memorial, ¶ 881.

> **1.4.19. "Government"** means the Government of the Republic of Peru.[1166]

696. These clauses demonstrate that the Parties clearly intended for the State to be the Grantor and for MINEM to be the State's representative. MINEM signed the contract only in its representative capacity, not in an individual capacity. As Dr. Benavides explains, MINEM's representative role under this contract means that MINEM is ***not*** a contract party in its individual capacity and its actions under the RER Contract are treated as if the State, itself, is undertaking the actions:

> The term "on behalf of" has no ambivalent, secret, or recondite meaning. In legal terms, whoever acts on behalf of another, in the conclusion of a legal act, such as a contract, does not enter into the contract as a party, because the legal effects of the signed contract do not fall on the legal sphere of the person signing it, representative, that is, in the present case, MINEM, but directly on the legal sphere of the represented party, in the present case, the State of the Republic of Peru. The legal effects, in the present case, are the execution of the RER Contract. The legal effect of the conclusion of the RER Contract is the birth of the mandatory relationship. In other words, the RER Contract binds not the person who signed it, as representative, MINEM, but the represented, the State.[1167]

697. Peru's interpretation ignores the plain text in the Minutes, Chapeau, and Clause 1.4.31 that state, uniformly and unambiguously, that MINEM was acting as a representative of the State when it executed the RER Contract. There are no other reasonable and common sense interpretations that would raise a possibility of ambiguity.

698. Peru's contrary interpretation in this proceeding also does not satisfy Article 168's requirement that "[t]he contract must be interpreted in accordance with . . . the principle of

[1166] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.31 and 1.4.9 (C-0002).
[1167] Benavides II, ¶ 116. (emphasis in original)

good faith."[1168] This requirement calls for an honest and fair interpretation of the contract.[1169] But Peru's current interpretation ignores the plain text of the RER Contract and its context and is, therefore, neither honest nor fair.

699. Furthermore, it is neither honest nor fair for Peru to now adopt an interpretation of the RER Contract that is completely contrary to how it interpreted the RER Contract during the relevant period. Yet, that is precisely what Peru tries to do here. As an example and as explained in **Section V.A.1**, *supra*, in 2014, MINEM issued the Selva Report, which confirmed that the State is the Grantor under the RER Contract and MINEM is merely its designated representative.[1170] This admission arose from a situation, almost identical to the situation here, where government-caused interferences to another RER project made that project's advancement impossible.[1171] MINEM held in the Selva Report that government-caused delays to RER projects amount to an "abuse of rights" and that such abuse must be imputed to the State in its capacity as "Grantor" under the RER Contract, as demonstrated from the below excerpt from that Report:

> It should be noted that the second paragraph of Article 103 of the Peruvian Political Constitution provides "The Constitution shall not protect any abuse of rights." This means that, in making any decision, the Administration should avoid abuses that are apparently lawful, when in fact, such as in the case at hand, the Administration's own omission gave rise to the Concessionaire Company's non-compliance with the periods under the Supply Contract; furthermore, ***since the State is "one and indivisible" pursuant to Article 43 of the Peruvian Constitution, such non-compliance is not attributable to the Concessionaire Company but to the Administration, therefore, to the Grantor***.[1172]

[1168] Benavides II, ¶ 215.
[1169] Quiñones II, ¶ 77.
[1170] Legal Report No. 026-2014-EM-DGE, October 28, 2014 (C-0212).
[1171] Legal Report No. 026-2014-EM-DGE, October 28, 2014 (C-0212).
[1172] Legal Report No. 026-2014-EM-DGE, October 28, 2014, pp. 6-7 (C-0212).

700. Though the Selva Report arose from a different RER project, its conclusions are apposite because its analysis concerns the same legal framework that governs the RER Contract. Moreover, the fact that MINEM issued this report in 2014 is particularly relevant here because that is the same year that MINEM (on behalf of Peru) and CHM executed the RER Contract.[1173] Hence, the Selva Report memorializes MINEM's contemporaneous understanding that the State, and not MINEM, is the Grantor under the RER Contract. Peru's *ex post facto* interpretation to the contrary is not in good faith because it deviates entirely from what Peru believed when it executed the RER Contract. Hence, that interpretation must be rejected under Article 168 under the Civil Code.

(2). *Claimants' Interpretation Is Consistent With The Systematic Canon Of Interpretation Under Article 169*

701. The systematic canon of interpretation under Article 169 removes any doubt that the State is the Grantor and MINEM is only its designated representative. As Dr. Benavides explains, this canon requires the interpreter to ensure that the meaning of a provision is consistent with the other provisions and legal principles embodied in the overall contract.[1174] In other words, the Parties cannot interpret a specific contract provision in a manner that would render other provisions meaningless, superfluous, or unenforceable.

702. But Peru's interpretation would render meaningless many of the State obligations under the RER Contract, including the Grantor's chief obligation to pay CHM its "Guaranteed Revenue" during the Term of Validity.[1175] This obligation was the *sine qua non* of the RER Contract. The Grantor guaranteed CHM a fixed price for a predetermined amount of energy

[1173] Legal Report No. 026-2014-EM-DGE, October 28, 2014, pp. 6-7 (C-0212).
[1174] Benavides II, ¶ 215.
[1175] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.36 and 6.3 (C-0002).

(*i.e.*, Guaranteed Revenue) on an annual basis over a 20-year period (*i.e.*, Term of Validity).[1176] If the annual revenues that CHM received fell below the Guaranteed Revenue, the Grantor guaranteed CHM it would receive annual "Premium" payments to make up the difference, as demonstrated in the following Clauses:

> **1.4.26. "Guaranteed Revenue"** means the annual revenue that the Concessionaire Company shall receive for the net injections of energy up to the limit of the Awarded Energy paid at the Award Tariff. It will only apply during the Term of Validity.
>
> **1.4.39. "Premium"** means the annual amount that is required for the Concessionaire Company to receive the Guaranteed Revenue, after subtracting the net revenue received by transfers in the COES. It will only apply during the Term of Validity of the corresponding Award Tariff.[1177]

703. Peru refers to this duty as the "main obligation" for the Grantor under the RER Contract.[1178] Peru omits to mention, however, that MINEM, in its individual capacity, ***is legally incapable*** of fulfilling this obligation. Rather, OSINERGMIN is the only governmental entity that is involved in this process,[1179] as provided under Article 7.3 of the RER Law:

> **Article 7.- Determination of regulated generation prices applicable to the RER**
>
> 7.3 OSINERGMIN shall establish on a yearly basis the expected surcharge on the Connection Toll, which shall include the settlement of the previous year's surcharge.[1180]

704. OSINERGMIN's task is to "establish on a yearly basis the expected surcharge" that users must pay in order for Peru to have the requisite funds to pay the Premiums under the

[1176] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.36 and 6.3 (C-0002).
[1177] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.26 and 1.4.39 (C-0002).
[1178] Counter-Memorial, ¶ 125.
[1179] The Comité de Operación Económica ("**COES**") is not a governmental entity but, rather, a private nonprofit organization made up of generators, distributors, and free users, whose main purpose is to coordinate the interconnected system operations to achieve the lowest operating costs.
[1180] Legislative Decree No. 1002, May 1, 2008, Preamble and Art. 7.3 (C-0007).

RER Contracts. This interpretation is confirmed by the RER Contract, which expressly provides that OSINERGMIN is the party responsible for ensuring CHM receives the necessary Premium payments:

> **6.3.3.** At the end of each Tariff Period, a settlement shall be prepared for the total amount of the Premium, calculated according to the relevant Procedure ***as approved by OSINERGMIN***.[1181]

705. As explained in detail in the Second Expert Opinion of Dr. Quiñones,[1182] the Premium-payment process can be summarized as follows. At the end of each year, OSINERGMIN compares the revenue RER concessionaires received versus their Guaranteed Revenue annual figure in their RER contracts. If the actual revenue is lower than the Guaranteed Revenue figure, OSINERGMIN calculates the surcharge that must be issued to regulated users to pay for the Premiums.[1183] After the users' payments are used to pay the distributors and generators, COES, at OSINERGMIN's direction, distributes the Premiums to the RER concessionaires.[1184] In other words, the Premium-payment process under the RER Contract is supervised and controlled by OSINERGMIN.[1185] MINEM has absolutely no role throughout this process.[1186] And MINEM does not have the capacity nor authority to order OSINERGMIN to calculate the tariffs accurately or to make the Premium payments.[1187] OSINERGMIN is a separate government agency outside of MINEM's control.[1188] Peru concedes this fact, noting in

[1181] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 6.3.3 (C-0002). (emphasis added)
[1182] Quiñones II, ¶¶ 42-44.
[1183] Quiñones II, ¶¶ 42-44.
[1184] Quiñones II, ¶¶ 42-44.
[1185] Quiñones II, ¶¶ 42-44.
[1186] Quiñones II, ¶¶ 42-44.
[1187] Quiñones II, ¶¶ 42-44.
[1188] Quiñones II, ¶¶ 42-44.

its Counter-Memorial that MINEM is incapable of "binding other ministries or authorities which are autonomous and independent from" MINEM.[1189]

706. Accordingly, the RER Contract would make no sense if MINEM were deemed the Grantor in its individual capacity. Clause 6.3 plainly establishes the responsibility of the State to provide the payments through a system of invoicing and payments established by OSINERGMIN. But MINEM, itself, cannot carry out this responsibility. Peru's interpretation of who was CHM's counterparty, therefore, would nullify the *quid pro quo* for CHM entering into the contract and investing in the Project because such an interpretation would render meaningless the Grantor's undisputed "main obligation" under the RER Contract to ensure CHM receives "Guaranteed Revenue" and "Premiums."

707. As demonstrated below, Dr. Quiñones identifies other responsibilities and obligations that are expressly assigned to OSINERGMIN under the RER Contract and, therefore, could not be carried out by MINEM in its individual capacity.[1190] If MINEM entered into the RER Contract in its individual capacity and not as a representative of the State, then CHM would have lacked the ability to enforce these obligations under the RER Contract's dispute clause. Conversely, if the State is the Grantor under the RER Contract, then these obligations make perfect sense because the State, unlike MINEM, has the authority to compel OSINERGMIN to act and would be legally responsible if OSINERGMIN were to fail to undertake these duties:[1191]

[1189] Counter-Memorial, ¶ 889.
[1190] Quiñones II, ¶ 47.
[1191] Other RER Contract provisions would similarly be rendered meaningless by Peru's interpretation of "Grantor" because they assign specific tasks to other Government Authorities, such as Clause 1.4.26 (which requires the Grantor to make the Guaranteed Revenue payments through Premiums, which can only be done through OSINERGMIN's calculations and instructions); Clause 1.4.39 (same); Clause 6.2 (which requires OSINERGMIN to make adjustments to the "Award Tariff" in certain circumstances); Clause 7.6 (which requires OSINERMING to assess events of *force majeure*); and Clause 10.2 (which requires OSINERGMIN to assess penalties in certain circumstances). Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.26, 1.4.39, 6.2, 7.6, and 10.2 (C-0002).

Clause	Content	Entity in Charge
1.4.8	"Premium Charge: means the unit charge **determined by OSINERGMIN** to ensure that the Awardee receives the appropriate Premium. . . ."	OSINERGMIN COES
4.6	"The Concessionaire Company shall, within a maximum term of six (6) months upon the Closing Date, submit the detailed schedule for the execution of works, providing information enough -**to the satisfaction of the OSINERGMIN**- to oversee the progress made at the project. Such schedule, a printed as well as a digital (MS Project) version of which shall be submitted, shall at least include the following deadlines: financial closing, commencement of civil works, arrival of the main electromechanical equipment at the construction site, Operation Start-up of electromechanical equipment and Commercial Operation Start-up and shall identify the works critical path. Moreover, the Concessionaire Company shall, on a quarterly basis, submit to OSINERGMIN a detailed report on the progress made in connection with the project tasks in the terms and **within the dates established by the OSINERGMIN to that end.**"	OSINERGMIN
4.7	"**The OSINERGMIN shall oversee the Works Execution Schedule**; to that end, the Concessionaire Company shall provide to such entity sufficient information as may be required."	OSINERGMIN
4.8	"**The OSINERGMIN shall oversee and conduct the technical inspection of the Works in order to verify compliance with the applicable technical regulations and quality and safety standards**; to that end, the Concessionaire Company shall provide to such entity sufficient information as may be required. This control shall be carried out in accordance with the industry's applicable regulations and the procedures of the OSINERGMIN."	OSINERGMIN
6.3.3	"At the end of each Tariff Period, a settlement shall be prepared for the total amount of the Premium, calculated according to the relevant Procedure **as approved by OSINERGMIN**."	OSINERGMIN
6.3.4	"The Premium so calculated at the end of the Tariff Period shall result in a debit or credit charge for the Concessionaire Company, as appropriate, which shall be cancelled in monthly installments over the twelve (12) months immediately following the annual settlement period, at the applicable monthly interest rate equal to the annual update rate set forth in Article 79 of the LCE."	OSINERGMIN
8.3	"**Delays in the Works Execution Schedule until December 31, 2018** If, in the context of the quarterly audit, the OSINERGMIN finds any delays in the performance of the Works Execution Schedule, the Concessionaire Company shall be under a duty to increase the amount of the Performance Bond by 20% with respect to the amount in force on the date of the audit. **This obligation shall be fulfilled within ten (10) Days from the receipt of a request from the OSINERGMIN to that effect**. Upon failure to increase the	OSINERGMIN

	amount of the bond within the specified period, and after a report is issued by the OSINERGMIN, the Ministry shall enforce the Performance Bond whose amount has not been increased. In this case, the Concessionaire Company shall post, with no need of any demand, a new Performance Bond for an amount equal to the amount enforced, within a period of ten (10) Days from the expiration of the term granted by the OSINERGMIN to submit the bond increase. Upon failure to comply with this obligation, the Contract shall be automatically terminated".	

708. As Dr. Quiñones explains, Claimants' interpretation is supported by Clause 1.4.2 of the RER Contract.[1192] This Clause, set forth below, presupposes the Grantor will be able to instruct or bind a "Government Authority to perform the acts referred to in this Contract or the Applicable Laws."[1193] This Clause would be rendered meaningless if MINEM were deemed the Grantor in its individual capacity because, as Peru concedes, MINEM is incapable of binding any other government authority.

> **1.4.2. "Government Authority"** means any judicial, legislative, political or administrative authority in Peru authorized by the Applicable Laws to issue or interpret rules or decisions, whether general or special in nature, with binding effects upon any person under their scope. Any reference to a specific Government Authority shall be deemed a reference to such Government Authority or its successor or any other authority appointed by such Government Authority to perform the acts referred to in this Contract or the Applicable Laws.[1194]

709. For these reasons, Peru's attempt to disavow its role as Grantor under the RER Contract must be rejected.

(3). *Claimants' Interpretation Is Consistent With The Purpose Canon Of Interpretation Under Article 170*

710. Claimants' interpretation of "Grantor" is also consistent with the "purpose" canon of interpretation under Article 170. As demonstrated immediately above, the quintessential

[1192] Quiñones II, ¶¶ 45-46.
[1193] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.2 (C-0002).
[1194] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.4.2 (C-0002).

purpose of the RER Contract is to ensure the RER concessionaire receives the promised Guaranteed Revenue. Only the State can make this sovereign guarantee. Hence, any interpretation where MINEM is deemed to be the Grantor in its individual capacity would be incompatible with fulfilling the principal purpose of the RER Contract.

711. Moreover, it is undisputed that the broad general purpose of the RER Contract is to implement the RER Law. This fact is significant because the RER Law was enacted ***by the State*** to further goals that are unique ***to the State***. These goals include: (i) the "implementation of the United States – Peru Trade Promotion Agreement" that was signed and executed by the State; (ii) ensuring that 5% of the electricity generated in Peru comes from clean energy resources, which the RER Law describes as a matter of "National Interest"; and (iii) the "improve[ment] [of] the quality of life of the population and [the] protect[ion] [of] the environment by promoting investment in electricity production."[1195] Given that these goals arise from a public interest of the State and not to MINEM alone, it would be consistent with the RER Contract's purpose to interpret that the State acted as Grantor. To state this principle another way, CHM had every reason to believe and rely upon the State's promise that it would be implementing the goals of the RER Law through its administration of the RER Contract. If any government authority violated those goals – such as by interfering with the Project – the State is responsible.

b. Peru's Standing Defense Is Groundless And Unsupported

712. In its Counter-Memorial, Peru argues, without citation or authority, that the State cannot serve as Grantor because it lacks standing to serve as a contract party under Peruvian law.[1196] In support of this argument, Peru cites the report of its administrative law expert, Mr.

[1195] Legislative Decree No. 1002, May 1, 2008, Preamble and Art. 2 (C-0007).
[1196] Counter-Memorial, ¶¶ 883-888.

Monteza, who cavalierly concludes the State "lacks legal standing" to serve as a contract party without providing any citation, authority, or case law precedent to support this conclusion.[1197]

713. Peru's standing argument is groundless. As Dr. Quiñones observes, Article 63 of the Peruvian Political Constitution expressly confers on the State standing both to enter into contracts like the RER Contract at issue and to enforce its contractual rights in arbitrations or courts:

> **Article 63.- National and Foreign Investment**
>
> National and foreign investment are subject to the same conditions. The production of goods and services and foreign trade are free. If another country or countries adopt protectionist or discriminatory measures that harm the national interest, the State may, in defense of the latter, adopt similar measures.
>
> ***In all contracts of the State*** and of public law persons with domiciled foreigners, it is stated that they are subject to the laws and jurisdictional bodies of the Republic and their waiver of all diplomatic claims. Financial contracts may be exempted from national jurisdiction.
>
> ***The State and other public law persons may submit disputes arising from a contractual relationship*** to courts constituted by virtue of treaties in force. They may also submit them to national or international arbitration, in the manner provided by law.[1198]

714. Based on its unproven presumption that the State cannot enter into contracts under Peruvian law – which it can, as shown above – Peru contends the RER Contract should be read to mean that MINEM acts as a representative of the State but only within the "bounds of [MINEM's] authority."[1199] Peru argues that the State cannot be held responsible under the RER Contract for actions or inactions by other government agencies since MINEM is not authorized to "bind[] other ministries or authorities which are autonomous and independent" and "is legally

[1197] Counter-Memorial, ¶¶ 883-888.
[1198] Quiñones II, ¶¶ 53-54 (emphasis added).
[1199] Counter-Memorial, ¶ 885.

forbidden from assuming contractual responsibility regarding the powers of other Government bodies or regional and decentralized authorities."[1200] Thus, Peru argues the State cannot be held responsible for measures conducted by the RGA, AAA, and others that interfered with CHM's ability to perform its contractual obligations.

715. Peru's interpretation is not only unfounded (because the State can be a contract party under Peruvian law, as explained immediately above), but it also would lead to the absurd result that the State would be liable under the RER Contract for the acts and omissions of other government entities (*e.g.*, RGA, AAA, and OSINERGMIN) ***only if all such entities*** were designated parties to the contract. Dr. Quiñones responds:

> The position of Mr. Monteza would imply that, for the Peruvian State to assume contractual responsibility for the conduct of various state entities, especially in the case of large-scale projects, all its public entities would have to sign the contract, an affirmation that has no legal basis, when Article 63 of the Constitution—the supreme rule of the Republic—enables the State to be a contractual party and, consequently, to bind all the public law persons, departments and entities that comprise it.[1201]

716. Claimants demonstrated in the sub-section immediately above that this result is untenable because it would render numerous clauses in the RER Contract meaningless. Indeed, if MINEM were the Grantor in its individual capacity, then many of the provisions of the contract would be nullified, or alternatively, they would represent aspirations and not binding commitments, as CHM would have no means of enforcing their contractual commitments, including the obligation of OSINERGMIN to ensure the payment of the required Guaranteed Revenue and Premiums which were the principal benefits offered under the RER Contract.

[1200] Counter-Memorial, ¶ 889.
[1201] Quiñones II, ¶¶ 53-54.

717. Peru also argues that MINEM cannot be held responsible for the actions or inactions of regional governments or local entities under the RER Contract because of the State's decentralized nature.[1202] For this proposition, Peru primarily relies on Mr. Monteza's analysis of the Decentralization Law, No. 27783, enacted in 2002, which bestows upon regional and local government authorities a certain degree of autonomy from central government authorities.[1203] Mr. Monteza posits that the State cannot bind regional government authorities or, in turn, be held responsible for their actions. Mr. Monteza's argument, however, is not persuasive.[1204]

718. Article 43 of the Peruvian Political Constitution makes clear that the "State is one and indivisible" and its government is "unitary" in nature and nothing in the Decentralization Law is to the contrary.[1205] As explained by Dr. Quiñones, Peru and Mr. Monteza omit from their submissions a description of other sections of the Decentralization Law that confirm the opposite conclusion; namely, that even after the Decentralization Law, the State maintains its indivisible and unitary character and, hence, is properly imputed with responsibility for the actions or inactions of regional and local government entities, such as the RGA and AAA:

> Then, contrary to what Mr. Monteza pointed out, the autonomy of the regional and local governments, as well as the decentralization process, does not affect the principle of unity of the State or put it in question; Rather, this principle is the framework in which decentralization unfolds and defines the autonomy of the different levels of government.
>
> This being the case, the delay in the granting of the Relevant Permits or the approval of the requests for contractual modification, the acts of obstruction and the breaches incurred by any governmental authority ─whether this is a division of a local, regional government or national─ are fully attributable to the

[1202] Counter-Memorial, ¶¶ 883-888.
[1203] Counter-Memorial, ¶¶ 883-888.
[1204] Counter-Memorial, ¶¶ 883-888.
[1205] Quiñones II, ¶ 55.

> Peruvian State, CHM's counterpart in the RER Concession Contract.[1206]

719. Nor could Peru make this showing. As explained in this Section, Article 51 of the Political Constitution plainly provides that constitutional principles will reign supreme over principles imposed by Laws.[1207] Hence, Peru's interpretation that the Decentralization Law supplanted or undid the edict in Article 43 that the State is "unitary" and "indivisible" and, thus, legally responsible for acts and omissions by government authorities, is unconstitutional.[1208]

720. Dr. Quiñones's opinion is consistent with the legal conclusion of MINEM's distinguished outside legal counsel, Dr. Maria del Carmen Tovar, who authored the Echecopar Reports. As explained in **Section II.A**, *supra*, MINEM asked Dr. Tovar to analyze whether MINEM is liable for delays to the RER projects caused by regional permitting agencies and, if so, whether MINEM was obligated to extend the RER Contract deadlines to compensate for such delays.[1209] Among other things, Dr. Tovar concluded that delays by regional permitting authorities are actionable under the RER Contract as the State *qua* State is the Grantor, as shown in the excerpt below from those Reports:

> In this respect, it must be noted that any acts of public authorities that are part of the State to which the entity that signed the contract belongs are always attributable to the State, not [MINEM], because the State always acts under one single capacity and any division of functions and competencies arises from a technical need that in some way fragments power, but not the State.
>
> When intervening in the RER Concession Contracts, [MINEM] does not do so on its own behalf but, rather, on behalf of the State, exercising the powers attributed by the Political Constitution of Peru. Thus, the disruptive measure (a delay by authorities other than [MINEM]) is not attributable to the agency that caused it, but to the State to which the agency belongs.[1210]

[1206] Quiñones II, ¶¶ 63-64.
[1207] Quiñones II, ¶ 207.
[1208] Quiñones II, ¶ 55.
[1209] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235).
[1210] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § 2.2.2 (C-0235).

721. For these reasons, Peru's contentions that the State lacks standing to serve as Grantor and cannot be held responsible under the RER Contract for the actions of any state entity other than MINEM, itself, must be rejected. Based on the RER Contract's text and purpose, only the State could have served as Grantor and nothing under Peruvian law prevented it from serving in this capacity. And because the State is unitary and indivisible, it is legally responsible for all government interferences proven in this arbitration.

3. Peru's Description Of How Risks Allegedly Were Allocated Under The RER Contract Is Debunked By The Express Terms Of The RER Contract And Applicable Canons Of Contract Interpretation

722. In their Memorial, Claimants demonstrated the RER Contract delegated risks in accordance with what the Parties controlled. Peru, as Grantor, committed, *inter alia*, to: (i) create a consistent legal framework; (ii) issue permits, concessions, and authorizations in a timely manner; (iii) protect CHM from government interference; and (iv) ensure Guaranteed Revenue and Premiums when the Project entered into commercial operation. CHM, as the concessionaire, committed, *inter alia*, to: (i) manage and comply with all the permitting requirements; (ii) work diligently towards achieving the milestones under the Works Schedule; and (iii) report its progress on a quarterly basis to OSINERGMIN. This was the deal that CHM and Peru struck under the RER Contract.

723. Consistent with this public-private partnership, where risks are allocated in accordance with what the Parties could control, Peru acknowledged through Addenda 1-6 its obligation to hold CHM harmless from interferences to the RER Contract that were exclusively within Peru's control, such as the risk of government interference.[1211] As Peru recognized

[1211] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009); Addendum 3 to the RER Contract, September 8, 2017 (C-0014); Addendum 4 to the RER Contract, January 17, 2018 (C-0015); Addendum 5 to the RER Contract, March 26, 2018 (C-0016); Addendum 6 to the RER Contract, July 23, 2018 (C-0017).

explicitly or implicitly through those Addenda, CHM could not have assumed the unforeseeable and unquantifiable risk of government interferences for several reasons. **First**, the plain text of the RER Contract does not allocate this risk to CHM. **Second**, allocating the risk of government interference to CHM would directly undermine the express objectives and mandates of the RER Law to eliminate barriers to investment in RER projects. **Third**, Articles 1314 and 1317 of the Civil Code confirm CHM cannot be penalized for noncompliance so long as it acted diligently and the reasons for noncompliance are not attributable to CHM. **Fourth**, actions of government interference amount to material contractual breaches by the State, as Grantor, and Article 1328 of the Civil Code ensures the RER Contract cannot be interpreted in a manner that would immunize a party's breach. **Fifth**, Article 1362 of the Civil Code and Article 1.8 of the GLAP require that the parties interpret and execute the RER Contract in good faith. **Sixth**, neither CHM nor any rational party would have ever agreed to invest millions of dollars under a contract that its counterparty could unilaterally interfere with, sabotage, or terminate with impunity.[1212]

724. In its Counter-Memorial, however, Peru takes the extreme position that CHM assumed "***any and all risks*** associated with the design, construction, financing, operation, and maintenance of and permitting for the operation of the Mamacocha Project."[1213] Peru even submits that CHM assumed the risk that it could be prevented from completing the Project due to "***causes attributable to agencies of the State of Peru***," *i.e.*, CHM's counterparty.[1214] In other words, Peru contends the RER Contract insulates Peru from all liability for its actions because CHM supposedly assumed that risk.

[1212] Memorial, ¶¶ 409-410.
[1213] Counter-Memorial, ¶ 903.
[1214] Counter-Memorial, ¶ 898.

725. Peru bases this extreme position on self-serving but unsustainable interpretations of the RER Contract. Specifically, as will be described below, Peru interprets the "for any reason" restriction on extensions to the Termination Date and COS deadline in Clauses 1.4.22 and 8.4, respectively, in a manner that would penalize CHM for its counterparty's breaches by depriving CHM of its bargained-for right to receive up to twenty (20) years of Guaranteed Revenue. Peru also interprets the text in Clauses 1.3, 3.2, and 4.3 to mean that CHM voluntarily assumed all risks related to permitting, including the risk that government agencies would arbitrarily delay or deny permits for the Project. And Peru interprets the text in Clauses 3.3 and 6.4.2 to mean that CHM assumed all risks related to Financial Close, including the risk that Peru would make it impossible for CHM to achieve it.

726. In **Section II.A**, *supra*, Claimants demonstrated that Peru's risk-allocation arguments are completely inconsistent with how Peru, itself, interpreted the RER Contract during the ***entire life of the Project*** until December 2018 (just as Peru turned on the Project for opportunistic and arbitrary reasons). Claimants also explained that Peru's draconian interpretation of the RER Contract is completely irreconcilable with the investor-friendly objectives of the RER Law. In the Section below, Claimants will show that Peru's interpretation is also untenable as a matter of law because it is flatly rejected by each of the applicable canons of contract interpretation embodied in Articles 168-170 of the Civil Code.

a. Clauses 1.4.22 And 8.4 Of The RER Contract Did Not Absolve Peru Of Its Contractual Breaches

727. Peru argues, without legal support, that an interpretation of Clauses 1.4.22 and 8.4 of the RER Contract applying the canons of contract interpretation contained in Articles 168-170 of the Civil Code "are in line with the position of Peru;"[1215] namely, that CHM assumed all risks

[1215] Counter-Memorial, ¶ 894.

of government-caused delays and, thus, CHM should not be compensated for those delays either by an extension or monetary compensation. Peru's argument is wrong.

728. Clauses 1.4.22 and 8.4 provide:

> **1.4.22. "Termination Date of the Contract"** means December 31, 2036, a date that cannot be modified for any reason whatsoever and until which the Concessionaire is guaranteed the Award Tariff.
>
> **8.4. Commercial Operation Start-up after December 31, 2018** If, for any reason, Commercial Operation Start-up of the RER Generation Project provided for hereunder has not taken place by December 31, 2018, this Contract shall be automatically terminated, and the Performance Bond shall be enforced.[1216]

(1). *A Plain Language And Good Faith Interpretation Of Clauses 1.4.22 And 8.4 Under Article 168 Does Not Support Peru's Interpretation*

729. Article 168 specifies that the first method for determining the parties' intent is to evaluate the plain and common meaning of the contract text. Peru argues that a plain reading of "for any reason" includes "*causes attributable to agencies of the State of Peru*" (emphasis in original).[1217] This argument fails for several reasons.

730. **First**, nowhere in these clauses is it stated expressly or even impliedly that "for any reason" includes breaches by CHM's counterparty (*i.e.*, government-caused delays). Had the Parties intended for CHM to assume the unforeseeable and unquantifiable risk that Peru would delay the Project through material contractual breaches, they would have expressly stated it. But they did not. It would be unreasonable and counter-intuitive to infer that they had such an intention without being explicit.

[1216] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.4.22 and 8.4 (C-0002).
[1217] Counter-Memorial, ¶ 898.

731. This plain language interpretation is supported by the Sworn Statement that CHM signed as a precondition for participating in the Third Auction.[1218] In that Statement, CHM acknowledged that the Termination Date "cannot be modified, even upon occurrence of events of *force majeure*."[1219] This express acknowledgement that CHM assumed the risk of *force majeure* events[1220] demonstrates that, where the Parties intended to change the allocation of risks in a fashion that could substantially impact CHM's benefits, they made it explicitly known in writing. By contrast, neither Clause 1.4.22, Clause 8.4, nor the consolidated tender requirements for the Third Auction notifies CHM it was waiving its reasonable expectations to hold its counterparty responsible for delays, interferences, or other misconduct it might cause. The waiver of such a major risk, one that would put the concessionaire's benefits wholly at the whim of the government, cannot be reasonably implied.

732. Significantly, the possibility of requiring the concessionaires to forfeit their right to hold the government accountable for government-created delays, interferences, or misconduct was so unfathomable that it was not even raised as a possibility by any concessionaire during the Questions and Answers preceding the Auction.[1221] The potential applicants only inquired as to the scope of the temporal restrictions under Clauses 1.4.22 and 8.4 as it pertained to *force majeure* events and the government explicitly responded that the risk of *force majeure* events would be borne by the concessionaire.[1222] But the risk of government breach or interferences

[1218] Sworn Statement on recognition of the non-modifiable nature of the contract termination date, even when force majeure events occur, CH Mamacocha, October 30, 2013 (R-0138).
[1219] Sworn Statement on recognition of the non-modifiable nature of the contract termination date, even when force majeure events occur, CH Mamacocha, October 30, 2013 (R-0138).
[1220] To be clear, "*force majeure*" events do not include events within the control of one of the Parties, such as the State. This conclusion is confirmed by Dr. Benavides, who confirms that Article 1315 of the Civil Code defines *force majeure* as an unforeseeable, unpreventable, and extraordinary event that is outside the control of the Parties. Benavides II, ¶¶ 203-213.
[1221] Circular No. 1, Committee for the Third Auction, September 10, 2013 (R-0101).
[1222] Circular No. 1, Committee for the Third Auction, September 10, 2013 (R-0101).

was not even raised, because it would have been wholly at odds with applicable Peruvian law that prevents a counterparty from preventing their counterparty from performing.

733. **Second**, Peru's interpretation does not satisfy the requirement that it reflect a good-faith implementation of the Parties' intentions. Article 168 requires that "[t]he contract must be interpreted in accordance with what has been expressed in it ***and in accordance with the principle of good faith***."[1223] In its application of Article 168, Peru noticeably fails to address how its interpretation accords with the principle of good faith. As Dr. Quiñones explains, this principle exists to ensure the contract is interpreted in line with what the Parties reasonably understood at the time of execution and to safeguard against any interpretation that would lead to "absurd, illogical and inconsistent" results:

> As I have already indicated, Article 168 of the Civil Code establishes that the legal act must be interpreted in accordance with what has been expressed in it and according to the principle of good faith.
>
> For Alfredo Bullard: "good faith implies that when the contract is interpreted, it must be read as a commitment to mutual collaboration aimed at ensuring that both parties see the interests for which they entered into the contract realized". Then, in application of the aforementioned principle, the interpretation of the clauses' subject matter must be read in the sense:
>
> i. in which it would have been reasonably understood by correct and loyal economic agents in the position of the parties;
>
> ii. that allows it to preserve its effects and, therefore, discarding readings that lead to ineffectiveness or illegality;
>
> iii. opposed to absurd, illogical and inconsistent interpretations.[1224]

[1223] Benavides II, ¶ 215.
[1224] Quiñones II, ¶ 77.

734. Peru's interpretation that Clauses 1.4.22 and 8.4 allocates the risk of government interference to CHM fails this standard. Peru's interpretation does not comport with CHM's reasonable expectation, based on the text of the RER Law,[1225] that the RER Contract would be interpreted in accordance with the investor-friendly objectives of eliminating barriers, creating a consistent legal framework protecting the RER projects, and ensuring their advancement. Under Professor Bullard's formulation: a good faith interpretation must uphold the "commitment to mutual collaboration aimed at ensuring that both parties see the interests for which they entered into the contract realized."[1226]

735. Mr. Jacobson confirms that Claimants never envisioned or could have foreseen that Peru would try to insulate itself from liability for its own breaches. This interpretation would not reflect a good faith collaboration consistent with the "interests for which they entered into the contract." Mr. Jacobson testifies:

> As a good-faith investor in the Peruvian renewable energy sector, I am completely dismayed to see that Peru falsely alleges that Latam Hydro and CHM knowingly assumed all risks arising from the Mamacocha Project, including the unknowable and unquantifiable risk that Peru would unilaterally interfere with the Project.
>
> *******
>
> I would never commit millions of dollars of my own money—as I did here—if my investments could unilaterally and "for any reason" be destroyed by my counterparty without recourse.[1227]

736. Further, Peru's interpretation leads to an "absurd, illogical and inconsistent"[1228] result in which, rather than punishing the State for any material breaches and interferences, Peru is completely ***absolved*** from liability, all without one explicit word of this severe risk

[1225] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).
[1226] Quiñones II, ¶ 77.
[1227] Jacobson II, ¶¶ 60-61.
[1228] Quiñones II, ¶ 77.

reallocation being included in the contract language, the Third Auction materials, or the Sworn Statement. Worse, under Peru's self-serving interpretation, Peru is effectively ***rewarded*** for these interferences by terminating the RER Contract and collecting CHM's US $5 million bond (as provided under Clause 8.4) as a direct result of its interferences.

737. Dr. Benavides confirms this result would be contrary to the principle of good faith because it would have the bad-faith effects of "legitimiz[ing] fraudulent conduct of the State" and "punish[ing] the Concessionaire for breaches and interferences of the State . . . freeing the State from any responsibility."[1229]

738. Such an interpretation also fails the Article 168 good-faith test because it would be wholly "inconsistent" with the Parties' course of dealing under the RER Contract.[1230] By granting extensions to the COS deadline under Addenda 1-2, Peru recognized that Clause 8.4 did not allocate to CHM the risk that the government could delay CHM's execution of the Works Schedule milestones. To the contrary, MINEM held in the Sosa Report (which approved the extensions to the RER Contract under Addendum 2) that such an interpretation "***constitutes an unreasonable allocation of risk derived from the economic and legal consequences of an act directly attributable***" to Peru and that for Peru to allocate those risks to CHM would "require[] a clear and unambiguous definition in the [RER Contract], ***which has not occurred in this case***."[1231]

739. Peru's interpretation that Clause 1.4.22 allocated to CHM the risk that government-caused delays would reduce the term of validity on the Guaranteed Revenue concession is also inconsistent with the Parties' contemporaneous interpretation of this provision.

[1229] Benavides II, ¶ 247.
[1230] Quiñones II, ¶ 77.
[1231] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016, p. 11 (C-0012) (emphasis added).

As demonstrated in **Section II.A**, *supra*, MINEM adopted the findings of the Echecopar Reports, including the finding that Peru had an obligation under the RER Contract to extend the Termination Date when the delays in question were "due to the exercise of those powers vested in any State entity (not just [MINEM])."[1232] Consistent with the Echecopar Reports' recommendation, in July 2018 MINEM offered to extend CHM's Termination Date by several years (up to an 18-year term of validity), demonstrating its clear understanding that Clause 1.4.22 did not allocate the risk of government interference to CHM.[1233] It would not be a good faith result to allow Peru to adopt completely different interpretations of Clauses 1.4.22 and 8.4 in this arbitration than it repeatedly adopted and expressed contemporaneously by the Parties.

(2). *A Systematic Interpretation Under Article 169 Does Not Support Peru's Interpretation*

740. Peru's interpretation also fails the systematic canon of interpretation under Article 169 of the Civil Code. It is undisputed that the purpose of this canon is to "avoid[] contradictions and antinomies in a contract."[1234] Yet, Peru's interpretation does exactly that. As established in **Section V.A.1**, *supra*, the RER Contract incorporates the "internal laws" of Peru.[1235] Peru's interpretation that the State or MINEM could interfere with the RER Contract with impunity, and even be rewarded for such conduct at CHM's expense, is inconsistent with myriad legal principles embodied in Peru's internal laws, such as: (i) Article 1328 of the Civil Code, which prohibits any interpretation of the RER Contract that immunizes a contract party from the consequences of its own breaches; (ii) Articles 1314 and 1317 of the Civil Code, which prohibit any interpretation of the RER Contract that punishes a contract party who acted

[1232] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018, § 2.3.4 (C-0235).
[1233] Sillen II, ¶ 82; Email from S. Sillen to M. Jacobson et al., August 28, 2018 (C-0242); Email from S. Sillen to E. Powers, October 23, 2018 (C-0243).
[1234] Counter-Memorial, ¶ 902.
[1235] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).

diligently and whose reasons for nonperformance are attributable to its counterparty; (iii) Article 1362 of the Civil Code and Article 1.8 of the GLAP, which require the Parties to implement the RER Contract in good faith; and (iv) Article 103 of the Peruvian Political Constitution, which provides that the State has an obligation to protect others from "any abuse of rights."

741. Peru ignores these legal principles entirely. Instead, Peru contends that its interpretation satisfies the systematic canon of interpretation because it is consistent with the Third Auction materials that the RER Contract incorporates by reference.[1236] These materials include: (i) CHM's sworn statement acknowledging the Termination Date cannot be moved, even for *force majeure* events;[1237] (ii) the "Tender Requirements" that, similar to Clauses 1.4.22 and 8.4 of the RER Contract, state that the Termination Date and COS deadline cannot be moved "for any reason";[1238] and (iii) MINEM's responses to comments about whether the Termination Date could be moved for *force majeure* events.[1239] But this contention fails because none of these materials state explicitly or by reasonable implication that CHM assumed the risk that the State would interfere with the RER Contract. The most these materials provide is that CHM assumed the risk of *force majeure* events. But, as explained above, breaches by a contract party are ***not*** *force majeure* events. Accordingly, those materials provided no notice that the State would be requiring CHM to forsake its rights under the contract to be compensated for its counterparty's breaches.

[1236] Counter-Memorial, ¶¶ 902-904.
[1237] Sworn statement regarding recognition of the non-modifiable nature of the contract termination date, even when force majeure events occur, CH Mamacocha, October 30, 2013 (R-0138).
[1238] Consolidated Bases for the Electricity Supply Auction with Renewable Energy Resources, September 2013 (R-0001).
[1239] Circular No. 1, Committee for the Third Auction, September 10, 2013 (R-0101).

(3). *A Review Of The Contract's Purpose Under Article 170 Does Not Support Peru's Interpretation*

742. Peru's interpretation of Clauses 1.4.22 and 8.4 must also be rejected applying Article 170's canon of construction, requiring harmony with the contract's nature and purpose. Peru contends its interpretation is consistent with the nature and purpose of the RER Contract because: (i) the purpose of the RER Contract is to protect consumers from increasing electricity prices and this purpose would be undermined by granting extensions to the Termination Date and COS deadline; and (ii) the RER Contract is a regulated contract (*contrato normado*) and, hence, its nature and purpose is to require the Parties to be restricted by its inflexible restrictions.[1240] Peru's arguments fail for several reasons.

743. **First**, Peru's contention that the RER Contract's purpose is to protect consumers from increasing prices is completely invented for this arbitration. That purpose is not stated in the RER Contract, RER Law, or the RER Regulations. To the contrary, as Claimants demonstrated in **Section II.A**, *supra*, the RER Law's stated objectives are to eliminate barriers to investment in RER projects, incentivize investors to make investments in RER projects, and provide a stable and consistent legal framework to protect these investments.[1241] The RER Law expressly provides that these investor-friendly objectives are necessary because RER projects are "of national interest and public necessity" and must be advanced through the auction of RER Contracts.[1242] Interpreting Clauses 1.4.22 and 8.4 to mean that concessionaires assumed all risks of government interference, including breaches by their counterparty, would completely undermine the RER Law's explicit objectives and flip the purpose of the RER Contract on its proverbial head.

[1240] Counter-Memorial, ¶¶ 905-909.
[1241] Legislative Decree No. 1002, May 1, 2008, Preamble and Art. 2 (C-0007).
[1242] Legislative Decree No. 1002, May 1, 2008, Preamble and Art. 2 (C-0007).

744. **Second**, as explained in **Section V.A.2**, *supra*, the RER Contract is ***not*** a regulated contract because only private contracts (not administrative contracts like the RER Contract) can be regulated contracts and because no law or regulation imposes any specific contract language onto the body of the RER Contract, as is needed for a contract to be a *contrato normado* under Peruvian law. And, even if the RER Contract were a regulated contract – which it was not – its restrictions would still have to further the public interests associated with the RER Law. As shown above, rather than furthering those public interest, Peru's interpretation would sabotage them.

745. Because none of the canons of contract interpretation support Peru's interpretation of Clauses 1.4.22 and 8.4, its interpretation must be rejected.

b. Clauses 1.3, 3.2, And 4.3 Of The RER Contract Did Not Allocate All Permitting-Related Risks To CHM

746. Peru argues that it is "evident from a reading of Clauses 1.3, 3.2, and 4.3 of the RER Contract . . . that CH Mamacocha expressly assumed any risk related to a failure to timely obtain the relevant qualifying permits."[1243] Peru does not apply any of the applicable canons of contract interpretation in reaching this conclusion. Instead, Peru contends that a plain reading of the text of these clauses confirms CHM "was required to secure a Final Concession and the relevant permits for the construction and [COS] of the power plant."[1244] This contention is both untenable and incomplete.

747. Clauses 1.3, 3.2, and 4.3 provide:

> **1.3.** The execution of this Contract shall not eliminate or affect the Concessionaire Company's obligation to *request, sign and comply* with the requirements for the Final Concession of the Power Plant to be obtained by the Concessionaire Company from the Ministry.

[1243] Counter-Memorial, ¶ 30.
[1244] Counter-Memorial, ¶ 25.

> *******
>
> **3.2**. The Concessionaire Company *shall manage and comply with all the requirements* in furtherance of obtaining the Final Concession and building the power generation plant as specified in Annex No. 1.
>
> *******
>
> **4.3**. The Ministry shall create any such easements as may be required in accordance with the Applicable Laws but shall not bear any costs incurred in obtaining them.
>
> Furthermore, the Ministry shall, upon request of the Concessionaire Company, use its best endeavors in order to allow the latter to access third-party facilities, and *shall assist [coadyuvar] it in obtaining permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right,* in the event of these not being timely granted by the relevant Government Authority despite all requirements and procedures required under the Applicable Laws having been met.[1245]

(1). *A Plain Language And Good Faith Interpretation Of Clauses 1.3, 3.2, And 4.3 Under Article 168 Does Not Support Peru's Interpretation*

748. A good-faith reading of these provisions under Article 168 of the Civil Code demonstrates CHM did ***not*** assume all risks with respect to permitting. For example, Clause 1.3 only requires CHM to "request, sign and comply with the requirements" for the power-generation concession from MINEM.[1246] Similarly, Clause 3.2 only requires CHM to "manage and comply with all the requirements" for this concession.[1247] And Clause 4.3 expressly puts the burden on MINEM to assist CHM in obtaining "permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right" in due recognition that CHM cannot force the government authorities to execute their administrative duties on a timely basis.[1248] In other

[1245] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.3, 3.2, and 4.3 (C-0002).
[1246] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 1.3 (C-0002).
[1247] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 3.2 (C-0002).
[1248] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 4.3 (C-0002).

words, CHM was ***not*** required to secure or obtain permits to comply with these Clauses; its burden was only to diligently apply for them in compliance with the permitting requirements. Peru does not cite to any specific language that imposes these burdens on the concessionaire, as opposed to the government. And none can be reasonably inferred in a good faith interpretation of these clauses.

749. Dr. Quiñones explains the basis for this interpretation (emphasis in original):

> I find no basis for the conclusion of the Peruvian State that the Concessionaire assumed all the risk of obtaining the Relevant Permits, when it is known that the actual obtainment depends on the State itself. **The Concessionaire's obligation is limited to carrying out the actions that are within its sphere of control**. Once the requirements and required procedures have been fulfilled, the responsibility for the timely granting of permits, in accordance with the principle of cooperation and legitimate confidence, lies with the State, through the competent Government Authority.[1249]

750. As Dr. Benavides explains, this explicit and reasonable allocation of duties makes sense because only the State (*i.e.*, the Grantor) is capable of issuing the permits in question:

> CHM can undertake to act diligently, to present all requests and appeals to the competent administrative authority and to prepare and submit all the necessary documentation and to do everything reasonably necessary to obtain the Permits. ***What it cannot guarantee is that, despite all its efforts and complying with all the requirements, the Permits will be effectively issued, and that they will also be issued in a timely manner, by the competent authority***.[1250]

751. Significantly, Peru's current interpretation is an entirely new invention. Throughout the relevant period up to its complete reversal in December 2018, Peru repeatedly acknowledged that it agreed with Claimants' interpretation of the allocation of duties with regard to permitting. For example, CHM diligently applied for the power-generation concession in

[1249] Quiñones II, ¶ 155 (emphasis in original).
[1250] Benavides II, ¶ 136 (emphasis added).

March 2015, but MINEM failed to grant the concession until June 2016 (fifteen (15) months later).[1251] Consistent with Clauses 1.3 and 3.2, MINEM determined in the Sosa Report, MR 559, and Addendum 2 that CHM should be held harmless from those government delays because it had acted diligently and had not assumed the risk that Peru would unduly delay this process.[1252]

752. Similarly, Clause 4.3 does not allocate all permitting-related risks to CHM.[1253] To the contrary, that Clause proves the Parties intended to split the risks associated with permitting. Through that Clause, the Parties agreed that CHM had the duty to apply for the permits and, if the permit was unduly delayed by the government entities involved, Peru, through MINEM, promised to *coadyuvar* (to contribute to achieve a result) in obtaining these permits.[1254] Claimants plainly were not to be left holding the bag, without recourse, if the government entity failed to act on time. This allocation of risks is consistent with the public-private partnership formalized under the RER Contract, where the Parties allocated risks depending on what they could control.

(2). *A Systematic Interpretation Under Article 169 Does Not Support Peru's Interpretation*

753. The systematic canon of interpretation under Article 169 of the Civil Code leads to the same interpretation. Articles 1314 and 1317 of the Civil Code, which are incorporated under the RER Contract through Clauses 1.2 and 1.4.30, provide that a contract party cannot be penalized or found to be in breach as long as he can demonstrate he acted with ordinary diligence

[1251] Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[1252] Addendum 2 to the RER Contract, January 3, 2017, p. 8 (C-0009); Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).
[1253] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 4.3 (C-0002).
[1254] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 4.3 (C-0002).

and he is not responsible for the reasons for his noncompliance.[1255] Hence, a finding that CHM is in breach of the RER Contract because it did not "obtain" or "secure" the permits in question would be entirely inconsistent with these Articles if CHM acted diligently in making application and was not responsible for the delays in issuing the permits. Notably, as discussed several times earlier, MINEM followed this same reasoning, citing Article 1314, when it approved the extensions under Addenda 1-2.[1256]

(3). *A Review Of The Contract's Purpose Under Article 170 Does Not Support Peru's Interpretation*

754. A review of the contract's goals and purposes under Article 170 of the Civil Code also requires rejection of Peru's interpretation. As Claimants have demonstrated, the purpose of the RER Law and RER Contract was to eliminate barriers to the development of RER projects and to incentivize concessionaires to invest in these projects.[1257] These purposes would be completely undermined if the RER Contract were interpreted to require a concessionaire to bear the risk that permitting and approval agencies could delay or deny permits with impunity. Peru fails to demonstrate otherwise. Peru also fails to show that the Parties knowingly and wittingly accepted the allocation of risks posited by Peru in this arbitration.

c. Clauses 3.3 And 6.4.2 Of The RER Contract Did Not Allocate All Risks Related To Financial Close To CHM

755. Peru also contends that Clauses 3.3 and 6.4.2 delegated to CHM all risks related to achieving Financial Close.[1258] Once again, Peru does not apply the canons of contract interpretation in reaching this interpretation. Rather, Peru just assumes this interpretation must

[1255] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).
[1256] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[1257] Legislative Decree No. 1002, May 1, 2008, Preamble and Art. 2 (C-0007).
[1258] Counter-Memorial, ¶¶ 31-33.

be correct based on its theory of the case that, under the RER Contract, Peru can interfere with impunity.

756. Clauses 3.3 and 6.4.2 of the RER Contract provide:

> **3.3.** The Concessionaire Company shall design, provide the financing and supply the goods and services required to build, operate and maintain the power generation plant specified in Annex 1, which shall be used to supply the Awarded Energy to the SEIN, including the communications systems applied by the COES to control the operation of the plant, ***in accordance with the Applicable Laws and Standards***.
>
> *******
>
> **6.4.2.** The provisions in the foregoing paragraph shall not release the Concessionaire Company from its obligation to comply with all the provisions set forth herein, in the Final Concession Contract and in the Applicable Laws. The Grantor agrees that neither the financial entities nor any person acting on behalf of the Concessionaire Company shall be liable for the performance of the Concessionaire Company's obligations hereunder or ***under the Applicable Laws***.[1259]

(1). *A Plain Language And Good Faith Interpretation Of Clauses 3.3 And 6.4.2 Under Article 168 Does Not Support Peru's Interpretation*

757. Peru's interpretation that these Clauses delegated all risks related to financing the Project is not supported by the canon of contract interpretation under Article 168 of the Civil Code. Neither of these Clauses state expressly or by reasonable inference that CHM assumed the risk that Peru would interfere with CHM's efforts to obtain financing. And Peru's interpretation cannot be implied from these Clauses because they each provide that CHM's financing obligations must be interpreted in accordance with the "Applicable Laws," which, as demonstrated in **Section V.A.2**, *supra*, include protections under the Civil Code, GLAP, and Political Constitution that prevent Peru from immunizing its own breaches under the RER

[1259] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 3.3 and 6.4.2 (C-0002). (emphasis added)

Contract, punishing CHM for circumstances that are outside of its control, and abusing its rights under the RER Contract.[1260]

758. Peru's argument does not rely upon an explicit textual basis for support, nor could such a vast reallocation of risks be presumed without clear and explicit language. Peru's argument is wholly at odds with the normal commercial allocation of risks for a large-scale energy or infrastructure project. It is almost axiomatic that a developer may take on the obligation to attract financing, but by so doing, it must rely upon the credibility of the government and its promise to uphold the rule of law and make the required long-term revenue payments set forth in the contract. If the government breaches these expectations and thereby undermines the confidence of lenders, the concessionaire can hardly be faulted or made to suffer the resulting damage. Peru has failed to point to any language in the RER Contract or any warning to the concessionaires to bolster its extreme interpretation.

759. Peru's current interpretation must also be rejected because it would be inconsistent with the Parties' course of dealing, which violates the good-faith component under Article 168. Indeed, one of the principal reasons MINEM granted the extensions under Addenda 1-2 was to compensate for the government's interference with CHM's ability to achieve Financial Close.[1261] This fact is demonstrated in the excerpt below from MR 320, which approved the extensions under Addendum 1:

> ***Inasmuch as the aforementioned delays in the administrative procedures made it impossible to achieve Financial Closing for the project***, entailing the failure to comply with the terms of the Milestones of the Works Execution Schedule of the Concession Agreement—having failed to conclude with the process of financing the project—***the conclusion must be reached that said***

[1260] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).
[1261] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).

> ***events of non-compliance do not fall within the scope of the Concessionaire's liability, applying article 1314 of the Civil Code which establishes that a party acting in ordinary due diligence cannot be held responsible for failure to execute its obligations or for the partial, late, or defective compliance with said obligations***.[1262]

760. Keeping in mind that this passage reflects the formal legal position of MINEM, the counterparty, during performance of the RER Contract, Peru's attempt in this arbitration to rewrite the contract by proposing an entirely different and inconsistent interpretation must be rejected, *inter alia*, because it is not being made in good faith.

(2). *A Systematic Interpretation Under Article 169 Does Not Support Peru's Interpretation*

761. Peru's interpretation must also be rejected through application of the systematic canon of interpretation under Article 169 of the Civil Code. The financing obligation was not an end goal of the RER Contract. Rather, it was merely a means to the end of producing renewable energy and supplying it to the citizens of Peru through injections into the grid. As with the permits, what Peru is arguing is that the Parties were aware of and agreed[1263] that the government could interpose unilateral roadblocks in the development and construction of the Project, without recourse. Claimants were not aware and did not agree to this, and Peru has failed to introduce any proof to the contrary. Moreover, any interpretation that Peru can interfere with CHM's performance with impunity cannot be reconciled with the binding legal principles under the Civil Code, GLAP, and Political Constitution. Peru's interpretation, therefore, must be rejected.

[1262] Addendum 1 to the RER Contract, July 22, 2015, p. 8 (C-0008) (emphasis added).
[1263] Peru fails to submit any proof that CHM was informed or agreed that the government could block permitting and financing with impunity.

(3). *A Review Of The Contract's Purpose Under Article 170 Does Not Support Peru's Interpretation*

762. Last, Peru's interpretation also must be rejected under an interpretation of the contract's purpose for the obvious and fundamental reason that allowing Peru to interfere with CHM's Financial Close would undermine, not support, the attractiveness of renewable power projects in Peru to foreign investors. Moreover, as Dr. Whalen states, no credible financial institution would undertake the extraordinary risk of providing non-recourse financing to a project that was not insulated from the risk of arbitrary interferences from the host government.[1264] Peru's theoretical position is without any analysis or reasoning of its potential commercial impact on the economics of the commercial arrangements underlying the Project. And Peru fails to demonstrate that its interpretation is consistent with a fair, commercially reasonable interpretation of the RER Contract, when read in context and in accordance with the purposes of the RER incentive program.

4. Peru's Reliance On Unrelated Awards Issued In Domestic Arbitrations Is Misplaced

763. Throughout its Counter-Memorial, Peru references arbitral awards issued by the Lima Chamber of Commerce in two arbitrations arising out of unrelated RER projects: *Empresa de Generacion Elecrica Santa Lorenza S.A.C. v. State of the Republic of Peru*, Case No. 0672-2018-CCL, Award, October 28, 2019 ("**Santa Lorenza Award**") and *Electro Zaña v. State of the Republic of Peru*, Case No. 0677-2018-CCL, Award, December 21, 2020 ("**Electro Zaña Award**").[1265] According to Peru, these Awards support its legal interpretations under the RER Contract. However, Peru's reliance on these Awards is misplaced because: (i) the facts in those arbitrations materially differed from the facts at issue here; (ii) many of their legal conclusions

[1264] Whalen I, ¶¶ 6.1-6.5.
[1265] Counter-Memorial, ¶¶ 452-457.

support Claimants' positions; and (iii) the Awards are internally inconsistent with one another and have no binding effect here.

a. The Santa Lorenza Award

764. Peru relies on the Santa Lorenza Award to support its position that the "for any reason" restriction in Clause 8.4 of the RER Contract must be interpreted to mean that the COS deadline could not have been extended for literally any reason. But the Santa Lorenza Award does not reach this conclusion. Quite to the contrary, the Santa Lorenza Award concludes the COS deadline cannot be extended for *force majeure* events but ***can be extended when the State is responsible for causing the delays to the project***.

765. By way of background, the claimant in that case was an RER concessionaire who, like CHM, was awarded an RER Contract during the Third Auction. That is where the similarities between these two cases end. Unlike CHM, the claimant in the Santa Lorenza arbitration never received extensions to the Works Schedule and its project was never delayed due to causes directly attributable to Peru. Instead, the entirety of the dispute in that case was whether Peru should have extended the COS deadline because of delays caused by *force majeure* events.[1266]

766. In support of its arguments, the claimant in the Santa Lorenza arbitration referenced the Sosa Report and argued its project should have received the same extensions that CHM received under Addendum 2.[1267] The tribunal denied this argument on the ground that the Sosa Report's findings did not apply to Santa Lorenza because the delays in question in Santa

[1266] *Empresa de Generación Eléctrica Santa Lorenza S.A.C. v. Ministerio de Energía y Minas*, Arbitral Case No. 0672-2018-CCL, Award, October 28, 2019 (Maccan, Pazos, Velaochaga) (RL-0098).
[1267] *Empresa de Generación Eléctrica Santa Lorenza S.A.C. v. Ministerio de Energía y Minas*, Arbitral Case No. 0672-2018-CCL, Award, October 28, 2019 (Maccan, Pazos, Velaochaga), ¶¶ 173-174 (RL-0098).

Lorenza were not attributable to the State.[1268] In so doing, the Santa Lorenza tribunal ***upheld the findings of the Sosa Report*** and concluded that "for any reason" under Clause 8.4 ***did not apply to instances where the State was at fault for the delays***, as can be seen in the excerpt below:

> [I]t is not possible to verify that in the present case the interpretive conduct of the MINEM is contradictory with the previous interpretive act contained in the so-called *Laguna Azul* precedent [*i.e.*, the Sosa Report]. This is due to the fact that the present case deals with the non-application of [Clause 8.4] due to *force majeure* events, which differs from events that are imputable to the creditor, that is, to the Peruvian State.[1269]

767. Accordingly, as Dr. Quiñones confirms, the Santa Lorenza Award actually ***supports*** Claimants' view that "for any reason" under Clause 8.4 of the RER Contract cannot absolve Peru of its contractual breaches under the RER Contract (emphasis in original):

> Another aspect to be highlighted is that in the Santa Lorenza award, the same tribunal distinguishes that case from that of Mamacocha. The plaintiff tried to rely on the precedent for the extension of the [COS] in favor of CHM, issued by [MR 559] that approved Addendum 2. Faced with such argument, the Arbitral Tribunal specified that the case of Santa Lorenza was one of force majeure, noting **that the precedent of CHM is unequivocal for cases in which the State engages in conducts that prevent the execution of the Project**.[1270]

768. There are other conclusions in the Santa Lorenza Award that differ materially from the positions taken by Peru in the present arbitration. For example, the Santa Lorenza Award liberally applies the Civil Code in its interpretation of the RER Contract, contrary to Peru's position here that the Civil Code applies only "residually," if at all.[1271] Further, the Santa Lorenza Award concludes that, even if the RER Contract is terminated under Clause 8.4 for

[1268] *Empresa de Generación Eléctrica Santa Lorenza S.A.C. v. Ministerio de Energía y Minas*, Arbitral Case No. 0672-2018-CCL, Award, October 28, 2019 (Maccan, Pazos, Velaochaga) (RL-0098).
Empresa de Generación Eléctrica Santa Lorenza S.A.C. v. Ministerio de Energía y Minas, Arbitral Case No. 0672-2018-CCL, Award, October 28, 2019 (Maccan, Pazos, Velaochaga), ¶ 175 (RL-0098).
[1270] Quiñones II, ¶ 187 (emphasis in original).
[1271] Counter-Memorial, ¶ 869.

failure to achieve COS by the contractual deadline, Peru cannot call the performance bond if the delays were ***not*** imputable to the concessionaire.[1272] This conclusion differs from Peru's position in this arbitration that the performance bond is "automatically" forfeited upon termination of the RER Contract under Clause 8.4.

b. The Electro Zaña Award

769. The Electro Zaña case also dealt with a project from the Third Auction that never received extensions under the RER Contract. The claimant alleged that MINEM's delays to an easement application forced the project to miss the COS deadline by approximately six (6) weeks.[1273] The Claimant argued that MINEM should have extended the COS deadline to account for these delays. Breaking from the tribunal in the Santa Lorenza arbitration, the Electro Zaña tribunal held that the COS deadline could not be extended even in instances where the State was responsible for the delays.[1274]

770. The Electro Zaña Award is replete with unjustified and incorrect interpretations of the applicable law. For example, its finding that the RER Contract is a regulated contract (*contrato normado*) is wrong (as shown in **Section V.A.2**, *supra*).[1275] And its finding that the concessionaire assumed the risk that its counterparty, the State, would breach the RER Contract borders on the frivolous.[1276] It is worth noting that, in reaching the latter conclusion, the tribunal relied heavily on MINEM's response to concessionaires during the Third Auction that it would

[1272] *Empresa de Generación Eléctrica Santa Lorenza S.A.C. v. Ministerio de Energía y Minas*, Arbitral Case No. 0672-2018-CCL, Award, October 28, 2019 (Maccan, Pazos, Velaochaga), ¶¶ 242-243 (RL-0098).
[1273] Electro Zaña S.A.C. v. República del Perú, Arbitral Case No. 0677-2018-CLL, Award, December 21, 2020 (Gamarra, Cauca, Velaochaga) (RL-0095).
[1274] [1274] Electro Zaña S.A.C. v. República del Perú, Arbitral Case No. 0677-2018-CLL, Award, December 21, 2020 (Gamarra, Cauca, Velaochaga) (RL-0095).
[1275] [1275] Electro Zaña S.A.C. v. República del Perú, Arbitral Case No. 0677-2018-CLL, Award, December 21, 2020 (Gamarra, Cauca, Velaochaga), ¶ 221 (RL-0095).
[1276] [1276] Electro Zaña S.A.C. v. República del Perú, Arbitral Case No. 0677-2018-CLL, Award, December 21, 2020 (Gamarra, Cauca, Velaochaga), ¶¶ 286, 289, 292 (RL-0095).

not accept a *force majeure* carveout for the Termination Date restriction in Clause 1.4.22 of the RER Contract.[1277] As Dr. Quiñones explains, this reliance is puzzling given that the issue at bar in Electro Zaña was whether Peru could extend the COS deadline (not the Termination Date) and the exchange in question concerned *force majeure* delays (not delays caused by the State):

> The Arbitral Tribunal supported this conclusion by noting that, in the queries related to the Bidding Terms, the bidders requested that it be specified that the phrase "for any reason" excluded the case of force majeure, the Award Committee responded: "Suggestion not accepted." In the Tribunal's opinion, this somehow meant that any delays to achieving COS -including acts attributable to the State- are included in the phrase "for any reason" in clause 8.4.
>
> ….
>
> I cannot find support . . . for the logical leap that the Tribunal takes to conclude that the response "Suggestion not Accepted" from the Adjudication Committee leads to the inclusion of acts imputable to the State. Due to the previously developed grounds, such an interpretation is unconstitutional, as it violates the constitutional right of property of the concessionaires, as well as the principles of interdiction of arbitrariness, legitimate expectations and good faith.[1278]

771. But the Electro Zaña Award is not in line with Peru's arguments in this case. For starters, the Award finds that ***the State is the Grantor under the RER Contract*** and not MINEM in its individual capacity, as Peru contends here.[1279] Further, similar to the Santa Lorenza Award, the Electro Zaña Award concluded the State could not call the performance bond when the reasons for the delays to the project were not imputable to the concessionaire.[1280] Lastly, the Electro Zaña Award relied heavily on the Civil Code when interpreting the RER Contract, in

[1277] Circular No. 1, Committee for the Third Auction, September 10, 2013 (R-0101).
[1278] Quiñones II, ¶¶ 190-191.
[1279] [1279] Electro Zaña S.A.C. v. República del Perú, Arbitral Case No. 0677-2018-CLL, Award, December 21, 2020 (Gamarra, Cauca, Velaochaga), ¶¶ 1-3 (RL-0095).
[1280] [1280] Electro Zaña S.A.C. v. República del Perú, Arbitral Case No. 0677-2018-CLL, Award, December 21, 2020 (Gamarra, Cauca, Velaochaga), ¶¶ 346-349 (RL-0095).

direct contradiction to Peru's contention that the Civil Code should almost never be applied under the RER Contract.

772. Moreover, the Electro Zaña award is distinguishable from the instant case in many important respects. **First,** the Electro Zaña tribunal did not face the situation where the State had previously twice granted extensions of the COS deadline to compensate for the government's delays. **Second,** unlike in the case at bar, the claimant in Electro Zaña did not present evidence that the State intentionally tried to interfere with the project by filing an obstructive and meritless lawsuit, by failing, without reason, to issue the CWA and other permits in a timely manner, by reversing its legal approach to the Project wholesale in December 2018, or by commencing an arbitration seeking to annul extensions previously granted. None of these facts were at issue in Electro Zaña. **Third,** unlike in Electro Zaña, where the tribunal questioned the diligence of the concessionaire, the Claimants undertook their role as developer and sponsor with extreme professionalism and diligence.

773. In sum, Peru's suggestion that these Awards are in line with its positions in this arbitration is incorrect. As demonstrated here, there are several instances where the two Awards differ dramatically from Peru's case. Ultimately, however, the application of these Awards to this case is extremely limited given the completely different factual backgrounds, the fact that the two Awards cannot even be reconciled with one another and the instant proceeding is operating under principles of international law.

C. Peru Has Not Articulated A Meritorious Defense To Its Material Breaches Of The RER Contract

1. By Rejecting The Third Extension Request, Peru Failed To Comply With Its Quintessential Obligation Under The RER Contract To Confer To CHM The Economic Benefits Of A 20-Year Guaranteed Revenue

774. It is undisputed that the 20-year Guaranteed Revenue concession was the *sine qua non* of incentives that Peru offered under the RER Promotion. Before this incentive, RER projects were not being developed in Peru. The significant up-front costs required for these projects and the price-volatility in Peru's spot market had made RER projects economically infeasible to developers and overly risky to lenders. Guaranteed revenue streams over a 20-year period eliminated these barriers because they made RER projects "bankable" and, as a result, profitable. This was the sovereign guarantee that induced Claimants' decisions to invest more than US $20 million in the Mamacocha and Upstream Projects and to enter into the RER Contract.

775. The RER Contract, and its investor-friendly legal framework, assured Claimants that they would benefit from the 20-year Guaranteed Revenue concession if CHM diligently pursued its contractual duties. That is precisely what CHM did. CHM began its permitting efforts years before executing the RER Contract and hired a team of world-class engineers, environmentalists, biologists, economists, lawyers, and businesspeople to advance the Project as quickly as possible. Despite its diligent efforts, CHM could not advance the Project because of Peru's interferences. MINEM recognized this fact in Addenda 1-2 and their underlying resolutions and reports, which conclude that: (i) CHM complied with its contractual obligations; and (ii) the years-long delays to the Project were exclusively and directly attributable to Peru. Following these extensions, CHM diligently advanced the Project until it faced a significant interference from the RGA Lawsuit. MINEM held CHM harmless from this interference by

suspending the RER Contract with the understanding that the suspended time would be restored in due course. When the interference subsided, CHM filed the Third Extension Request, asking Peru to extend the COS deadline and Termination Date in a manner that restored the 20-year term of validity that Peru had guaranteed. But, on December 31, 2018, Peru repudiated its sovereign guarantee when it denied the Third Extension Request in its entirety, thereby ensuring the Mamacocha Project could not proceed despite CHM's diligent efforts.

776. In their Memorial, Claimants demonstrated with documents and legal support that Peru's denial of the Third Extension Request was a material breach of its obligation under Clause 1.4.26 of the RER Contract to confer to CHM the economic benefits of a 20-year Guaranteed Revenue concession. In support of this claim, Claimants explained that Articles 1314 and 1317 of the Civil Code provide that a contract party who acts with "ordinary diligence" cannot be deprived of its contractual benefits. And Claimants also described that Articles 1328 and 1362 of the Civil Code prevented the contract from being interpreted in a manner that immunized Peru's breaches, which is exactly what would happen if Peru were relieved of its obligation to pay Guaranteed Revenue only because its own interferences with the RER Project made it impossible for CHM to achieve COS.

777. In its Counter-Memorial, Peru devotes only one paragraph to its defense to this claim.[1281] In that paragraph, Peru argues CHM is not "entitled" to receive the benefits of the Guaranteed Revenue concession because CHM failed to achieve COS on time.[1282] Peru does not address CHM's arguments under the Civil Code because, according to Peru, the Civil Code does not apply to the RER Contract. Instead, Peru doubles down on its interpretation that CHM "assumed the risk" that Peru would make it impossible for the Project to achieve COS. In other

[1281] Counter-Memorial, ¶ 910.
[1282] Counter-Memorial, ¶ 910.

words, Peru argues that the 20-year Guaranteed Revenue concession was an illusory promise because it was always subject to unilateral revocation by Peru and that CHM supposedly knew about its illusory nature when it invested more than US $20 million to develop the Mamacocha Project. This is Peru's principal defense.

778. As demonstrated in **Section V.A.3**, *supra*, Peru's risk-allocation defense is groundless as a matter of law, unsupported by any evidence, inconsistent with the Parties' contemporaneous interpretation, and appears to be submitted solely to immunize Peru's contractual breaches. CHM ***never*** assumed the risk that its counterparty would breach the RER Contract. Hence, when Peru prevented CHM from achieving COS, Peru had a duty to grant the Third Extension Request or pay CHM damages. Its failure to do either constitutes a material breach of the RER Contract.

779. Peru's civil law expert, Mr. Lava, advances a separate defense that Peru does not include in its Counter-Memorial. According to him, Clause 8.4 of the RER Contract imposed a condition subsequent (*condición resolutoria*) such that failure to reach COS terminated the contract.[1283] Mr. Lava contends this termination happened automatically, *i.e.*, neither party had discretion to prevent the termination and the termination occurred regardless of who was at fault.[1284] Although he recognizes this interpretation leads to the absurd result where Peru would be ***rewarded*** for its contractual breaches that prevented COS and, thereby, relieved Peru of its

[1283] Lava Report, ¶¶ 5.18-5.34.
[1284] Lava Report, ¶¶ 5.18-5.34.

obligation to pay the Guaranteed Revenue, Mr. Lava opines that this result is fair because that is what the Parties wanted.[1285] This defense is specious, unproven, and unsupported.

780. **First**, the Parties never intended for the RER Contract to terminate automatically if the COS were not achieved on or before December 31, 2018. This fact is evident from their agreement, via Addendum 2, ***to extend the COS deadline beyond that date***.[1286] In reaching that modification of the RER Contract, MINEM issued the Sosa Report, which, among other things, found the December 31, 2018 date was not an "essential term" under the RER Contract because any changes to this date "would not be relevant" especially when compared to the "material" impact that would follow if the RER Contract was terminated because of the Grantor's interferences to the project.[1287] Neither Peru nor its expert, Mr. Lava, present any evidence or authority to the contrary.

781. **Second**, Mr. Lava's interpretation fails the good-faith test under Article 168 of the Civil Code. As explained in **Section V.A.3**, *supra*, any defense that would immunize Peru from responsibility for its breaches does not constitute a good-faith interpretation under Peruvian law, because it would violate the governing principles under Articles 1314, 1317, 1328, and 1362 of the Civil Code. Peru's Clause 8.4 interpretation also does not satisfy the good-faith test because it is wholly inconsistent with the conduct and practices of the Parties at the time. On these grounds alone, this defense should be rejected.

782. **Third**, Mr. Lava's interpretation must be rejected under the systematic canon of interpretation under Article 169 of the Civil Code. Specifically, Mr. Lava's interpretation that

[1285] Lava Report, ¶¶ 5.18-5.34.
[1286] Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[1287] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

Clause 8.4 requires the automatic termination of the RER Contract cannot be squared with the plain text of Clause 10.2, which provides:

> **10.2.** The Ministry ***may*** terminate the Contract if the Concessionaire Company:
>
> a) Misrepresents any information.
> b) ***Fails to fulfill any of its obligations under paragraphs 8.2, 8.3 and 8.4.***
> c) Ceases to operate its facilities without cause for 876 cumulative hours within a twelve (12)-month period.
> d) After having been administratively penalized on two (2) occasions by OSINERGMIN, it continues failing to fulfill its obligations of supplying the generated power in compliance with the safety and quality standards set forth in the Contract and the relevant technical standards, provided that the administrative decision ordering such penalties is final and unappealable and the relevant contentious proceeding has been brought before the courts.
> e) Assigns the Contract in whole or in part, for any reason, without the prior written consent of the Ministry.
> f) Is penalized by OSINERGMIN with administrative non-tax fines that are final and unappealable which in one (1) calendar year exceed by 10% the Annual Billing of the previous years provided that the administrative decision ordering such fines is final and unappealable and the relevant contentious proceeding has been brought before the courts. This cause is applicable from the second year of commercial operation.
> g) Undergoes a merger, spin-off or transformation without the prior written approval of the Ministry.
> h) Is declared insolvent, bankrupt, dissolved or liquidated.
> i) Is repeatedly held in material and unjustified breach of any obligation under the Contract or the Applicable Laws, other than those set forth in the preceding paragraphs.[1288]

783. As can be seen, Clause 10.2(b) provides that if CHM "[f]ails to fulfill any of its obligations under paragraph[] . . . 8.4" of the RER Contract, MINEM "***may*** terminate the Contract." A plain-reading of this Clause reveals that, contrary to Mr. Lava's conclusions, failure to achieve COS by the deadline established in Clause 8.4 would ***not*** result in the RER

[1288] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 10.2 (C-0002) (emphasis added).

Contract's "automatic" termination. Rather, the Parties made clear in Clause 10.2 that Peru (through MINEM) would have discretion to terminate, or not to terminate, the RER Contract depending upon the circumstances that led to CHM's inability to reach COS by the deadline in Clause 8.4.

784. Dr. Benavides confirms that this interpretation is the only way to read Clauses 8.4 and 10.2 in "harmonious" fashion, as required by Article 169 of the Civil Code:

> From a joint and harmonious reading of sections 10 and 8.4 of the Contract, it is noted that, in accordance with section 10.2 b) of the Contract, the termination of the RER Contract due to delay on the date of the POC is an assumption of termination of the Contract due to non-compliance by the Concessionaire, and not due to the occurrence of a resolving condition. As established in Section 10.2 of the Contract, for each of the cases listed in said Section, among which is the delay of the POC, under Section 8.4, for the resolution to take effect, the MINEM must have an interest in the resolution and, therefore, notify said decision to the Concessionaire: "*The Ministry may terminate the Contract ...*"
>
> The language used in this clause is clear. The resolution does not operate for the sole fact that the [COS] does not occur on the scheduled date, but MINEM could exercise its right to terminate the Contract. If MINEM can terminate the Contract, it also has the right of not terminating it. For MINEM to exercise said right, notification by MINEM is required, exercising the resolution. For this reason, Section 10.2 of the RER Contract uses the verb "terminate" in an optional way and attributes the initiative to MINEM: "it may terminate the Contract". What MINEM has received is a faculty, a right, which it may or may not exercise, according to the public interest that MINEM is in charge of protecting.
>
> Where a party is granted the power or the right to terminate the Contract, there can be no automatic effects, but the right must first be exercised. There can be no termination of the contract, without notification of the termination of the creditor party. The MINEM has to previously activate that right, declare its interest in resorting to the resolution. Therefore, it is not possible to speak of a

> resolutive condition, when the agreement is an optional faculty of the MINEM, than can or cannot be activated.[1289]

785. **Fourth**, Mr. Lava's interpretation must also be rejected by application of the "purpose" canon of contract interpretation under Article 170. Mr. Lava bases his interpretation on the unproven premise that the Parties wanted the project to end if CHM did not achieve COS by a date certain.[1290] But the purpose of the RER Contract, as flowed down from the RER Law, was to promote, protect, and ***advance*** the RER projects because they are "of national interest and public necessity." Terminating RER projects in automatic fashion regardless of the attendant circumstances would run counter to this legislative purpose.

786. **Fifth**, Mr. Lava's interpretation must also be rejected by application of Article 70 of the Political Constitution, which requires that, for the State to expropriate a private entity's property right, it must provide due compensation and a compelling explanation of why the expropriation was necessary to further a public interest. Article 70 provides:

> **Inviolability of property rights**
>
> **Article 70.-** The property right is inviolable. The State guarantees it. It is exercised in harmony with the common good and within the limits of the law. No one can be deprived of their property except, exclusively, for reasons of national security or public need, declared by law, and after payment in cash of just-appreciated compensation that includes compensation for possible damage. There is action before the Judicial Power to answer the value of the property that the State has indicated in the expropriation procedure.[1291]

787. As Dr. Quiñones explains, this constitutional protection would be violated if Peru were able to terminate the RER Contract and collect CHM's performance bonds "automatically"

[1289] Benavides II, ¶¶ 217-219.
[1290] Lava Report, ¶¶ 5.18-5.34.
[1291] Peruvian Civil Code of 1984, Art. 70 (CL-0149).

even if CHM was not responsible for the delays creating the obstacle to meeting the COS milestone (emphasis in original):

> Therefore, the interpretation put forward by the Peruvian State and its experts, that clause 8.4 of the RER Concession Contract contains a condition subsequent that operates even when the delay is attributable to the Grantor and that, even, enables it to execute the performance bond, is equivalent to maintaining **that the RER Regulation enabled the State to confiscate, at its discretion, the RER Premium of the Concessionaire and its Faithful Compliance Guarantee, an interpretation that is manifestly unconstitutional**.[1292]

788. **Sixth**, Peru's recurrent defense in this arbitration is that the RER Contract COS and Termination deadline dates could not be extended "for any reason." But even assuming, *arguendo*, that the Parties intended the RER Contract to terminate automatically on December 31, 2018 – which they did not and Peru has not proved – this interpretation would still not absolve Peru of its full liability to compensate CHM for Peru's breaches of the RER Contract resulting in the delays. Articles 1328 and 1362 of the Civil Code prohibit any interpretation of a contract that immunizes the breaches of a contract party.[1293] Hence, even if the COS deadline could not have been extended beyond December 31, 2018, Peru must still pay CHM for the damages it sustained as a result of Peru's breaches of the RER Contract and Peruvian law resulting in the inability to meet the deadline.

789. For these reasons, Peru has not articulated a meritorious defense to its material breach of Clause 1.4.26 of the RER Contract.

[1292] Quiñones II, ¶ 181 (emphasis in original).
[1293] Peruvian Civil Code of 1984, Arts. 1328 and 1362 (CL-0149).

2. By Rejecting The Third Extension Request, Peru Breached Its Duty Under Addenda 3-6 To Suspend Its Obligations Under The Execution Works Schedule

790. Peru's denial of the Third Extension Request also breached Peru's obligations under Addenda 3-6 and Peruvian law to compensate CHM for the 17-month period that the RER Contract was under suspension.[1294] Claimants have proven these Addenda suspended ***all of CHM's obligations*** under the RER Contract, including CHM's obligations under the Works Schedule. Claimants have also proven in **Section II.C**, *supra*, that the Parties understood at all relevant times that Peru had a legal obligation to restore the 17-month suspension period through corresponding extensions under the RER Contract. CHM requested these extensions in its Third Extension Request, but Peru inexplicably waited ten (10) months to respond and then denied the request in its entirety on December 31, 2018, marking a complete repudiation of its commitments to good faith negotiation under Addenda 3-6.[1295]

791. In its Counter-Memorial, Peru argues the "suspensions" were not actually suspensions and, hence, the 17-month suspension period should count ***against*** CHM.[1296] Peru contends, again without documentary proof or weight of legal authority, that Addenda 3-6 did nothing to stop the clock on the fast-approaching deadlines in the Works Schedule but, rather, merely suspended Peru's "supervision" of those deadlines.[1297] This defense is almost laughable, particularly when reviewed under the then-existing circumstances. Instead of trying to justify this position by parsing the plain language of the RER Contract or practices of the Parties, Peru argues it was clear from the face of these Addenda that Peru had no obligation to extend the RER

[1294] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).
[1295] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).
[1296] Counter-Memorial, ¶¶ 254-264.
[1297] Counter-Memorial, ¶ 265.

Contract to account for the suspended time. As demonstrated below, Peru's interpretation must be rejected under each of the canons of contract interpretation under the Civil Code.

(1). *A Plain Language Analysis Under Article 168 Contradicts Peru's Interpretation*

792. Peru's interpretation of Addenda 3-6 is incompatible with a plain language analysis under Article 168 of the Civil Code. Peru does not dispute that the suspension was accompanied by a written Suspension Agreement, dated July 21, 2017,[1298] which was affixed to Addendum 3.[1299] Paragraph 2.1 of the Suspension Agreement expressly provides that the Parties had agreed to suspend CHM's obligations under the RER Contract, including "the obligations, rights and the Works Execution Schedule:"

> **The parties agree to the following:**
>
> 2.1. To provide, in the framework of the RER Concession Agreement, and having previously informed the main representative of the Ministry of Economy and Finances of the Special Committee created through Law No. 28933 for the information centralization and coordination purposes established in that regulation, the suspension of the Concession Agreement for the Supply of Renewable Power to the National Interconnected Electrical Grid for the project CH Mamacocha S.R.L., ***including the obligations, rights and the Works Execution Schedule*** contained in Annex II of the RER Concession Agreement previously modified by Addendum No. 1 and Addendum No. 2.[1300]

793. A plain language analysis of this text confirms Claimants' interpretation of the Suspension Agreement, as formalized by Addenda 3-6.

794. **First**, by its plain terms, CHM was relieved of all of its obligations during the mutually agreed suspension period, including, but not limited to, those under the Works

[1298] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).
[1299] Addendum 3 to the RER Contract, September 8, 2017 (C-0014).
[1300] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017, ¶ 2.1 (C-0094). (emphasis added)

Schedule as modified by Addenda 1-2, and each successive Addendum. As Claimants demonstrated in **Section II.C**, *supra*, the modified Works Schedule expressly included the obligation to achieve COS by March 14, 2020. In other words, the Parties clearly understood and explicitly provided that CHM would no longer be bound by the deadlines under the Works Schedule (including the COS deadline) because the clock had effectively stopped on the RER Contract until the Parties agreed to lift the suspension.[1301] Noticeably missing from the text of the Suspension Agreement is any language that supports Peru's interpretation that the Parties only agreed to suspend Peru's "supervision" of CHM's obligations under the RER Contract. Peru appears to have made this up out of whole cloth. To be sure, Peru does not cite to any evidence supporting this interpretation. Peru's interpretation must be rejected under Article 168.

795. **Second**, Peru's interpretation is also inconsistent with the good faith component of an Article 168 interpretation. Peru argues these suspensions do not obligate Peru to grant corresponding extensions to the RER Contract Works Schedule.[1302] Again, this view is contradicted by the express inclusion of the Works Schedule in the scope of the suspension. MINEM's execution of four suspension agreements would be evidence of bad faith if MINEM never intended to grant equivalent extensions to the Works Schedule milestone deadlines.

796. The evidence proves that MINEM represented to CHM that, contrary to Peru's argument here, extensions of the Works Schedule would follow in harmony with the suspension periods. As Claimants demonstrated in **Sections II.C** and **II.G**, *supra*, MINEM sent Claimants a letter on July 13, 2017, attaching Legal Report No. 122-2017-MEM/DGE, dated June 28, 2017.[1303] As quoted below, that Report plainly stated that a suspension of obligations under the

[1301] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017, ¶ 2.1 (C-0094).
[1302] Counter-Memorial, ¶¶ 254-264.
[1303] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).

RER Contract would result, "in due course," in a conforming extension of the Works Schedule:[1304]

> **2.3. Analysis by the MINEM's General Directorate of Electricity**
>
> ***It is appropriate to liken the request for suspension of the Contract to a request for postponement of the milestones in the Contract***, to the extent that, in the event that the request for suspension is accepted and, therefore, that an order is given not to compute the term for performance of the contract obligations for an indefinite time period (as spelled out in the request for suspension), ***the non-computed term for performance (during which the contract obligations will be unenforceable) should be, in due course, added to the current works schedule***, and a new COS date should be scheduled beyond March 2020. In this scenario, consideration should be given to Clause 8.4 of the RER Supply Contract, the scope of which has been defined by Ministerial Resolution No. 559-2016-MEM/DM, dated December 29, 2016 (See above).[1305]

797. As can be seen from this excerpt, MINEM confirmed to Claimants that a suspension to the RER Contract meant that MINEM would "not . . . compute the term for performance of the contract obligations[,]" *i.e.*, the clock would stop on CHM's deadlines.[1306] And the Report confirmed that "the non-computed term for performance (during which the contract obligations will be unenforceable) ***should be, in due course, added to the current works schedule, and a new COS date should be scheduled beyond March 2020***."[1307] A plain-language interpretation of this statement by MINEM demonstrates that MINEM plainly knew and agreed with the obvious correlation between the suspension of obligations to permit settlement negotiations to take place, and its corresponding impact on the Works Schedule. Peru's

[1304] Ironically, MINEM relied upon this analysis to deny CHM's initial request for an extension. MINEM plainly knew and agreed with the obvious correlation between the suspension of obligations to permit settlement negotiations to take place, and its corresponding impact on the Works Schedule.
[1305] Official Letter No. 121-2017-MEM/VME, July 13, 2017, § 2.3 (C-0216) (emphasis added).
[1306] Official Letter No. 121-2017-MEM/VME, July 13, 2017, § 2.3 (C-0216) (emphasis added).
[1307] Official Letter No. 121-2017-MEM/VME, July 13, 2017, § 2.3 (C-0216) (emphasis added).

contention in this arbitration that the suspensions should not have resulted in extensions is directly inconsistent with what Peru (through MINEM) represented to CHM during the relevant period.

798. Dr. Quiñones confirms that Peru's interpretation fails a common sense reading of the term "suspension" under Peruvian administrative law:

> The usual meaning of a suspension is that it means that the term ceases to be computed during the Suspension Period and is resumed once the suspension is lifted. Therefore, a suspension necessarily extends the term for the fulfillment of the obligation, since it excludes the period of suspension from its calculation. When a contract refers to the "suspension" of a contract and its schedule, there is no need to specify the "effects" of said suspension, because these are the consequences of giving mandatory effects to "suspend" agreement; especially in the field of administrative contracts, in which the "suspension" has consistently had the necessary and unquestioned consequence of extending the term, as a materialization of the contractor or concessionaire's right to maintain the agreed term.[1308]

799. Dr. Quiñones adds:

> While I consider that this aspect is obvious and should not merit further explanation, given that the Peruvian State insists that the suspension did not automatically imply that the Concessionaire had the right to the extension of the Schedule as a consequence of excluding the Period of Suspension from the calculation, below I show that the understanding of the effects of a suspension are transversal in Peruvian Law."[1309]

800. Dr. Quiñones then includes in her analysis numerous examples showing that when the State suspends an administrative contract, it is also an affirmative promise that it will grant future extensions to account for the suspended time.[1310]

[1308] Quiñones II, ¶ 120.
[1309] Quiñones II, ¶ 121.
[1310] Quiñones II, ¶ 121.

801. **Third**, Peru's interpretation in this arbitration is also flatly contradicted by Peru's pleadings in the Lima Arbitration. As Claimants demonstrated in **Sections II.C** and **II.G**, *supra*, Peru, through MINEM, pleaded in its Statement of Claims, dated December 6, 2019, that the suspensions formalized under Addenda 3-6 meant it was "pertinent" for MINEM to have extended the RER Project by "528 calendar days" (*i.e.*, just over seventeen (17) months) that the Project had been in suspension.[1311] Further, Peru submitted a report by its delay expert in that proceeding, Metacontrol Ingenieros SAC, which also concluded that it was necessary for MINEM to grant extensions of time to the COS date that corresponded to the suspension period under Addenda 3-6.[1312] Peru's own pleadings and admissions in the Lima Arbitration undermine its groundless contention in this case that attempts to decouple the suspension period from the obvious correlated impact on the RER Contract milestone dates.

802. **Fourth**, Peru's interpretation also fails the good-faith standard under Article 168 because it is illogical. As demonstrated in **Sections II.C** and **II.G**, *supra*, it would make no sense for CHM to agree to a "suspension" that did not actually suspend CHM's obligations. The whole point of CHM's request for a suspension was to stop the clock on those obligations so that the Special Commission could resolve the RGA Lawsuit, which had made it impossible to advance the Project and had triggered other harmful measures, such as the AEP criminal proceeding. Any efforts to resolve the RGA Lawsuit without a suspension of the relevant deadlines would have been pyrrhic in nature because CHM would still have run out of time on the ticking milestone clock.[1313] If CHM had any reason to believe the suspension was not

[1311] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).
[1312] Technical Expert Report (Metacontrol Report) submitted by MINEM in the Lima Chamber of Commerce Arbitration No. 669-2018-CCL, December 1, 2019 (C-0251).
[1313] Jacobson II, ¶¶ 43-45.

actually a suspension, as Peru now claims, CHM would have just submitted its claims to ICSID as it had already noticed through the First Notice of Intent.[1314] If Peru, on the other hand, had entered into the Suspension Agreement while knowing that it did not intend to grant CHM correlating extensions to the milestone deadlines, it could raise issues of bad-faith treatment of its contractual counterparty.

(2). *Peru's Interpretation Also Fails A Systematic Interpretation Under Article 169 Peru*

803. Peru's interpretation must also be rejected by application of the Civil Code's systematic canon of interpretation under Article 169. It is undisputed that, under the RER Contract, ***every day mattered***. For that reason, it would be entirely contradictory to interpret the suspensions as anything other than a decision by the Parties to stop the clock on the Project with the understanding that CHM would receive a corresponding extension, in due course, that compensated CHM for the time that was under suspension. Again, Peru has failed to introduce any evidence to square its interpretation of the Addenda with this undisputed reality.

804. Instead, Peru argues that its interpretation is supported by Paragraphs 3.2 and 3.3 in Addenda 4-6, which on their face appear to be a straightforward "No Other Changes" clause, providing that except as specifically amended, all other provisions remain in full force and effect.[1315] Significantly, these paragraphs were not included in the Suspension Agreement, itself, or in Addendum 3.[1316] Therefore, even under Peru's case, the suspension period of April 21, 2017 to December 31, 2017 would not have been affected by these new paragraphs added to

[1314] Jacobson II, ¶¶ 43-45.
[1315] Addendum 4 to the RER Contract, January 17, 2018, ¶¶ 3.2-3.3 (C-0015); Addendum 5 to the RER Contract, March 26, 2018, ¶¶ 3.2-3.3 (C-0016); Addendum 6 to the RER Contract, July 23, 2018, ¶¶ 3.2-3.3 (C-0017).
[1316] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094); Addendum 3 to the RER Contract, September 8, 2017 (C-0014).

Addenda 4-6, which extended the suspension period from December 31, 2017 through September 2018. These paragraphs provide:

> **3.2.** The clauses and points of the RER Concession Agreement, which have not been modified or invalidated through this Addendum, remain unchanged, and are effective and enforceable in accordance with the terms of the Agreement. Nothing indicated or contained in this Addendum may be interpreted or considered as a waiver, discontinuance, consent or modification of any position or statement by the Parties with respect to any subject or matter of the Agreement, unless expressly stated in this Modification.
>
> **3.3.** The present Addendum shall take effect on the calendar day following its signing. Specifically and not exhaustively, the provisions of the Eighth Clause of the RER Concession Agreement maintain their full validity and effectiveness.[1317]

805. Peru argues that these paragraphs specifically carved out and meant to continue CHM's obligation to achieve COS by the requisite deadline because: (i) the COS deadline was not specifically modified or invalidated by the Suspension Agreement and thus, it continued under Paragraph 3.2; and (ii) the COS deadline was contained in Clause 8.4 of the RER Contract (part of the Eighth Clause), which means it continued under Paragraph 3.3.[1318] This argument fails for several reasons.

806. **First**, Peru fails to acknowledge that CHM's obligation to achieve COS by March 14, 2020 ***was specifically modified and invalidated*** by the Suspension Agreement, ensuring that it does not fall within the exception stated under Paragraph 3.2 in Addenda 4-6.[1319] The COS deadline was an explicit deadline specified in the Works Schedule and was expressly suspended by the Suspension Agreement (as proven in the section immediately above).[1320] Therefore,

[1317] Addendum 4 to the RER Contract, January 17, 2018, ¶¶ 3.2-3.3 (C-0015); Addendum 5 to the RER Contract, March 26, 2018, ¶¶ 3.2-3.3 (C-0016); Addendum 6 to the RER Contract, July 23, 2018, ¶¶ 3.2-3.3 (C-0017).
[1318] Counter-Memorial, ¶¶ 254-264.
[1319] Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).
[1320] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Annex I (C-0002).

contrary to Peru's argument, Paragraph 3.2 actually supports Claimants' position that the COS deadline, like all the contract milestone dates, were meant to be extended with the granting of the suspension of obligations.

807. **Second**, contrary to Peru's current argument, CHM's obligation to achieve COS by March 14, 2020 was ***not*** contained in Clause 8.4 of the RER Contract. That obligation was included in the Works Schedule and contained in Annex 1 to the RER Contract.[1321] All Clause 8.4 provided was that if CHM failed to achieve COS by the relevant deadline set forth in the Works Schedule, Peru had discretion to terminate the RER Contract and call the bond.[1322] That deadline, however, was, by mutual agreement of the Parties, under suspension and subject to modification by a future extension, as confirmed in MINEM's Legal Report No. 122-2017-MEM/DGE, dated June 28, 2017, which MINEM sent to CHM on July 13, 2017.[1323]

808. **Third**, Peru's interpretation must also be rejected because it would lead to the absurd result where the Parties agreed to suspend the COS obligation under Addendum 3, but not under Addenda 4-6, which would be internally inconsistent and violates the systematic canon of interpretation under Article 169. Moreover, prior to this arbitration, neither MINEM nor Claimants had ever stated orally or in writing that Addenda 4-6 were intended to have a different effect than Addendum 3. To the contrary, except for an extension of the dates, the Parties at all times believed them to have the same legal effect. That was the plain intention of entering into a "No Other Changes" provision in the amendments.

[1321] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Annex I (C-0002).
[1322] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 8.4 (C-0002).
[1323] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).

(3). *Under An Article 170 Analysis, The Purpose Of The Suspension Agreements Would Be Defeated By Peru's Interpretation*

809. Peru's interpretation must also be rejected by application of the "purpose" canon of interpretation under Article 170 of the Civil Code. In its Counter-Memorial, Peru fails to prove or offer any argument as to how its interpretation furthers the RER Contract's purpose. Indeed, Peru's interpretation would defeat the purpose of the RER Contract as well as the purpose of the suspensions.

810. As Claimants have proven, the RER Contract's purpose was to eliminate barriers to the advancement of RER projects. This purpose would not be served by an interpretation that resulted in the time necessary to suspend contract obligations due to meritless interferences by government authorities would be counted against the RER concessionaire. This interpretation would raise not lower barrier to investment and development. Instead, under Article 170 of the Civil Code, the suspension period should be interpreted in a way that protects the RER projects and ensures their advancement.

811. Similarly, Peru's interpretation is completely inconsistent with the purpose of the suspensions themselves. The Suspension Agreement identifies that the purpose of the suspensions was to facilitate the ongoing discussions between Claimants and the Special Commission. Because every day mattered under the RER Contract, this purpose would be undermined if the COS deadline was not intended to be extended in correlation with the agreed suspension period. Under any commercially reasonable interpretation, if such an extension were not guaranteed, CHM would have been incentivized to avoid spending any time in these negotiations.

3. By Commencing The Lima Arbitration, Peru Breached Clause 11.3(A) Of The RER Contract

812. In their Memorial, Claimants demonstrated that Peru breached Clause 11.3(a) of the RER Contract when it tried to circumvent ICSID jurisdiction through commencement of the Lima Arbitration. That Clause provides that disputes valued at more than US $20 million ***must*** be submitted to ICSID and seated in Washington, D.C., as quoted below in pertinent part:

> **11.3.** Non-Technical Disputes shall be settled through national or international arbitration of law, as follows:
>
> a) Disputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency shall be settled through international arbitration of law by means of a procedure carried out in accordance with the Rules for Conciliation and Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID) established in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States approved by Peru through Legislative Resolution No. 26210, to whose standards the Parties submit unconditionally. Where the Concessionaire Company does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rules referred to in subparagraph b) below.
>
> The Arbitration shall be carried out in the city of Washington, D.C., or in the city of Lima, at the choice of the Concessionaire Company, and shall be conducted in Spanish. The relevant arbitral award shall be rendered within ninety (90) Days following the constitution of the Arbitral Tribunal.[1324]

813. It was always clear that Peru's claims in the Lima Arbitration exceeded the US $20 million monetary threshold because Peru sought to annul the extensions granted under Addenda 1-2, which, if successful, would have reinstated the original COS deadline of December 31, 2018.[1325] Given that the Lima Arbitration was commenced by MINEM on December 27, 2018, it was evident from the moment of its commencement that the entire value of the Project was at stake. As has been proven in this arbitration and as was also finally determined by the

[1324] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 11.3(a) (C-0002).
[1325] MINEM's Statement of Claims submitted in the Lima Chamber of Commerce's Arbitration Case No. 0669-2018-CCL, December 16, 2019 (C-0097).

Lima Arbitration tribunal in its dismissal of the case,[1326] the value of the Project exceeded the US $20 million threshold for jurisdiction before ICSID under Clause 11.3(a).

814. In its unsuccessful attempt to justify jurisdiction before the Lima Chamber of Commerce under Clause 11.3(b) of the RER Contract,[1327] MINEM also argued that its claims for declaratory judgment relief in the Lima Arbitration had ***no monetary value*** whatsoever because MINEM did not seek monetary damages.[1328] Peru tried to shoehorn its claims into the exception to ICSID jurisdiction for disputes that "cannot be quantified or assessed in money."[1329]

815. In December 2020, the tribunal in the Lima Arbitration rejected both arguments raised by MINEM and unanimously dismissed the case for lack of jurisdiction.[1330] As explained fully in **Sections II.F.2** and **II.G**, *supra*, the tribunal dismissed Peru's claims ***in their entirety*** on the ground that they should have been filed at ICSID in the first instance because the value exceeded US $20 million and the Parties had intended under Clause 11.3(a) to submit all such disputes to ICSID.[1331] In so holding, the tribunal found that Peru's interpretation of the RER

[1326] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).
[1327] Clause 11.3(b) provides: "*Disputes involving amounts equivalent to or lower than Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency, or which cannot be quantified or assessed in money, shall be settled through national arbitration of law by means of a procedure carried out in accordance with the Arbitration Rules of the National and International Arbitration Center of the Chamber of Commerce of Lima, to whose standards the Parties submit unconditionally. Legislative Decree No. 1071, which regulates Arbitration, shall apply in the alternative. The Arbitration shall be carried out in the city of Lima, Peru, and shall be conducted in Spanish. The relevant arbitration award shall be rendered no later than ninety (90) days following the constitution of the Arbitral Tribunal*." Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 11.3(b) (C-0002).
[1328] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).
[1329] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 11.3(b) (C-0002).
[1330] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).
[1331] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).

Contract: (i) was not a good-faith interpretation;[1332] (ii) allowed for forum shopping;[1333] and (iii) was "nonsensical from an efficiency perspective" because it would allow for scenarios (as MINEM attempted to do here) where the same Parties could litigate the same dispute across several arbitrations.[1334]

816. In its Counter-Memorial, Peru tries to justify its commencement of the Lima Arbitration by arguing it was "reasonable" to interpret Clause 11.3 to mean that a claimant could select its forum and undertake an end-run around ICSID jurisdiction simply by the manner in which it formulated its damages.[1335] Peru fails to explain, however, how its interpretation is reasonable under any of the canons of contract interpretation. Nor does Peru address the Lima Arbitration tribunal's concerns about forum shopping and arbitral economy.

817. Peru also argues that filing a lawsuit in an improper forum, in and of itself, cannot amount to a breach of Clause 11.3.[1336] But its defense fails for several reasons.

818. **First**, this defense is contradicted by the plain language of Clause 11.3, which provides that "Non-Technical Disputes ***shall*** be settled through national or international arbitration of law, ***as follows:***" and then includes the requirement under Clause 11.3(a) that "[d]isputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency ***shall be settled through international arbitration of law***" at ICSID.[1337] The bolded text demonstrates the Parties' intent to adhere strictly to the monetary

[1332] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020, ¶¶ 117-119 (C-0245).
[1333] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020, ¶¶ 120-124 (C-0245).
[1334] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020, ¶ 125 (C-0245).
[1335] Counter-Memorial, ¶¶ 476-481.
[1336] Counter-Memorial, ¶¶ 955-957.
[1337] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 11.3(a) (C-0002) (emphasis added).

threshold under Clause 11.3(a). Had the Parties intended to allow for forum shopping, they would not have used this language, as explained by Dr. Benavides:

> The submission of the controversy to arbitration must always be done in accordance with what has been agreed by the parties. MINEM did not have the freedom to choose the arbitration jurisdiction of its choice and liking, as the Lava Report tendentiously suggests. MINEM was obliged to respect the procedure and the arbitration jurisdiction agreed in the RER Contract. Where the parties have agreed on a dispute resolution clause, there is neither freedom to choose to go to a local arbitration, nor rights of choice, nor free choice of forum, but, on the contrary, subject to the arbitration clause and obligation to submit to the jurisdiction and jurisdiction agreed.[1338]

819. **Second**, Peru's interpretation is inconsistent with the purpose of Clause 11.3(a). It is undisputed that offering developers, including foreign investors, the ability to resolve significant disputes before an impartial tribunal sited outside Peru was one of the main protections provided under the RER Contract. Indeed, Claimants proved in their Memorial that they relied heavily on this protection when deciding to execute the RER Contract. Peru's decision to renege on that promise by filing the Lima Arbitration undermined the principal purpose of Clause 11.3 and the RER Law in general; namely, to protect and incentivize foreign investment in the renewable energy sector.

820. **Third**, Peru's decision to file the Lima Arbitration significantly injured CHM. This measure signaled that Peru would no longer honor previous extensions granted and would actively seek an arbitral award that allowed it to terminate the RER Contract and call the performance bond. The arbitration made it impossible for CHM to obtain project financing or complete its deal for an equity partner. And, even though it was ultimately dismissed on

[1338] Benavides II, ¶ 345.

jurisdictional grounds, CHM was forced to spend hundreds of thousands of dollars in legal fees to defend itself in an arbitration that should never have been filed.

821. For these reasons, Peru has not presented or proven a meritorious defense to its material breach of Clause 11.3(a) of the RER Contract.

4. By Disavowing Addenda 1-2, Peru Breached Clause 2.2.1 Of The RER Contract

822. In their Memorial, Claimants proved that Peru breached Clause 2.2.1 of the RER Contract when it filed the Lima Arbitration. That Clause provides:

> **2.2.** The Ministry ensures the Concessionaire Company, on the Closing Date, that the following representations are true and accurate:
>
> > **2.2.1.** The Ministry is duly authorized under the Applicable Laws to act as Grantor of this Contract. The execution, delivery and performance hereof by the Ministry fall within its powers, are consistent with the Applicable Laws and have been duly authorized by the Government Authority.[1339]

823. As is evident from the plain text of this Clause, Peru guaranteed CHM that MINEM's actions under the RER Contract would be "consistent with the Applicable Laws" and "duly authorized by the Government Authority" (*i.e.*, Peru).[1340] Hence, when MINEM executed Addenda 1-2, CHM believed that those Addenda were "consistent with the Applicable Laws" and "duly authorized" by Peru and not subject to unilateral challenge by Peru years later.[1341] CHM invested millions of dollars under the RER Contract in reasonable reliance on this

[1339] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 2.2.1 (C-0002).
[1340] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 2.2.1 (C-0002).
[1341] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 2.2.1 (C-0002).

guarantee. Peru's attempt to annul these Addenda in the Lima Arbitration was, therefore, a material breach of its obligations to CHM under Clause 2.2.1.

824. In its Counter-Memorial, Peru contends that Peru's guarantee under Clause 2.2.1 does not reach "modifications" made by MINEM to the RER Contract.[1342] According to Peru, Clause 2.2.'s express reference to the "Closing Date" indicates that Peru's guarantee was limited to MINEM's actions as of February 18, 2014, the date the Parties executed the RER Contract.[1343] This interpretation is unsustainable and must be rejected.

825. **First**, this interpretation is contradicted by the plain text of Clause 2.2.1. Peru's guarantee under Clause 2.2.1 is that MINEM's "execution, delivery and ***performance***" of the RER Contract would be lawful and duly authorized. The inclusion of the word "performance" demonstrates the Parties' understanding that MINEM's ***future*** actions under the RER Contract would be covered by this guarantee.[1344] The fact that Peru made this guarantee on the "Closing Date" does not change this interpretation. To the contrary, Peru's guarantee on the closing date served as a critical feature of the RER Contract, upon which CHM was justified in relying. Under Clause 2.2.1, Peru promised it would abide by its laws in the fulfillment of its contractual duties.

826. **Second**, Peru's construction is also arbitrary and commercially unreasonable. CHM had no opportunity to negotiate the terms of the form RER Contract; therefore, any attempt by Peru to restrict its terms must be tested against a standard of good faith (Article 168 of the Civil Code) and commercial reasonableness. An interpretation that suggests that the government guaranteed that it would act in accordance with Applicable Laws, but only if the contract is not

[1342] Counter-Memorial, ¶¶ 958-961.
[1343] Counter-Memorial, ¶¶ 958-961.
[1344] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 2.2.1 (C-0002).

modified, does not withstand scrutiny under either a good faith test or common sense commercial reasonableness.

827. **Third**, Peru's interpretation must also be rejected under the systematic canon of interpretation of Article 169 of the Civil Code. As demonstrated elsewhere in this Reply and as testified by Dr. Quiñones, the RER Contract requires the Parties to work together in timely fashion in order to ensure the Project achieves commercial operation before the COS deadline. Under the "time is of the essence" nature of this contract, Peru has failed to prove that it could, at any time up to the expiration of the statute of limitations, challenge its own acts in derogation of the rights of its counterparty. Even if MINEM had such a right – which it has not proven – the time-limited nature of the contract would have prevented MINEM from challenging its own prior decisions at a time that would render further performance impossible.

828. **Fourth**, Peru's interpretation is also irreconcilable with the RER Law's key objective of having the RER Contract and Peru's implementation reflect transparency, consistency, and a predictable legal framework.[1345] Indeed, allowing Peru to overturn MINEM's decisions years after-the-fact would hardly eliminate "barriers" to investment. In fact, sanctioning arbitrary reversals of administrative decisions would have the opposite effect.

5. By Failing To Protect The Project's Permits, MINEM Breached Its Obligation Under Clause 4.3 Of The RER Contract To *Coadyuvar* CHM In The Permitting Process

829. In their Memorial, Claimants demonstrated that MINEM had an obligation under Clause 4.3 of the RER Contract to *coadyuvar* CHM in securing permits that were unduly withheld or subject to delay or interferences by government authorities. This obligation is separate from and supplemental to the obligation of Peru, as Grantor under the RER Contract, to

[1345] Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).

issue the permits in a timely and lawful manner in the first place. By its plain terms, MINEM's obligation under Clause 4.3 is to help ensure all government permits and approvals are issued on a timely basis, or else, MINEM will assist in facilitating the permits.[1346]

830. Clause 4.3 provides:

> **4.3.** The Ministry shall create any such easements as may be required in accordance with the Applicable Laws but shall not bear any costs incurred in obtaining them.
>
> Furthermore, the Ministry shall, upon request of the Concessionaire Company, use its best endeavors in order to allow the latter to access third-party facilities, ***and shall [coadyuvar] it in obtaining permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right, in the event of these not being timely granted*** by the relevant Government Authority despite all requirements and procedures required under the Applicable Laws having been met.[1347]

831. Although *coadyuvar* does not have a perfect corollary in English, it is undisputed in this arbitration that this word is roughly translated to mean "to contribute and help to obtain."[1348] Claimants demonstrated this obligation is results-driven, requiring MINEM to work with CHM until the affected permits are issued to CHM free from government interference.[1349] And this obligation is triggered when: (i) a relevant government authority is interfering with the timely issuance of a permit; and (ii) CHM met the relevant requirements and procedures.[1350]

832. Claimants have proven that MINEM breached its *coadyuvar* obligation because it did nothing during a critical period in 2017-2018 when the Project faced an onslaught of measures that affected its ability to secure its permits. The first interference occurred on March

[1346] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 4.3 (C-0002).
[1347] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 4.3 (C-0002). (emphasis added).
[1348] Lava Report, ¶ 1.12.
[1349] Memorial, ¶¶ 442-449.
[1350] Memorial, ¶¶ 442-449.

14, 2017, when the RGA filed its spurious Lawsuit in an attempt to nullify the Project's environmental permits and prevent the Project from proceeding. The second interference came on March 24, 2017, when the AEP commenced a criminal investigation that unfairly and baselessly questioned the legality of the Project's environmental permits. And the third interference came from AAA, which subjected CHM to a regulatory rollercoaster wherein the CWA (one of the key permits for the Project) was: (i) unlawfully delayed by months; (ii) unlawfully denied in May 2017; and (iii) issued in defective fashion in July 2017. Notwithstanding CHM's repeated requests,[1351] MINEM failed to provide any assistance with respect to these measures, much less *coadyuvar* CHM in defending these permits from unreasonable government interferences.

833. In its Counter-Memorial, Peru raises a series of defenses to sidestep MINEM's *coadyuvar* responsibilities. Peru's defenses are groundless, unsupported by the evidence, and distort the language and purpose of Clause 4.3, which was to ensure Claimants could advance the Project in a timely fashion. For example, Peru argues that the *coadyuvar* obligation is not results-oriented but, rather, akin to a "best endeavors" obligation.[1352] But that interpretation must be rejected because it is inconsistent with the Parties' intent. As Claimants explained in their Memorial, had the Parties intended for MINEM to use its "best endeavors" to help CHM secure these permits, they would have used those words.[1353] This conclusion is evident from the fact that the Parties used the "best endeavors" standard in the first paragraph under Clause 4.3 when describing MINEM's obligation to help CHM obtain easements from private third-parties.[1354]

[1351] Letter from C.H. Mamacocha to Ministry of Energy and Mines, March 28, 2017 (C-0091); Letter from C.H. Mamacocha to G. Tamayo, Minister of Energy and Mines, April 26, 2017 (C-0139); Letter from CH Mamacocha to A. Vasquez, Vice Minister of Energy, July 17, 2017 (C-0142).
[1352] Counter-Memorial, ¶ 317.
[1353] Memorial, ¶¶ 444-445.
[1354] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 4.3 (C-0002).

The Parties' decision to use the heightened *coadyuvar* standard with respect to MINEM's obligation to help CHM secure permits confirms that this standard must be given a different meaning.

834. Peru also argues that MINEM never breached this obligation because CHM had to provide formal notice of the governmental interference before MINEM could do anything. But this defense fails for three reasons.

835. **First**, this argument fails because CHM ***sent MINEM four (4) formal notices*** in 2017 requesting that MINEM *coadyuvar* in protecting the environmental permits that were challenged by the RGA Lawsuit and the related criminal proceeding and ***MINEM did nothing***.[1355] Peru does not dispute these facts. Instead, it argues the requests fell outside MINEM's obligation under Clause 4.3 because that Clause allegedly only concerns the original issuance of permits and it is undisputed that CHM had already obtained its environmental permits.[1356] But this overly narrow interpretation of Clause 4.3 is unsustainable. The undisputed purpose of Clause 4.3 was to ensure the Project had all its permits so the Project could advance to completion. That purpose would be defeated if MINEM stood by and did nothing as the Project's permits were subjected to unlawful processes of annulment commenced by government authorities. This fact is confirmed by Dr. Whalen, who concludes that it would have been impossible for CHM to achieve Financial Close under these conditions, particularly because the party seeking the annulment of these permits was the ***same government*** that issued these permits in the first place.[1357]

[1355] Letter from C.H. Mamacocha to Ministry of Energy and Mines, March 28, 2017 (C-0091); Letter from C.H. Mamacocha to Ministry of Energy and Mines, April 21, 2017 (C-0092); Letter from C.H. Mamacocha to G. Tamayo, Minister of Energy and Mines, April 26, 2017 (C-0139); Letter from CH Mamacocha to A. Vasquez, Vice Minister of Energy, July 17, 2017 (C-0142).
[1356] Counter-Memorial, ¶¶ 941-945.
[1357] Whalen I, ¶ 6.2.

836. **Second**, it is impermissible under Peruvian law to rely upon a party's own breaches to undermine the rights of the counterparty.[1358] Here, the government's attempt to annul its own decisions for unsubstantiated reasons and after the limitations period had run, cannot be used to justify MINEM's failure to provide assistance. CHM could not reasonably have expected that its counterparty would, after issuance of a permit or approval, unlawfully challenge their issuance.

837. **Third**, Peru's argument fails because there is no formal notice requirement under Clause 4.3. By designating MINEM as its representative, Peru put MINEM in charge of supervising the RER Contract and ensuring the project advanced in a timely manner. As a result of this charge, MINEM had a *sua sponte* obligation under Clause 4.3 to work with CHM in securing the Project's permits. This interpretation is confirmed by Dr. Quiñones, who explains that the GLAP requires government authorities to perform their duties with or without formal notice of the issue in question:

> [A]ll Government Authorities have the legal duty to initiate the procedures under their responsibility, such as those initiated by CHM at the time, without waiting for the administrated entity to notice a delay.[1359]

838. Dr. Quiñones's conclusion is dispositive here because it is undisputed that MINEM did nothing during the year-long period when AAA illegally withheld the CWA from the Project. To summarize, CHM applied for this important permit in November 2016 with the reasonable expectation (based on the binding TUPA review periods) that it would be issued no later than January 2017. But AAA dithered and arbitrarily refused to issue the CWA for months. In May 2017, AAA denied the CWA outright only to reverse itself weeks later. In July 2017,

[1358] Peruvian Civil Code of 1984, Arts. 1328 and 1362 (CL-0149).
[1359] Quiñones II, ¶ 169.

AAA issued a defective CWA that was unusable. AAA refused to cure these defects and only did so in January 2018 when ordered by an administrative judge. During this year-long regulatory rollercoaster, MINEM ***did nothing*** to help CHM secure this permit. Not one letter. Not one telephone call. Nothing.

839. For its last defense, Peru contends that MINEM did not breach its obligation under Clause 4.3 because MINEM has no legal authority to force other government authorities to do anything and, hence, cannot be blamed for not trying.[1360] This argument must be rejected because it would render the *coadyuvar* obligation meaningless and illusory. Moreover, Peru's argument misses the point. Claimants do not argue that MINEM could force other government authorities to do anything. Rather, Claimants argue MINEM had to work with CHM to help secure the permits that were unduly delayed or subject to challenge.

840. As Dr. Quiñones confirms, even though it cannot "force" other government authorities to do anything, MINEM regularly coordinates with central, regional, and local government authorities with respect to matters that are in its purview:

> The role of the MINEM to contribute within the framework of the RER Concession Contract is consistent with the duty attributed to it by Law 30705, the Law of Organization and Functions of the MINEM and the Regulation of Organization and Functions of the MINEM, to coordinate with the entities of the Executive Power and Regional Governments with respect to those matters that are the object of their rectory. Framed in the duties of collaboration or inter-administrative cooperation to which it is subject in accordance with article 87.1 of the Law of Administrative Procedure
>
> MINEM had the obligation to coordinate with any public entity linked to the RER Project, as this is its legal duty. What the RER Concession Contract does is convert this duty of collaboration and coordination into a contractual duty.[1361]

[1360] Counter-Memorial, ¶ 922.
[1361] Quiñones II, ¶ 171.

841. This coordination role and contractual duty is a fundamental part of MINEM's mandate and often leads to positive results. To cite just one example, on February 23, 2021, OSINERGMIN sent CHM a letter demanding that CHM increase its performance bond pursuant to Clause 8.3 of the RER Contract for its failure to meet the Works Schedule milestone deadlines.[1362] This request made no sense because: (i) the Project ended in December 2018 (*i.e.*, more than two (2) years before this request was made); (ii) Clause 11.6 of the RER Contract specifically provides that CHM's obligations under Clause 8.3 are suspended during the pendency of an ongoing arbitration under the RER Contract (such as the present arbitration);[1363] and (iii) Peru stated in its Counter-Memorial that it would honor its obligation under Clause 11.6.[1364] When Claimants brought this matter to MINEM's attention, MINEM intervened and coordinated a quick resolution to this matter.[1365] On March 25, 2021, OSINERGMIN sent a second letter to CHM that confirmed that it would no longer be seeking an increase in the bond after receiving instruction from MINEM.[1366]

842. This type of coordination and intervention would have been useful when the Project's permits were being delayed or subject to legal challenge. But MINEM did nothing, even when asked. This failure to act is a clear breach of MINEM's *coadyuvar* obligation.

D. Peru Misinterprets And Misapplies Peruvian Legal Principles Incorporated Under The RER Contract

843. In their Memorial, Claimants demonstrated that the Parties incorporated legal principles from the Civil Code, GLAP, and other Peruvian laws through Clauses 1.2 and 1.4.30

[1362] Official Letter No. 518-2021-OS-DSE, February 23, 2021 (C-0301).
[1363] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clause 11.6 (C-0002).
[1364] Counter-Memorial, ¶ 1211.
[1365] Official Letter No. 733-2021-OS-DSE, March 25, 2021 (C-0302).
[1366] Official Letter No. 733-2021-OS-DSE, March 25, 2021 (C-0302).

of the RER Contract.[1367] These principles impose obligations on contract parties to perform their duties in good faith (Article 1362 of the Civil Code and Article 1.8 of the GLAP), without arbitrary inconsistencies (*actos propios* doctrine enshrined in Article 1362 of the Civil Code and Article 1.8 of the GLAP), and in line with their counterparty's legitimate expectations (*confianza legítima* doctrine encompassed in Article 1.15 of the GLAP).[1368]

844. In its Counter-Memorial, Peru argues that the Parties never incorporated these legal principles into the RER Contract and instead, chose to be bound only by the RER Contract provisions, RER Law, and RER Regulations.[1369] Claimants rebut these arguments in **Section V.A.2**, *supra*. Briefly, Peru's interpretation: (i) is not supported by the plain text of the RER Contract, which provides that Peru's "domestic" and "internal" laws are "[a]pplicable" and "govern[]" the Parties' interpretation and performance under the RER Contract; (ii) is unconstitutional because it improperly excludes the constitutional principles from the RER Contract and violates the hierarchy of laws as mandated under the Political Constitution; (iii) betrays the purpose of the RER Law, which was to create a consistent legal framework that protects RER concessionaires; (iv) is inconsistent with the Parties' course of dealing in the relevant period; and (v) is inconsistent with how Peru's own legal experts interpret the RER Contract.

845. Peru also argues the measures by the RGA, AEP, and AAA cannot rise to contract breaches by the Grantor because the Grantor is MINEM, in its individual capacity, and MINEM is not responsible for these other government agencies or for their conduct.[1370] Claimants refuted

[1367] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).
[1368] Memorial, ¶¶ 470-498.
[1369] Counter-Memorial, ¶¶ 966-969.
[1370] Counter-Memorial, ¶ 972.

this defense in **Section V.A.1**, *supra*. Briefly, Peru's interpretation: (i) is unsupported by contract language introducing the Parties to the RER Contract, which identifies the State as the Grantor and MINEM as the designated representative of the State; (ii) would render meaningless numerous provisions in the RER Contract because MINEM, in its individual capacity, has no legal authority to execute the Grantor's obligations or instruct other government agencies to carry out fundamental obligations under the RER Contract; and (iii) is inconsistent with the Parties' course of dealing and the purpose of the RER Contract.

846. The balance of Peru's defenses concern the scope of the standards imposed by these principles under the Civil Code and GLAP and the standards' applicability to the facts of this case. In the sub-sections below, Claimants address and rebut these defenses.

1. Peru Fails To Demonstrate That Any Of The Measures In Dispute Conform With The Principle Of Good Faith

847. Claimants have demonstrated that the principle of good faith is encompassed in Article 1362 of the Civil Code and Article 1.8 of the GLAP. These articles provide:

> **Good Faith**
> **Article 1362.-** Contracts should be negotiated, entered into, and executed according to the rules of good faith and common intention of the parties.
>
> *********
>
> **1.8. Principle of procedural good faith.-** The administrative authority, the administered, their representatives or lawyers and, in general, all participants in the procedure, perform their respective procedural acts guided by mutual respect, collaboration and good faith. The administrative authority cannot act against their own acts, except the cases of *ex officio* review contemplated in the present Law.
>
> No regulations of administrative procedure can be interpreted in

> such a way as to protect any conduct against procedural good faith.[1371]

848. As Claimants explained in their Memorial, these principles are substantially similar to one another, as both require contract parties to perform their obligations with "honesty, prudence and responsibility, throughout all the stages of the contract, typical of a diligent businessman."[1372] The standard is objective in nature, requiring contract parties to act reasonably to prevent situations that are "absurd, illogical or inconsistent."[1373] With respect to the good faith principle enshrined in Article 1.8 of the GLAP, Dr. Quiñones explains that Peru's Constitutional Tribunal has held that this principle is incorporated in the Political Constitution's requirement (under Articles 3 and 43) that the government act predictably and without arbitrariness.[1374]

849. Peru does not dispute this standard and concedes it requires the contract parties to avoid interpretations of the RER Contract that are "contrary to the legal system."[1375] As demonstrated below, however, Peru fails to apply this standard with respect to the measures that are at issue in this case.

a. The RGA Lawsuit Violated The Principle Of Good Faith

850. Claimants have proven in their Memorial and in **Sections II.B** and **II.G**, *supra*, that the RGA Lawsuit was not commenced in good faith. This characterization is not Claimants' alone. The evidentiary record is replete with contemporaneous documents containing admissions by Peru about the arbitrary, discriminatory, and baseless nature of the RGA Lawsuit. These documents ***speak for themselves*** and, for that reason, Claimants have quoted extensively from

[1371] Peruvian Civil Code of 1984, Art. 1362; GLAP, Art. 1.8 (CL-0149).
[1372] Memorial, ¶¶ 471-472.
[1373] Quiñones II, ¶ 77.
[1374] Quiñones II, ¶ 94.
[1375] Counter-Memorial, ¶ 968.

these documents in their Memorial and in this Reply. A summary of these documents is included below in chronological order:

a. **The Press Interviews of Regional Councilmembers, Messrs. Edy Medina and James Posso (dated April 11, 2017)**: in these interviews, these councilmembers admit that the RGA's legal theories against the Project: (i) were unprecedented; and (ii) were being used exclusively against the Mamacocha Project notwithstanding the fact that, if those legal theories were meritorious (which they were not), they would affect up to 109 permits from other projects;[1376]

b. **The Press Interview of the Head of ARMA, Mr. Sanz (dated July 19, 2017)**: in this interview, Mr. Sanz admits that: (i) he had not seen any scientific, technical, or expert report that in any way substantiated the allegations in the RGA Lawsuit; (ii) he saw "no reason to oppose the" Project; and (iii) those who opposed the Project should substantiate their claims with expert analysis rather than just concluding the Project would have an adverse environmental impact;[1377]

c. **The Morón Report (dated December 5, 2017)**: concludes: (i) the Lawsuit was filed outside of the statute of limitations; (ii) the lack of support for the RGA Lawsuit's allegations means that "it is expected that the claim will be declared unfounded"; (iii) the RGA's allegations about ARMA's decision to reconsider its classification of the Project was "groundless[]" and "appears to be legally untenable"; (iv) certain of the abnormalities with respect to the permits were curable and not grounds for the annulment of the permits; (v) the Project is not located in a protected area; and (vi) the RGA cannot punish CHM for perceived procedural irregularities for which ARMA is responsible;[1378]

d. **The Minutes of the Special Commission Meeting (dated December 13, 2017)**: confirm the Special Commission agreed to: (i) "warn the RGA" of the meritless nature of the Lawsuit and the liability it created for Peru; and (ii) "recommend" to the RGA that it should "reconsider[]" its pursuit of the Lawsuit "in light of these conclusions";[1379]

e. **The Letter from the Special Commission to the RGA (dated December 14, 2017)**: transmits the Morón Report to the RGA and issues the Special Commission's "warn[ing]" that if Claimants pursue their claims against Peru, Peruvian law would require the RGA to pay all costs, fees, and damages associated with that arbitration;[1380]

[1376] Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).
[1377] Benigno Sanz Interview, Diario Correo, July 19, 2017 (C-0218).
[1378] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).
[1379] Dr. Morón Urbina's presentation of his legal report's conclusions, December 13, 2017 (C-0230).
[1380] Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), December 14, 2017 (C-0231).

f. **The Letter from the RGA Governor to the Regional Council (dated December 18, 2017)**: provides that: (i) the Lawsuit "was highly unlikely to succeed"; (ii) if Claimants proceed with their noticed arbitration, the RGA could end up paying millions of dollars associated with that arbitration; and (iii) the Lawsuit had to be withdrawn immediately "in order to safeguard the interests of the [RGA] and the State";

g. **The Regional AG Report (dated December 21, 2017)**: provides that: (i) the RGA's Attorney General had recommended ***against*** filing the RGA Lawsuit because its allegations were unsubstantiated; (ii) her recommendation was overruled by Regional Councilmembers; (iii) these Councilmembers never substantiated their allegations and claims to the satisfaction of the RGA's Attorney General; (iv) the RGA's Attorney General recommended that the RGA Governor investigate these Councilmembers for their "EVASIVE CONDUCT" (emphasis in original); and (v) the RGA's Attorney General believed that if the Lawsuit was not dismissed it was "highly likely that the [RGA] will be made to pay millions to [CHM]";[1381]

h. **The RGA Governor's Executive Resolution No. 665-2017-GRA/GR (dated December 30, 2017)**: orders the immediate withdrawal of the RGA Lawsuit because: (i) the Special Commission's administrative law expert (Dr. Morón) concluded the Lawsuit "would have little chance of success"; (ii) the Special Commission "warn[ing]" about the "reputational damage" and "economic impact" that would befall the State if this Lawsuit is not withdrawn; (iii) the fact that, under Peruvian law, the RGA would pay all costs, fees, and damages associated with an international arbitration arising from the Lawsuit; and (iv) the RGA's Regional Attorney General agrees the Lawsuit lacked merit and should be dismissed in order for the RGA to avoid "having to pay an incredible amount of money to" CHM;[1382]

i. **The Press Interview of the RGA Governor (dated December 30, 2017)**: in which the RGA Governor admits that she ordered the withdrawal of the RGA Lawsuit because: (i) the Special Commission warned her that it "would charge [the RGA] immediately" for the millions of dollars that would be expended if Claimants' noticed arbitration went forward; (ii) of her belief that the State would bring "criminal charges" against the RGA officials responsible for the Lawsuit "for causing economic damages to the State"; and (iii) CHM is subject to the investment protections set forth in the TPA that could have been violated by the RGA Lawsuit.[1383]

851. These documents, taken together, demonstrate that Peru always knew the RGA Lawsuit lacked merit. The Lawsuit arose from a sham investigation by the Regional Council

[1381] Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).
[1382] Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).
[1383] Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017 (C-0011).

whose conclusions had no scientific, legal, or technical support. The Regional Attorney General believed it was unfounded. The head of ARMA believed it was unfounded. The Special Commission's expert, Dr. Morón, believed it was unfounded, untimely, and highly unlikely to succeed. The Special Commission believed it harmed the State's reputation and exposed the State to significant economic liability. The RGA Governor believed her government would face civil and/or criminal sanctions if it did not dismiss it immediately.

852. Peru largely ignores this extensive documentary evidence that proves the RGA lacked good faith when it commenced and pursued its Lawsuit. The main exception is the Morón Report, which Peru inexplicably uses as ***support*** for the proposition that the RGA Lawsuit was submitted in good faith. That is a gross mischaracterization of the Report's contents. Claimants once more refer the Tribunal to the analysis and conclusions in that Report because they speak for themselves.

853. Because the RGA Lawsuit advanced allegations that were arbitrary, dishonest, and incompatible with applicable law, Peru's pursuit of this measure constitutes a breach of the good-faith standard set forth in Article 1362 of the Civil Code and Article 1.8 of the GLAP. This breach was material because it made it impossible for CHM to achieve Financial Close or advance the Project. Hence, Peru must compensate CHM for all damages resulting from this Lawsuit, including lost profits.

b. <u>The Criminal Proceeding Violated The Principle Of Good Faith</u>

854. It is undisputed that the AEP opened the criminal proceeding in March 2017 ***based only on the allegations in the RGA Lawsuit***.[1384] As demonstrated above, those allegations were unfounded and had been debunked during the relevant period, leading Peru, in

[1384] Counter-Memorial, ¶ 368.

December 2017, to order the Lawsuit's withdrawal. The AEP should have followed suit and dropped its investigation into this issue. But, in February 2018, it announced that it would "formalize and continue" its investigation and named the Project's lead lawyer, [redacted], as a criminal suspect.[1385] This unsupported pursuit of a set of allegations that already were determined to be baseless demonstrates arbitrary and unfair government conduct. Under the circumstances, it could be reasonably inferred that the AEP criminal proceeding has been pursued as a form of retaliation against Claimants for having exposed the arbitrariness of the RGA's opposition to the Project.

855. Since the prosecutor's original commencement announcement in February 2018, the AEP has formally charged [redacted] of "fraudulently collaborating" with ARMA officials with whom he never met, spoke, or collaborated during the relevant period, and neither the AEP nor Peru has introduced any evidence to the contrary.[1386] On many occasions, [redacted] has demanded that the AEP present whatever evidence it believes it has of fraudulent collaboration. More than four (4) years into the criminal proceeding, the AEP has yet to produce even a scintilla of such evidence. The only relevant document that exists is an application from CHM to ARMA that [redacted] signed in his capacity as CHM's legal representative. In the application, CHM asks ARMA to reconsider its original classification of the Project, which even ARMA later determined was wrongly classified.[1387] Peru concedes this document alone does not establish criminal activity, much less fraudulent collaboration. But even as of the date of filing this Reply, the government (the AEP and Peru) has failed to produce any other evidence to support its baseless charge. The AEP criminal proceeding is not only unsupported by any

[1385] Arequipa Environmental Prosecutor Order No. 04-2018-O-FPEMA-MP-AR, February 2, 2018 (C-0193).
[1386] Counter-Memorial, ¶ 401.
[1387] Request for Reconsideration submitted by Hidroeléctrica Laguna Azul S.R.L. (Mamacocha's predecessor), October 30, 2013 (C-0254).

evidence, but the AEP admittedly is pursuing its groundless case against [redacted] relying on a criminal statute that ***did not exist at the time of the alleged misconduct.*** The AEP is retroactively applying a criminal prohibition which violates a fundamental principle of the Peruvian Political Constitution.[1388]

856. For these reasons, Peru has not met its burden of demonstrating that this criminal proceeding is reasonable or consistent with Peruvian law, as required under the good-faith standard of Article 1362 of the Civil Code and Article 1.8 of the GLAP.

857. Peru's breach in regard to the AEP prosecution was material and had an immediate and direct impact because it alienated the Project's expected lender, DEG, due to the reputational risks that would be created if a respected development finance institution were to finance a project whose legal representative was under investigation for alleged criminal conduct associated with the Project. Further, this measure immediately depreciated the value of CHM's investments under the RER Contract and impaired its ability to use [redacted] in its dealings with Peru. Accordingly, Peru has an obligation under the RER Contract to make CHM whole for this breach.

c. <u>MINEM's Rejection Of The Third Extension Request Violated The Principle Of Good Faith</u>

858. Claimants have also proven that Peru's rejection of the Third Extension Request was without good faith. This measure marked a complete reversal of how Peru had interpreted the RER Contract before December 2018.[1389] Specifically, this was the first time that Peru adopted the position that: (i) CHM had assumed ***all risks concerning the Project***, including the unforeseeable and unquantifiable risk that its counterparty would breach the RER Contract and

[1388] *See* **Section II.D**, *supra*, for evidentiary support for these allegations.
[1389] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).

interfere with the Project; (ii) the RER Contract could not be extended for any reason, even if the delays to the Project were exclusively caused by government agencies; and (iii) the suspensions under Addenda 3-6 were not actually suspensions and, hence, the 17-month suspension period should count entirely against CHM.[1390] As demonstrated in **Sections II.A**, **II.C**, **II.F**, **II.G**, and **V.A.3**, *supra*, in addition to reflecting a complete reversal of MINEM's prior interpretations of the RER Contract, MINEM's rejection of the Third Extension Request in December 2018 was arbitrary, unreasonable, not based upon proper application of Peruvian law and the RER Contract, and appears to have been enacted as part of strategy to bring the Mamacocha Project to an end.

859. In its Counter-Memorial, Peru insists it denied the Third Extension Request for reasons that were "indisputably" required under the RER Contract, RER Law, and RER Regulations.[1391] As Claimants have demonstrated, this defense is totally specious because, *inter alia*, those legal sources do not support Peru's arguments and the Parties mutually interpreted the RER Contract in a completely different way throughout the relevant period.

860. The real reason for Peru's complete about-face was that the Mamacocha Project had become politically unpalatable by December 2018 due to plummeting prices in Peru's spot market, the resulting very high Premiums that would be due for a 20-year period, increased political pressure from the competing natural gas lobby, and MINEM's own inability to adopt a universal solution to cure the problems affecting many RER projects.[1392] MINEM adopted a strategy of regulatory opportunism toward the Mamacocha Project, by reversing its prior legal authorities and practices towards Claimants, by ignoring its legal obligations to compensate for

[1390] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).
[1391] Counter-Memorial, ¶¶ 142, 983.
[1392] Santiváñez II, ¶¶ 39-51.

the State's admitted past interferences, by adopting untenable decisions to protect the political self-interest of the State, and effectuating a multi-prong administrative and litigation plan to cut off, destroy and fight the Mamacocha Project.[1393] This wholesale reversal was a textbook example of unlawful regulatory opportunism by a public administration under Peruvian law.[1394] Accordingly, the denial of the Third Extension Request constituted a breach of the good-faith principle incorporated under the RER Contract.

861. This breach was material because it made CHM's performance under the RER Contract impossible. Hence, Peru must compensate CHM for all resulting damages arising from this measure.

d. The Lima Arbitration Violated The Principle Of Good Faith

862. In their Memorial and in **Sections II.F** and **II.G**, *supra*, Claimants have proven—and the three-arbitrator panel in the Lima Arbitration held—that the Lima Arbitration was a unilateral, unauthorized, and surreptitious attempt to circumvent the Parties' dispute resolution agreement and their unequivocal choice of resolving all large disputes before ICSID at a situs outside Peru. In one paragraph, however, Peru conclusorily contends this challenge was submitted in good faith. This defense is insufficient for the following reasons.

863. **First,** as an initial matter, Peru purportedly justified its strategy by arguing before the Lima Arbitration that the extensions provided under Addenda 1-2 were illegal and unfounded. But this position was a complete reversal of it long-time position that the Addenda not only were legal and justified, but they were required under Peruvian and international law to compensate CHM for the government's unjustified delays and interferences. Prior to commencement of the Lima Arbitration, Peru had ***never*** told CHM that it believed or suspected

[1393] Santiváñez II, ¶¶ 39-51.
[1394] Santiváñez II, ¶¶ 39-51.

that those extensions were illegal in any way. The evidentiary record confirms that the Parties always deemed those extensions and their associated Addenda to have been lawful and binding on the Parties. And the evidentiary record further shows that Peru had every opportunity to give CHM notice of this supposed new belief, given that the Parties had been engaged in 17-month-long settlement negotiations pursuant to a legal suspension agreement, that was renewed three times. The last renewal committed the Parties to withhold bringing claims against one another until April 1, 2019.[1395] But, on December 27, 2018, Peru launched this measure without warning and in breach of the Parties' standstill agreement.

864. **Second,** as the Lima Arbitration tribunal eventually ruled after a preliminary jurisdictional hearing, Peru's attempt to circumvent the plain mandate of Clause 11.3(a) by trying to shoehorn its characterization of the dispute into Clause 11.3(b) was unanimously rejected.[1396] The Lima Arbitration tribunal found that MINEM's position was "nonsensical" and lacked good faith.[1397]

865. Peru offers no defense to the Lima Arbitration tribunal's conclusions. Nor does Peru offer an explanation as to why it never notified Claimants of these claims while the Parties were in settlement discussions nor why it chose to proceed with this aggressive litigation strategy in late December 2018 rather than continue negotiating with CHM until the April 1, 2019 expiration date of the standstill agreement. If Peru believed its claims in the Lima Arbitration were meritorious—as Peru insists—then it would have filed them in the present arbitration with

[1395] Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), September 21, 2018 (C-0062); Confidentiality Agreement, December 5, 2017 (C-0028).
[1396] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).
[1397] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).

its Counter-Memorial. Peru's failure to test its claims in the present arbitration further supports the inference that it filed those claims in the Lima Arbitration without good faith.

866. For these reasons, Peru has not met its burden of establishing a meritorious defense to its proven breach of the good-faith principles incorporated in the RER Contract. This breach was material as it, in conjunction with the other December 2018 measures, effectively destroyed the Project. CHM, thus, is entitled to full compensation for the damages it sustained as a result of this breach.

e. AAA's Measures Violated The Principle Of Good Faith

867. In their Memorial, Claimants proved that AAA sent CHM through a regulatory rollercoaster that delayed CHM's ability to obtain the CWA for more than a year. AAA baselessly sat on the permit application for months, even though it had all the necessary information to grant it. Then AAA denied the permit application in May 2017, only to reverse itself weeks later. In July 2017, AAA issued the CWA with significant defects that made it unusable. When CHM asked for AAA to cure these defects, AAA inexplicably refused. The rollercoaster ride finally ended in January 2018, when AAA re-issued the CWA (this time, without defects) when ordered to do so by an administrative judge.

868. As demonstrated in **Section II.E**, *supra*, Peru's defenses to these measures are groundless and unsupported by the evidence. For example, Peru failed to establish its theory that AAA could not cure the defective permit while the permit was being challenged by third-parties. Nor has Peru proven exactly what material information was purportedly missing from the permit application that would have justified AAA's sitting on the application for six (6) months and then denying it outright. Instead, the evidentiary record confirms that these measures were arbitrary and, thus, in violation of the good-faith principles under the RER Contract.

869. These breaches were material because they impeded CHM's ability to advance the Project. As Claimants have proven, the CWA was a key permit for the Project and, without it, CHM would have been unable to achieve Financial Close. Accordingly, CHM is entitled to be compensated for all damages caused by these breaches.

2. Peru's "Legally Valid Reason" Defense To The Doctrine Of *Actos Propios* Must Be Rejected On The Law And Facts

870. In their Memorial, Claimants demonstrated that Peru flip-flopped on a number of key matters concerning the Mamacocha Project during the relevant period. For example, Peru issued resolutions that confirmed the legality of the Project's environmental permits in 2014 but then sought to annul those resolutions in 2017 through the RGA Lawsuit. Peru issued contract extensions via Addenda 1-2 in 2015 and 2016, respectively, but then sought to annul those extensions in 2018 through the Lima Arbitration. Peru issued contract suspensions via Addenda 3-6 in 2017-2018 but, in December 2018, argued those suspensions were not actually suspensions. And, after almost five (5) years of interpreting the RER Contract to mean that CHM did ***not*** assume the risk of government interference, Peru argued for the ***first time*** in December 2018 that CHM had assumed that unforeseeable and unquantifiable risk.

871. The government's constant flip-flopping on key matters violates the *actos propios* doctrine encompassed in Article 1.8 of the GLAP and Article 1362 of the Civil Code. Once again, these Articles provide:

> **Good Faith**
> **Article 1362.-** Contracts should be negotiated, entered into, and executed according to the rules of good faith and common intention of the parties.
>
> *********
>
> **1.8. Principle of procedural good faith.-** The administrative authority, the administered, their representatives or lawyers and, in general, all participants in the procedure, perform their respective

> procedural acts guided by mutual respect, collaboration and good faith. The administrative authority cannot act against their own acts, except the cases of *ex officio* review contemplated in the present Law.
>
> No regulations of administrative procedure can be interpreted in such a way as to protect any conduct against procedural good faith.[1398]

872. As explained by Civil Law expert Dr. Benavides, the *actos propios* doctrine is violated if the following conditions exist: (i) a binding act by an administrative authority; (ii) a contradictory act by that administrative authority; and (iii) each of these acts must be about the same subject.[1399] Dr. Benavides also confirmed there is a narrow exception to this doctrine that allows an administrative authority to take inconsistent positions in the rare case where not doing so would be akin to validating an objectively illegal act.[1400] Claimants have demonstrated in this case that Peru violated this doctrine when it filed the RGA Lawsuit, commenced the Lima Arbitration, and denied the Third Extension Request because, in each case, Peru adopted a contradictory position on the same subject without justification.

873. In its Counter-Memorial, Peru ***does not dispute*** that Claimants have pleaded a *prima facie* case that each of those measures violates the *actos propios* doctrine. In other words, Peru concedes it adopted contradictory positions about the same subject matter when it executed these measures. Peru instead argues the measures do not constitute violations of the *actos propios* doctrine because Peru had a "legally valid reason" for its contradictory behavior in each of those cases.[1401] As shown below, this defense is unfounded under law or as applied to this case.

[1398] Peruvian Civil Code of 1984, Art. 1362 (CL-0149); Peruvian General Administrative Procedure Law (*Ley del Procedimiento Administrativo General*), Art. 1.8 (0205).
[1399] Benavides II, ¶¶ 315-320.
[1400] Benavides II, ¶¶ 315-320.
[1401] Counter-Memorial, ¶¶ 986-988.

a. Peru Has Not Demonstrated It Had A Legally Valid Reason To File The RGA Lawsuit

874. Peru argues its decision to file the RGA Lawsuit did not violate the *actos propios* doctrine because there was a legally valid reason for this measure.[1402] Specifically, Peru argues that Peruvian law allows for governments to test the legality of their prior decisions through judicial actions. Based on this premise, Peru argues the RGA Lawsuit was "legal" and "valid" and, thus, outside the scope of the *actos propios* doctrine.[1403] This defense fails for several reasons.

875. **First**, Peru's defense misses the point. The RGA Lawsuit constitutes a breach of the *actos propios* doctrine because Peru used the lawsuit to propound contradictory positions as to ***the legality of the Project's environmental permits***. As summarized earlier, in 2014 Peru, through ARMA, issued resolutions stating these permits were valid and binding. In 2017, Peru, through the RGA, filed a lawsuit that argued the same permits were illegal and subject to nullification. Hence, the three elements are present and the State's contradictory position amounts to a breach of the *actos propios* doctrine unless Peru can show it was legally necessary to challenge those permits.

876. Notably, Peru ***does not even make this argument***. Peru does not present any proof that it was necessary to bring the Lawsuit because the Project's environmental permits were illegal. Peru does not introduce a scintilla of evidence to meet its burden, just as it failed to do so in the RGA Lawsuit, itself. All that Peru contends here to justify its breach of the *actos propios* doctrine is that it purportedly had a legal right to bring a Lawsuit to inquire into the legality of the permits. But, as demonstrated in this Reply, RGA had no legal authority or factual

[1402] Counter-Memorial, ¶¶ 989-994.
[1403] Counter-Memorial, ¶¶ 989-994.

evidence to back up its contentions that the environmental permits had been unlawfully issued. Filing a frivolous lawsuit espousing an unsupported legal theory without factual support does not serve as a defense to a breach of the *actos proprios* doctrine. In fact, it served as evidence that a breach occurred.

877. **Second**, even if Peru's defense was valid – which it is not – it would only work if the Lawsuit satisfied all procedural requirements such that it could be said to be a legal and valid challenge. But Peru has already acknowledged in this arbitration that the RGA filed the RGA Lawsuit outside the applicable statute of limitations. This is one of the conclusions of the Morón Report and Peru has not contested it here.[1404] Accordingly, by Peru's own admission, the filing of the RGA Lawsuit was neither "legal" nor "valid."

878. **Third**, Peru's defense makes no sense. Its Lawsuit was not testing the legality of the environmental permits, as Peru contends. The Lawsuit was trying to have the permits annulled. And there was no reason to test the legality of the permits. The ARMA resolutions accompanying the permits from 2014 documented their legality. As Dr. Benavides explains, the RGA's actions is precisely the type of contradictory behavior the *actos propios* doctrine was designed to prevent:

> [Peru] refers to the Environmental Permits and the RER Contract as if they were a laboratory experiment that must be subjected to examinations to decide on their legitimacy, and not legally valid and binding titles. That doesn't seem like a responsible position to us.
>
> A judicial process for the annulment of administrative decisions and environmental permits is not a process that aims to "investigate possible irregularities." Investigations are the responsibility of the Comptroller General of the Republic and the competent areas of the RGA. The judicial demand for nullity implied a prior position and a value judgment by the RGA, which considered said Permits as invalid. The RGA was not submitting

[1404] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).

> the Permits for evaluation by the Court. Rather, what the RGA did is ask the Judicial Power to consider said Permits as null and void and asked the Court for a statement to that effect. The consequences of said lawsuit are extremely serious, as the Morón Report itself explains, since the judicial declaration of nullity of the Environmental Permits would also lead to the nullity of the definitive generation concession and would mean the definitive frustration of the Project.[1405]

879. For these reasons, Peru has not proven a "legally valid" reason that could have justified the filing of the RGA Lawsuit.

b. Peru Has Not Proven It Had A Legally Valid Reason To File The Lima Arbitration

880. The same result is true with respect to the Lima Arbitration. Once again, Peru does not deny that the three elements of the *actos propios* doctrine are present. It is undisputed that Peru (through MINEM) granted extensions under Addenda 1-2 and, years later, sought to nullify those extensions through the Lima Arbitration. The only issue here is whether Peru had a legally valid reason to bring this challenge.

881. Peru argues it was legally necessary to challenge Addendum 1 because it became clear that CHM's application for this extension had been a "ruse."[1406] And Peru argues it was legally necessary to challenge Addendum 2 because MINEM "erred" in granting extensions beyond the contractual COS deadline found under Clause 8.4 of the RER Contract. Significantly, Peru fails to submit any proof in support of either defense, both of which fail as a matter of fact and law.

882. **First**, Claimants have already demonstrated the "ruse" defense is completely baseless. It presupposes two things that Peru has not proven to be true: (i) that CHM knowingly lied in its extension request; and (ii) MINEM had no way of testing the veracity of CHM's

[1405] Benavides II, ¶¶ 335-336.
[1406] Counter-Memorial, ¶¶ 182, 995

representations and rubber-stamped them on blind trust. In reality, MINEM did not take CHM at its word, as Peru suggests, but rather did its own independent analysis and instructed OSINERGMIN to conduct a separate analysis, too, to ensure that CHM's claims were accurate. As demonstrated in **Section II.A**, *supra*, the whole process lasted eight (8) months from start to finish and went through six (6) levels of review by MINEM and OSINERGMIN officials. Ultimately, MINEM concluded that CHM had actually ***understated*** the delays in question by 58 days, proving that it did an independent analysis and did not just rubberstamp the data provided by CHM. In other words, Peru's "ruse" defense must be rejected as specious and unproven.

883. **Second**, MINEM did not err in granting the extensions under Addendum 2, either. As explained in **Sections II.A** and **V.A.3**, *supra*, MINEM was correct in holding that CHM should be held harmless from interferences by its counterparty. That was the conclusive finding of the Sosa Report, dated October 2016.[1407] When MINEM obtained a second opinion in April 2018, its outside counsel issued the Echecopar Reports, which held that Peru, and not the concessionaire, assumed the risk of government interference.[1408] The first time Peru held otherwise was in December 2018, when the RER projects were no longer politically expedient for Peru due to plummeting spot-market prices and increased pressure from the natural gas lobby.

884. **Third**, the fact that Peru has not re-filed its challenge to Addenda 1-2 in this ICSID arbitration further suggests that Peru's original challenge in the Lima Arbitration was baseless. It is undisputed that the Lima Arbitration tribunal dismissed Peru's challenge on jurisdictional grounds and instructed Peru to bring those claims at ICSID, as required under

[1407] Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).
[1408] First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 5, 2018 (C-0235); Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), April 17, 2018 (C-0236).

Clause 11.3 of the RER Contract.[1409] Peru had an opportunity to bring those claims here as counterclaims but opted not to do so. Nor has Peru brought a separate ICSID arbitration to challenge those Addenda. Its unwillingness to test these claims before an international tribunal at ICSID speaks volumes as to the "validity" (or lack thereof) of the claims.

885. For these reasons, Peru has failed to demonstrate that it had a legally valid reason to file the Lima Arbitration in the first place.

c. Peru Has Not Proven It Had A Legally Valid Reason To Reject The Third Extension Request In Its Entirety

886. In their Memorial, Claimants demonstrate that Peru breached the *actos propios* doctrine when MINEM denied the Third Extension Request in its entirety. The denial reversed years of consistent application of the RER Contract and Peruvian law toward the Project. For example, Peru previously held the position that extensions to the RER Contract were legally necessary when the government was responsible for interferences to the Project, as those interferences were material breaches of the RER Contract.[1410] But, when it rejected the Third Extension Request, Peru adopted the exact opposite position, determining that the government had no liability for delays caused by its interference because CHM had assumed the risk.[1411] Peru similarly previously determined on four occasions that CHM's obligations under the RER Contract would be suspended for a 17-month period to allow the government to resolve disputes

[1409] MINEM v. CH Mamacocha S.R.L., Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, December 24, 2020 (C-0245).
[1410] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[1411] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).

involving the RGA Lawsuit.[1412] But Peru ultimately refused to credit this suspension as an extension, and instead argued the suspended time should count against CHM.[1413]

887. As with the previous breaches of the *actos propios* doctrine, the only issue for this Tribunal to decide is whether Peru had a legally valid reason to flip-flop on these issues in its denial of the Third Extension Request. Peru argues in this case, again without any evidentiary proof or supporting legal authority, that it was justified in denying the Third Request because it realized that all of the extensions were unauthorized since CHM, purportedly, had assumed the risk that its counterparty would breach the RER Contract.[1414]

888. These defenses are completely unsupported and must be rejected. Claimants proved in **Sections II.A** and **V.A.3**, *supra*, that CHM never assumed the unforeseeable and unquantifiable risk that its counterparty would breach the RER Contract. And Claimants proved in **Sections II.C** and **V.B.2**, *supra*, that the suspensions stopped the clock on CHM's obligations and should have been restored to the RER Contract via an extension, just as MINEM admitted at the time (via Legal Report No. 122-2017-MEM/DGE, dated June 28, 2017)[1415] and in the Lima Arbitration (via its Statement of Claims, dated December 6, 2019).[1416]

889. For these reasons, Peru has failed to prove that it had a legally valid reason to deny the Third Extension Request in its entirety.

3. Peru Fails To Demonstrate How Its Contradictory Positions Under The RER Contract Conform With Its Binding Obligation Under The *Confianza Legítima* Doctrine To Protect CHM's Legitimate Expectations

[1412] Addendum 3 to the RER Contract, September 8, 2017 (C-0014); Addendum 4 to the RER Contract, January 17, 2018 (C-0015); Addendum 5 to the RER Contract, March 26, 2018 (C-0016); Addendum 6 to the RER Contract, July 23, 2018 (C-0017).
[1413] MINEM's Official Letter No. 2312-2018 MEM-DGE, December 31, 2018 (C-0030).
[1414] Counter-Memorial, ¶¶ 996-998.
[1415] Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0216).
[1416] Letter from C.H. Mamacocha to Ministry of Energy and Mines, April 21, 2017 (C-0092).

890. In their Memorial, Claimants demonstrated that Peru violated the *confianza legítima* doctrine, incorporated under the RER Contract under Clauses 1.2 and 1.4.30, which prevents a government authority from violating the legitimate expectations of a private party.[1417] This doctrine is incorporated in Article 1.15 of the GLAP, which provides:

> **1.15. Principle of predictability or legitimate trust**. The administrative authority shall provide private parties or their representatives with true, complete and reliable information regarding each proceeding under its responsibility, so that private parties accurately understand at all times the relevant requirements, procedures, estimated duration and possible results.
>
> The actions by the administrative authority shall be in line with the private party's legitimate expectations reasonably created by practice and administrative precedents, unless it decides to depart therefrom and explains the relevant reasons in writing.
>
> The administrative authority shall comply with the applicable legal system and may not act arbitrarily. Therefore, the administrative authority may not vary its interpretation of the applicable rules in an unreasonable and unjustified way.[1418]

891. As can be seen, this doctrine provides that private parties can form reasonable, legitimate expectations based on their course of dealing with government authorities and those authorities must honor these expectations by not acting arbitrarily. Claimants argued in their Memorial that the following legitimate expectations was formed based on their course of dealing with Peru:[1419]

a. The legitimate expectation that ARMA's resolutions granting the Project's environmental permits were properly vetted, tested, and approved and would not be changed unilaterally (based on ARMA Resolutions Nos. 110-2014-GRA/ARMA-SG and 158-2014-GRA/ARMA-SG and Article 1362 of the Civil Code);

b. The legitimate expectation that CHM would not face a criminal investigation or prosecution merely for submitting an application for reconsideration using an *ex post*

[1417] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).
[1418] Peruvian General Administrative Procedure Law (*Ley del Procedimiento Administrativo General*), Art. 1.15 (CL-205).
[1419] Memorial, ¶ 295 and its chart.

facto law (based on Article 20.2 of the Political Constitution and Article 1362 of the Civil Code);

c. The legitimate expectation that Peru would adhere to the fixed review periods under the TUPA (based on Articles 55, 131, 142, and 143 of the GLAP and Article 1362 of the Civil Code);

d. The legitimate expectation that Peru would *coadyuvar* in the permitting process when permits were unduly delayed (based on Clause 4.3 of the RER Contract);

e. The legitimate expectation that MINEM had authority to execute Addenda 1-2 on behalf of Peru and these mutually executed contract modifications were fully in accordance with Peruvian law (based on Clause 2.2 of the RER Contract, MR 320, MR 559, and the Sosa Report);

f. The legitimate expectation that disputes valued at more than US $20 million would be resolved by arbitration seated outside Peru in a proceeding administered by ICSID (based on Clause 11.3(a) of the RER Contract);

g. The legitimate expectation that CHM would receive a commercially bankable 20-year Guaranteed Revenue concession as long as it performed diligently (based on Clause 1.4.37 of the RER Contract and Articles 1314, 1317, and 1328 of the Civil Code);

h. The legitimate expectation that Peru would not interfere with CHM's performance without compensating CHM or extending the relevant deadlines to account for its interference (based on Articles 1328, 1362, and 1432 of the Civil Code, MR 320, MR 559, and the Sosa Report); and

i. The legitimate expectation that the mutually agreed suspensions of the RER Contract -- Addenda 3-6 -- suspended CHM's performance under the RER Contract and triggered an obligation for Peru to grant corresponding extensions to the RER Contract to account for the suspended time (based on Addenda 3-6, Legal Report No. 122-2017-MEM/DGE, and Article 1362 of the Civil Code).

892. Claimants argue that Peru unjustifiably breached these legitimate expectations when it filed the RGA Lawsuit, commenced the AEP criminal proceeding, delayed the CWA permit, filed the Lima Arbitration, and denied the Third Extension Request.

893. In its Counter-Memorial, Peru effectively argues it was illegitimate for CHM to expect that Peru would act in accordance with how it acted throughout almost all of the relevant period. Based on this cynical defense, Peru contends these measures could not have violated the

confianza legítima doctrine. As set forth below, Peru's defense is unsubstantiated and contrary to law.

a. The RGA Lawsuit Breached The *Confianza Legítima* Doctrine

894. Peru argues it was illegitimate for CHM to have relied on the resolutions that authorized the Project's environmental permits because CHM should have expected that Peru would challenge them in court during the applicable statute of limitations.[1420] This defense fails for the following reasons.

895. **First**, the RGA Lawsuit was not filed within the applicable statute of limitations. The Morón Report concluded that the statute ran in December 2016, *i.e.*, more than three (3) months before the filing of this Lawsuit.[1421] Peru has failed to present evidence to the contrary. Accordingly, using Peru's own standard, the filing of the RGA Lawsuit constitutes a breach of the *confianza legítima* doctrine.

896. **Second**, Peru's defense must be rejected because it leads to the absurd result where a private party cannot rely on a government action until years later when the statute of limitations runs on any potential legal challenge. Peru argues that it had two (2) years to reconsider its administrative actions and, after that period ran, Peru had an additional two (2) years to bring a judicial action to challenge the government's own administrative decisions.[1422] According to Peru, therefore, CHM should have waited an additional four (4) years before relying on any administrative act, including the approval of each permit and issuance of the concessions. Peru's argument is unreasonable and commercially untenable particularly in the context of a time-limed construction contract where over a dozen permits must be obtained,

[1420] Counter-Memorial, ¶¶ 1009-1013.
[1421] Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), December 5, 2017 (C-0229).
[1422] Counter-Memorial, ¶¶ 1009-1013.

financing must be secured and then construction and testing must be completed all while respecting very tight milestone deadlines. Under the circumstances of the RER Contract, providing a drop-dead date with the possibility of the contract being terminated and the performance bonds lost, ***time was of the essence*** and every day literally mattered. It is significant that Peru fails to point to any specific language in the RER Contract to support its extreme interpretation. Moreover, Peru failed to introduce any evidence that the Parties knew and agreed to this interpretation when the contract was signed or at any time thereafter, up to the fabrication of this defense in this arbitration. This defense must be rejected as it is fundamentally at odds with the contract milestones, Works Schedule and time limits established in the contract.

897. **Third**, Peru has failed to prove that commencement of the RGA Lawsuit was reasonable. Claimants have demonstrated in **Sections II.B** and **II.G**, *supra*, that this Lawsuit was based on conspiracies theories that had been debunked or discredited at the time, including by Peru's own exhibit, the Morón Report. Hence, Peru has failed in its burden to demonstrate that this measure was not arbitrary, as required to articulate a meritorious defense to the *confianza legítima* doctrine.

b. <u>The Criminal Proceeding Breached The *Confianza Legítima* Doctrine</u>

898. With respect to the criminal proceeding, Peru argues that CHM had no legitimate expectation that its representatives would not face criminal prosecution for matters concerning the Project's environmental permits.[1423] In support, Peru cites to the RGA's allegations about

[1423] Counter-Memorial, ¶¶ 1014-1020.

so-called "irregularities" regarding these permits and the AEP's allegations of "fraudulent collaboration" between [redacted] and the ARMA officials who granted these permits.[1424]

899. Peru's reliance on the RGA allegations is unavailing because Peru has not substantiated them or otherwise demonstrated it was reasonable for the AEP to rely upon these groundless allegations to pursue a criminal proceeding. As demonstrated in **Sections II.B**, **II.D**, and **II.G**, *supra*, it is undisputed the AEP criminal investigation was based entirely on the same allegations in the RGA Lawsuit that had been debunked or discredited. When Peru withdrew the RGA Lawsuit for lack of merit, it should have also closed the criminal proceeding. But Peru did the opposite by announcing, just weeks after the RGA Lawsuit was withdrawn, that it would "formalize and continue" the criminal proceeding and, for the first time, include Claimants' legal representative within the scope of the investigation.[1425] As demonstrated above, given the timeline of events, a reasonable inference could be drawn that this totally meritless expansion of the scope of the criminal investigation by the Arequipa prosecutor may have been in retaliation for the forced withdrawal of the Arequipa Regional Council's lawsuit against the Project, just weeks earlier. In any event, Peru certainly has not proven that the AEP's criminal investigation is based upon any facts or evidence or is a lawful exercise of the prosecutor's authority.

900. Furthermore, Peru's reliance on the AEP's unproven and unsupported contention that there is evidence of "fraudulent collaboration" between [redacted] and ARMA officials is wholly fictional and unreasonable. After four (4) years of investigation, Peru has failed to present any proof that there was ***any*** relationship between [redacted] and the implicated

[1424] Counter-Memorial, ¶¶ 1014-1020.
[1425] Arequipa Environmental Prosecutor Order No. 04-2018-O-FPEMA-MP-AR, February 2, 2018 (C-0193).

ARMA officials. [redacted] is uncontroverted proof to the contrary.[1426]

901. Because Peru has failed to demonstrate the criminal proceeding was reasonable when commenced or now, Peru has not articulated a viable defense to its breach of the *confianza legítima* doctrine.

c. The CWA Delays Breached The *Confianza Legítima* Doctrine

902. Under the TUPA, Peru had only thirty (30) business days to resolve CHM's CWA application. But it ultimately took more than a year to issue a responsive and usable CWA. As Claimants explained in **Section II.E**, *supra*, this unreasonable and unjustified delay contributed to CHM's inability to move the Project forward and were based upon arbitrary conduct by Peru. These delays were fundamental breaches of Peru's responsibilities under the *Confianza Legítima* doctrine.

903. Peru defends itself by arguing that CHM had no right to rely upon the TUPA regulation time periods.[1427] According to Peru, CHM had no recourse but to accept AAA's unjustified administrative delays because such delays were normal and to be expected.[1428] And that CHM knew this as it had experienced delays in the permitting process even before it entered into the RER Contract.[1429] Peru concludes by arguing that it was unreasonable for CHM to expect "perfection or infallibility from" Peru.[1430]

904. CHM did not expect perfection or infallibility from Peru. What CHM reasonably expected was that Peru would comply with the binding laws and regulations that dictated how Peru would behave. If Peru breached those laws and regulations, CHM reasonably expected to

[1426] [redacted]
[1427] Counter-Memorial, ¶¶ 1020-1023.
[1428] Counter-Memorial, ¶¶ 1020-1023.
[1429] Counter-Memorial, ¶¶ 1020-1023.
[1430] Counter-Memorial, ¶¶ 1020-1023.

be compensated for those breaches, similar to how Peru compensated CHM for other permitting delays through extensions to the RER Contract under Addenda 1-2.[1431] Peru's contention that CHM should have assumed that Peru would breach binding legal principles with impunity is exactly the type of arbitrary administrative conduct the *confianza legítima* doctrine was designed to protect against. Accordingly, Peru has failed to prove a meritorious defense to its breaches under that doctrine with respect to this measure.

d. The Lima Arbitration Breached The *Confianza Legítima* Doctrine

905. Peru's decision to file the Lima Arbitration to annul the extensions under Addenda 1-2 is a perfect example of how Peru breached the *confianza legítima* doctrine. Between 2015 and 2016, Peru issued numerous resolutions and reports that confirmed the legitimacy of those extensions.[1432] CHM invested millions of dollars under the RER Contract in reasonable reliance on those representations. Then, in December 2018, Peru commenced the Lima Arbitration and argued for the first time that those extensions were suddenly illegal.

906. In its Counter-Memorial, Peru argues that CHM should have never relied on those Addenda because they were always illegal.[1433] In so arguing, Peru effectively takes the position that CHM should have ignored the government's binding resolutions and executed contract addenda because they should have known that, years later, Peru would take the position that those resolutions were illegal.[1434] In other words, according to Peru, the legitimacy of CHM's expectation depends not on what Peru believed at the time but, rather, on what Peru propounds in litigation thereafter. This is the sum and substance of Peru's defense.

[1431] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009).
[1432] Addendum 1 to the RER Contract, July 22, 2015 (C-0008); Addendum 2 to the RER Contract, January 3, 2017 (C-0009); Ministry of Energy and Mines' Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).
[1433] Counter-Memorial, ¶¶ 1024-1028.
[1434] Counter-Memorial, ¶¶ 1024-1028.

907. Peru's defense fails for several reasons. **First**, as explained in **Sections II.F** and **II.G**, *supra*, Peru has failed to prove that the extensions were illegal. **Second**, Peru never gave CHM any indication that it believed the extensions were illegal until it filed the Lima Arbitration in December 2018, despite years of operating under the Addenda. **Third,** although Peru characterizes the Addenda and their related resolutions as "illegal" and "void," no court or tribunal has reached this conclusion. This is merely Peru's self-styled, litigation characterization. It is relevant to note, again, that Peru had an opportunity to put the issue to a test in this arbitration by filing a counter-claim, but it chose not to. Peru's baseless characterizations of the executed Addenda 1-2, therefore, have no legal significance and are just theater.

e. The Denial Of The Third Extension Request Breached The *Confianza Legítima* Doctrine

908. With respect to the denial of the Third Extension Request, Peru similarly argues that it was unreasonable for CHM to have relied on what Peru told CHM for years.[1435] This includes Peru's representations from 2014 - 2018 that: (i) extensions under the RER Contract were legally necessary to compensate the concessionaire in instances of government delays or interferences; (ii) CHM did not assume the risk that its counterparty would breach the RER Contract; and (iii) CHM would be relieved of its obligations under the Works Schedule during the suspension period and would receive an extension in due course that credited CHM for the time under suspension. Each of these representations is backed up by myriad legal reports, ministerial resolutions, and contract addenda that have never been annulled or modified. But Peru now argues that CHM should never have relied on these representations because it should have known that, years later, Peru would unilaterally deem them to be illegal.

[1435] Counter-Memorial, ¶¶ 1029-1036.

909. This defense must be rejected. Peru has failed to prove that Peru has the unilateral right to reverse and disavow representations and views it communicated to Claimants in official reports, resolutions, and executed contract modifications, particularly under the circumstances where it is undisputed that up until its pirouette in December 2018, the Parties mutually believed that the government contract counterparty was bound to the promises and representations made in the reports, resolutions and contract modifications. As explained in **Sections II.A**, **II.F**, **II.G**, and **V.A.3**, Peru has failed to prove a lawful and reasonable basis for this disavowal, much less that CHM should have known and agreed to Peru's right to disavow its past decisions.

910. Accordingly, Peru has not proven a meritorious defense to the *confianza legítima* doctrine with respect to this measure.

4. Peru Has Not Raised Or Proven A Meritorious Defense To Its Admitted Violations Of The GLAP And TUPA Review Periods

911. In their Memorial, Claimants demonstrated that Peru violated its obligations under the GLAP by failing to render timely decisions on applications by CHM that were material to the RER Contract. Specifically, Peru had an obligation under Article 142 of the GLAP to render a decision on CHM's Third Extension Request within thirty (30) business days but instead took ten (10) months to render a decision. And Peru had an obligation under the TUPA to render a decision on the CWA application within thirty (30) business days but instead took more than a year to render its decision.[1436] Because these obligations are incorporated under the RER Contract through Clauses 1.2 and 1.4.30, their violation here amount to contractual breaches.[1437]

[1436] Supreme Decree No. 001-2010-AG approving the regulations of Law No. 29338, Water Resources Law, March 23, 2010 (CL-0209).
[1437] Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).

912. In its Counter-Memorial, Peru does not deny these violations occurred. Instead, Peru argues these violations do not rise to contract breaches because the RER Contract does not incorporate these obligations.[1438] Claimants, however, have refuted these claims in **Section V.A.2**, *supra*, which comprehensively explains that, under the canons of contract interpretation found in Articles 168-170 of the Civil Code, it is clear that the Parties intended to incorporate all legal obligations contained in Peru's domestic laws that governed the Parties' actions related to the Project.

913. For these reasons, Peru has not raised or proven a meritorious defense to its admitted violations under the GLAP and TUPA for failing to render timely decisions on matters important to the RER Contract.

E. The Evidentiary Record Confirms Peru Made CHM's Performance Under The RER Contract Impossible

914. In their Memorial, Claimants demonstrated the RER Contract terminated as a matter of law on December 31, 2018, when Peru consummated a series of measures that collectively made it impossible for CHM to perform its contractual obligations. This result is mandated by Article 1432 of the Civil Code, which provides:

> **Article 1432 - Resolution by Fault of the Parties**
>
> If the provision is impossible due to the fault of the debtor, the contract is fully terminated and the latter cannot demand the consideration and is subject to compensation for damages.
>
> When the impossibility is attributable to the creditor, the contract is fully terminated. However, said creditor must satisfy the consideration, corresponding to him the rights and actions that have remained related to the provision.[1439]

[1438] Counter-Memorial, ¶¶ 1037-1047.
[1439] Peruvian Civil Code of 1984, Art. 1432 (CL-0149).

915. As Claimants explained in their Memorial, Peru is the "creditor" and CHM is the "debtor" under the RER Contract. Accordingly, under Article 1432, if Peru's actions or inactions made it "impossible" for CHM to perform, the RER Contract would be deemed "fully terminated" and CHM would be entitled to recover the "consideration" it would have received had Peru not made it impossible for CHM to perform. This result occurred here because: (i) the RGA Lawsuit, criminal proceeding, and AAA delays made it impossible for CHM to complete the Works Schedule without the requested extensions under the Third Extension Request; (ii) Peru's outright denial of the Third Extension Request left CHM with fifteen (15) months to complete the Works Schedule, which rendered performance impossible since construction, alone, was projected to take approximately 26 months; and (iii) the filing of the Lima Arbitration further ensured that CHM would not be able to secure the necessary project financing to move the Project forward.[1440]

916. In its Counter-Memorial, Peru does not dispute how Claimants interpret Article 1432 of the Civil Code. Instead, Peru argues this Article does not apply here because none of the alleged measures by Peru made it "impossible" for CHM to perform under the RER Contract.[1441] In so arguing, Peru raises the following three (3) defenses: (i) the "debtor" is MINEM and, hence, the measures concerning the RGA Lawsuit, criminal proceeding, and delays to the CWA cannot be the "fault" of the debtor, as required by Article 1432; (ii) even if these measures were attributable to the debtor, CHM assumed the risk of government interference so it only has itself to blame for the measures in question; and (iii) none of these measures impeded CHM's ability

[1440] Memorial, ¶¶ 409-501.
[1441] Counter-Memorial, ¶¶ 1048-1066.

to move the Project forward and, hence, the fact that CHM ran out of time cannot be blamed on these measures.[1442] These defenses fail for the following reasons.

917. **First**, the State, not MINEM, was the "debtor" under the RER Contract. As proven in **Section V.A.2**, *supra*, the canons of contract interpretation under Articles 168-170 of the Civil Code each arrive at this conclusion. Because the State is legally responsible for all government measures under Article 43 of the Political Constitution, Peru cannot argue that the RGA Lawsuit, criminal proceeding, or AAA delays were not the fault of the debtor. Moreover, this defense fails because the Lima Arbitration, alone, would have made it impossible for CHM to perform under the RER Contract for the reasons stated in **Section II.F.2**, *supra*. Hence, even if MINEM were deemed the debtor in its individual capacity (which it was not), the RER Contract would have still terminated as a matter of law in December 2018, and CHM would still have its legal right to compensation under Article 1432.

918. **Second**, for the reasons set forth in **Section V.A.3**, *supra*, CHM never assumed the risk of government interference. To summarize, Peruvian law prohibits any interpretation of the RER Contract that immunizes Peru's breaches, which is exactly what Peru argues in this arbitration.

919. **Third**, the measures in question made it impossible for CHM to advance the Project. This is evident from the fact that these measures resulted in the ***suspension of the RER Contract*** for seventeen (17) months. As Claimants have proven, this suspension relieved CHM of all of its obligations under the Works Schedule. Peru argues this time should count against CHM. But, as demonstrated in **Section V.B.2**, *supra*, this interpretation of Addenda 3-6 (which imposed the suspension) is untenable and inconsistent with the Parties' interpretations at the time

[1442] Counter-Memorial, ¶¶ 1048-1066.

as well as Peru's representations in the Lima Arbitration, where it conceded the 17-month suspension period should not have counted against CHM.

920. Moreover, Claimants have proven that CHM could not have achieved Financial Close as a direct result of the measures in question. This conclusion is clear from the findings of independent financial expert, Dr. Whalen, who concludes that any of these measures, alone, would have prevented any rational financial institution, investor, and sponsor from financing the Project.[1443] This conclusion is also supported by Claimants' independent delay expert, Mr. McTyre, who after careful review of the record, concluded that Peru is responsible for all but two days of the delays to the Works Schedule during the relevant period.[1444]

921. For these reasons, Peru—the "debtor" under the RER Contract—is at fault for the series of measures that made it impossible for CHM—the "creditor" under the RER Contract—to perform. Pursuant to the Parties' shared interpretation of Article 1432 of the Civil Code, the RER Contract terminated as a matter of law on December 31, 2018. CHM is thereby entitled to receive from Peru the full compensation CHM would have received had Peru not made it impossible for CHM to perform under the RER Contract.

[1443] Whalen I, ¶¶ 6.1-6.5.
[1444] HKA II, ¶¶ 2-4 and 100-103.

VI. CLAIMANTS ARE NO LONGER BOUND BY THE CONFIDENTIALITY AGREEMENT

A. Peru Materially Breached The Confidentiality Agreement When It Submitted Testimony Concerning The Contents Of The Parties' Settlement Discussions

922. In addition to its breaches under the TPA, RER Contract, and Peruvian law, Peru also breached the Confidentiality Agreement, dated December 5, 2017, between the Special Commission and Claimants.[1445]

923. The Tribunal is familiar with the Confidentiality Agreement and its contents. On March 19, 2020, Peru moved to expunge thirty-one (31) allegations and seven (7) exhibits from Claimants' Request for Arbitration on the ground that those allegations and exhibits allegedly contained information protected by the Confidentiality Agreement.[1446] This dispute centered on the "use" restriction under Clause 8 of this Agreement, which prohibits the Parties from using information exchanged during their settlement discussions in any legal proceeding.[1447] Clause 8 provides:

> The Parties agree that under no circumstances, and in no way, may any statement or communication, whether oral or written, from one Party to the other or to a third-party, or any action taken over the course of the Consultation and Negotiation procedure, including this Confidentiality Agreement, be used now or in the future by either Party in any other context, including any international or domestic arbitration proceedings, or any other legal or contentious proceedings before any domestic of foreign courts, whether pending or threatened to be commenced by the Parties. In this regard, the Parties agree to handle all information, representations and materials and/or documents created or disclosed during the course of the Consultation and Negotiation procedure in strict confidentiality, except for any information which is generally available to the public of which has come into the public domain for reasons other than a breach of this Confidentiality Agreement by either Party. The Parties accept that the provisions of this

[1445] Confidentiality Agreement, December 5, 2017 (C-0028).
[1446] Respondent's Letter to the Tribunal, March 19, 2020.
[1447] Confidentiality Agreement, December 5, 2017, Clause 8 (C-0028).

> clause shall apply to all exchanges between them since the Consultation and Negotiation procedure commenced.[1448]

924. On March 26, 2020, Claimants objected to Peru's motion because the information at issue fell outside of the scope of this Clause.[1449] Claimants demonstrated, *inter alia*, that this Clause: (i) covers only information exchanged between Claimants and the Special Commission, or between either of those Parties and third-parties, during the Parties' settlement discussions; and (ii) does not cover information that has become public or publicly available for reasons other than a breach of this Confidentiality Agreement by either party.[1450] Because all the information contained in the RFA had become public, originated from third-parties who were not parties to the Agreement, or did not relate to the Parties' settlement discussions, Claimants asked the Tribunal to reject Peru's motion in its entirety.[1451]

925. On April 15, 2020, this Tribunal issued Procedural Order No. 1 ("**PO1**"), which rejected Peru's motion in its entirety and concluded Claimants had not breached the Confidentiality Agreement.[1452] In PO1, the Tribunal endorsed Claimants' plain-language interpretation that Clause 8 is limited to non-public information exchanged between the Parties, or between either of the Parties to third-parties, as part of the Parties' settlement discussions.[1453] And the Tribunal agreed with Claimants that none of the allegations or exhibits in question contained any information that fit that description.[1454] The Tribunal, however, issued the following warning to the Parties:

> **Confidentiality of settlement negotiations.** The Tribunal ***takes allegations of confidentiality of settlement negotiations seriously***. The Tribunal adheres to the principle of the confidentiality of

[1448] Confidentiality Agreement, December 5, 2017, Clause 8 (C-0028).
[1449] Claimants' Letter to the Tribunal, March 26, 2020.
[1450] Claimants' Letter to the Tribunal, March 26, 2020.
[1451] Claimants' Letter to the Tribunal, March 26, 2020.
[1452] Procedural Order No. 1, April 15, 2020.
[1453] Procedural Order No. 1, April 15, 2020, ¶¶ 33-35.
[1454] Procedural Order No. 1, April 15, 2020, ¶¶ 33-35.

> settlement negotiations, and that settlement negotiations are understood to be conducted on a without prejudice basis.[1455]

926. Peru did not heed the Tribunal's warning when it filed its Counter-Memorial on February 9, 2021. Enclosed with that pleading is testimony from Mr. Ricardo Ampuero Llerena, the former President of the Special Commission and the individual responsible for "coordinat[ing] the defense of Peru in investment disputes between the State of Peru" and Claimants.[1456] In disregard of the Tribunal's warning and in breach of Clause 8 of the Confidentiality Agreement, Mr. Ampuero's testimony is replete with allegations that contain non-public information exchanged between the Parties, or between the Special Commission and third-parties, arising from the Parties' settlement discussions. These statements are largely contained in paragraphs 18-36 and 43-45 of his Witness Statement.[1457] Below are some notable but non-exhaustive examples taken from these paragraphs where Mr. Ampuero divulges the confidential discussions between the Parties:

> 24. . . . . ***I also recall that, on the occasion of several meetings with Claimants, I expressly corrected such assertions by Claimants, made orally or in writing, which mistakenly suggested that the Special Commission had authority to force or order State entities to adopt a specific action***.
>
> *******
>
> 34. . . . . ***I recall expressly mentioning at the various meetings with the Claimants*** that the [Confidentiality] Agreement was essential to us, as it had to be absolutely clear that the State's good-faith actions in the context of the direct negotiations, and the communications exchanged in connection with the dispute between the parties, were, quite obviously, without prejudice to the parties' positions and rights.
>
> 35. ***I even recall myself repeating, at a fair number of meetings with Claimants' representatives***, that the purpose was to maintain the status quo (in order not to exacerbate the dispute from the

[1455] Procedural Order No. 1, April 15, 2020, ¶ 33.a (emphasis added).
[1456] Witness Statement of Ricardo Ampuero Llerena, ¶ 2.
[1457] Witness Statement of Ricardo Ampuero Llerena, ¶¶ 18-36 and 43-45.

> perspective of any of the parties), and that neither party should use any acts done in the context of the direct negotiations stage against the counter-party. ***At the meetings, Claimants expressly represented that they understood and agreed with this. I was emphatic on this point,*** because it had to be clear for the Claimants that any actions taken in good faith by the State in the context of direct negotiations to attempt a solution to the dispute could not be used against the State of Peru in an eventual arbitration . . . .
>
> *******
>
> 43. ***I want to be absolutely clear about this as well: I noted, on multiple occasions at meetings with Claimants***, that not only was the Draft Supreme Decree covered by the Confidentiality Agreement –and, therefore, it was applicable "notwithstanding"— but also it was neither a promise nor a guarantee. ***I explained that*** this was an alternative under examination, but we were unable to ensure that it would be adopted and promulgated. ***I recall this clearly*** because I wanted to remove any false expectations about a Draft Supreme Decree which still had to undergo the relevant approval process, including the consultation stage. ***I expressly recall saying, on more than one occasion***, that only upon becoming effective (through publication in the *El Peruano* official gazette) would the alternative be realized; until such time, we were not able to give any guarantees. ***Claimants led us to believe, at the various meetings we held, that they understood and accepted that this was so*** . . . .[1458]

927. As can be seen from the highlighted text, the information contained in paragraphs 18-36 and 43-45 of Mr. Ampuero's Witness Statement is protected by the Confidentiality Agreement.[1459] And neither Peru nor Claimants had made these views public before introduction of his witness statement in this proceeding.

928. Dr. Benavides agrees with this opinion:

> In our opinion, the Ampuero Declaration breaches the obligation of non-disclosure assumed by the Special Commission, which is contained in number 8 of the Confidentiality Agreement and which precisely covers "any kind of declaration or communication, verbal

[1458] Witness Statement of Ricardo Ampuero Llerena, ¶¶ 18-36 and 43-45 (emphasis added).
[1459] Confidentiality Agreement, December 5, 2017, Clause 8 (C-0028).

> or in writing, sent by a party to the other or to third parties, or actions taken in the course of the Negotiation and Consultation ... "
>
> What the Special Commission has done precisely is to use in this arbitration statements and communications from CHM / Latam Hydro made before the Special Commission and from the Special Commission to said parties; as well as actions taken during said stage, as a means of proof, in defense of the State's position, in the ICSID Arbitration.
>
> By using this information, in contravention of the provisions of paragraph 8 of the Confidentiality Agreement, the Special Commission has been in breach of the Confidentiality Agreement.[1460]

929. Claimants are disappointed that Peru would so blatantly breach the Confidentiality Agreement particularly given Peru's counsel's strident accusations against Claimants when it submitted its unsuccessful application to expunge portions of Claimants' pleadings.[1461] Its current breach is all the more surprising given the Tribunal's clear direction in PO1 as to what information and statements are covered by that Agreement, and what is not.[1462] Mr. Ampuero's testimony about conversations during the settlement discussions is directly within the scope of the restrictions contained in the Confidentiality Agreement.

930. Peru's only justification for this obvious breach appears to be Mr. Ampuero's comment in Paragraph 22 of his Witness Statement that he believed the Confidentiality Agreement was only in effect "from the date of execution up to April 1, 2019."[1463] But that interpretation is wrong. Clause 14 of the Confidentiality Agreement expressly provides that its restrictions "shall survive the termination of this Agreement."[1464] In other words, Peru's

[1460] Benavides II, ¶¶ 388-390.
[1461] *See* Respondent's Letter to the Tribunal, March 19, 2020.
[1462] Procedural Order No. 1, April 15, 2020, ¶¶ 33-35.
[1463] Witness Statement of Ricardo Ampuero Llerena, ¶ 22.
[1464] Confidentiality Agreement, December 5, 2017, Clause 14 (C-0028).

confidentiality obligations were still binding on Peru at the time Peru submitted Mr. Ampuero's testimony with its Counter-Memorial.

B. Peru Has Waived Any Protections Or Rights Under The Confidentiality Agreement Through Its Affirmative Use Of Confidential Information

931. As a result of these unauthorized disclosures of the Parties' settlement discussions, Peru has waived its protections or rights under the Confidentiality Agreement. The IBA Rules on the Taking of Evidence in International Arbitration, approved on May 29, 2010 ("**IBA Rules**"), which "guide[]" this case,[1465] provide that a party to an international arbitration can waive its protections and rights under a confidentiality agreement in various ways. Specifically, Article 9.3(d) provides that such waiver can occur "by virtue of consent, earlier disclosure, ***affirmative use*** of the Document, statement, oral communication or advice contained therein, or otherwise."[1466]

932. Although the IBA Rules do not define "affirmative use," scholars have interpreted this term as "positive reliance on the evidence" that "may be found to be inconsistent with an assertion of privilege."[1467]

933. This definition is consistent with how the Tribunal has interpreted affirmative use waivers in the present arbitration. Specifically, on May 3, 2021, the Tribunal held that Peru had waived any privileges related to the Morón Report because Peru affirmatively used that Report when it filed it as an exhibit to these proceedings.[1468] In reaching this decision, the Tribunal

[1465] Procedural Order No. 2, May 13, 2020, ¶ 16.9.
[1466] IBA Rules, Art. 9.3(d) (emphasis added).
[1467] Roman Khodykin et al., *Commentary on the IBA Rules of Evidence, Article 9 [Admissibility and Assessment of Evidence],* in *A Guide to the IBA Rules on the Taking of Evidence in International Arbitrati*on 407, 465 (Oxford University Press 2019) (CL-0210).
[1468] Procedural Order No. 4, May 3, 2021, ¶ 53(i).

correctly noted that a finding to the contrary would be incompatible with "due process, fairness and equality between the Parties."[1469]

934. The Tribunal should reach the same conclusion here. By affirmatively using Mr. Ampuero's testimony about the Parties' settlement discussions, Peru has waived any rights or protections that may still exist with respect to those discussions. As a result of this waiver, Peru is no longer allowed to raise any privilege-related defense with respect to any allegations, documents, or testimony concerning those discussions.

935. A holding to the contrary would be incompatible with "due process, fairness and equality between the Parties." Indeed, it would be manifestly unfair for Peru to provide a one-sided, incomplete, and inaccurate account of the Parties' settlement discussions while, simultaneously, preventing Claimants from submitting their account of what transpired during those discussions. For these reasons, Claimants are relieved of their obligations under the Confidentiality Agreement.

C. In Any Event, The Confidentiality Agreement Has Terminated As A Matter Of Law

936. Peru's breaches of the Confidentiality Agreement gave Claimants the legal right to be relieved of their contractual obligations and terminate the Confidentiality Agreement as a matter of law. These remedies are found under Articles 1428 and 1429 of the Civil Code, which provide:

> **Article 1428.- Termination for Breach**
>
> In contracts with reciprocal benefits, when one of the parties fails to comply with its provision, the other party may request the fulfillment or termination of the contract and, in either case, compensation for damages.

[1469] Procedural Order No. 4, May 3, 2021, ¶ 53(i).

> As of the date of the summons with the demand for resolution, the defendant is prevented from fulfilling its provision.
>
> **Article 1429.- Termination as of Right**
>
> In the case of article 1428, the party that is harmed by the breach of the other may request it by means of a notarial letter to satisfy its provision, within a period of no less than fifteen days, under the warning that, otherwise, the contract is terminated.
>
> If the provision is not fulfilled within the specified period, the contract is fully terminated, with the debtor being responsible for compensation for damages.[1470]

937. As can be seen, the first remedy under Article 1428 provides that the injured party will be relieved of its obligations under the contract upon providing its counterparty with notice of the breach. The second remedy under Article 1429 provides that if the counterparty does not cure the breach within fifteen (15) days, the contract terminates as a matter of law. This interpretation is confirmed by Dr. Benavides:

> Consequently, CHM and Latam Hydro are entitled to legitimately suspend compliance with their confidentiality obligation, if required to comply with it, until the Special Commission remedies the breach in which they have incurred.
>
> CHM and Latam Hydro could also, alternatively, in application of article 1429 of the Civil Code, choose to notify the Special Commission of the breach in which it has incurred, giving it a period of 15 days to remedy it, under penalty of resolution. If the Special Commission does not correct its breach within said period, the Confidentiality Agreement will be automatically terminated.[1471]

938. Claimants provided Peru written notice of its breach on three (3) separate occasions: (i) on March 2, 2021, when Claimants served Peru with their "Request for Production of Documents";[1472] (ii) on March 23, 2021, when Claimants responded to Peru's objections to

[1470] Peruvian Civil Code, Arts. 1428-1429 (CL-0149).
[1471] Benavides II, ¶¶ 395-396.
[1472] Claimants' Request for Production of Documents, March 2, 2021.

those requests;[1473] and (iii) on April 21, 2021, when Claimants objected to Peru's privilege log.[1474] After each occurrence, Peru failed to cure its breach. Accordingly, the Confidentiality Agreement has terminated as a matter of Peruvian law.

[1473] Claimants' Response to Respondent's Objections, March 23, 2021.
[1474] Claimants' Objections to Respondent's Privilege Log, April 21, 2021.

VII. CLAIMANTS ARE ENTITLED TO THE DAMAGES THEY SEEK

939. As more fully set forth in Claimants' Memorial, the damages sought here seek to put Claimants into the same financial position they would have been "but for" Peru's wrongful measures (the "**Measures**").[1475] For claims under the TPA, the applicable standard, first articulated in the *Chorzow Factory* case, is undisputed: "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."[1476]

940. For Contract claims, Claimants rely on Peruvian law, which similarly provides, as a remedy for breach, that the non-breaching party should be placed in the same financial position in which it would have been absent said breach. Peru, again, does not dispute this to be the appropriate standard.[1477]

941. Because Claimants' evidence establishes that all or substantially all of the economic value of the Project was destroyed[1478] as a direct result of the Measures, the appropriate measure of damages for both Claimants' TPA and Contract claims is the fair market value ("**FMV**") of the Project as of March 14, 2017, when the RGA Lawsuit was filed ("**Valuation Date**").[1479]

942. Claimants' damages expert, BRG, provides a detailed assessment of the Project's FMV utilizing the discounted cash flow ("**DCF**") method and application of a commercially

[1475] For avoidance of doubt, the term "measures" is used in this portion of the Reply to mean both "measures" under international law and contract breaches under Peruvian law.
[1476] Counter-Memorial, ¶1083 (citing *Chorzow Factory* and stating: "In explaining the kinds of damages that must be compensated as the result of an "illegal act", the Permanent Court of International Justice stated, in its decision in the *Factory at Chorzów* case, 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.'").
[1477] Counter-Memorial, ¶ 1072.
[1478] *See* Section IV.B, *supra*; Section VII.B.
[1479] The Valuation Date is March 14, 2017, the date comprising the onset of the Measures.

reasonable pre-award interest rate.[1480] Peru's expert, Versant, agrees with the use of DCF to determine FMV.[1481] As an alternate damages theory, BRG quantifies the investment value of the Project and applies an update to that investment value based on the cost of equity capital for a project with similar risks as the Mamacocha Project.[1482]

943. In addition, Claimants seek compensation for certain costs and expenses incurred by Claimants to wind down the Mamacocha Project; legal and expert costs relating to the Lima arbitration; and legal costs related to [redacted] defense against the AEP criminal investigation ("**Additional Costs**").[1483] These Additional Costs are updated from the date they were incurred to the date of BRG's report using a commercially reasonable rate (7.06%) corresponding to Claimants' cost of debt.

944. As of the date of BRG's Second Report, Claimants' damages claim, inclusive of applicable pre-award interest, totals US $45.62 million[1484] under the FMV/DCF approach; and US $38.97 million[1485] under the investment value approach.

945. Peru divides its damages rebuttal into three sections. **First**, in response to Claimants' damages assessment, Peru argues that Claimants have failed to show that the totality of their investment was destroyed by the Measures and that FMV is therefore not the appropriate standard by which to measure damages under the TPA or under Peruvian contract law. **Second**, Peru argues that Claimants have failed to show that the Measures were the cause of Claimants'

[1480] BRG Report II, ¶ 12.
[1481] *See* Counter-Memorial, ¶ 1142 ("The Parties, BRG, and Versant agree that DCF is an adequate method to determine the fair market value). *See also* Versant Report, ¶ 37 ("We agree that the DCF is a suitable method in the present case. Although the Project was still at an early stage and did not yet have an established history of operations, there is sufficient information to assess the likely development costs, project financing, and future income generation potential.").
[1482] BRG Report II, ¶ 30(a).
[1483] In the event that Claimants are paid costs awarded in either the Lima Arbitration or the criminal proceedings, Claimants will update their damages claim here to avoid any possibility of double recovery.
[1484] BRG Report II, Table 1.
[1485] BRG Report II, Table 2.

injuries. Instead, Peru argues, Claimants were the authors of their own demise by choosing an unnecessarily risky and complex strategy of seeking an equity partner and a project finance lender. **Third**, Peru challenges the methodology of Claimants' damages experts, BRG, arguing that BRG's damages assessment is fatally flawed and inflated. Each of these arguments is without merit, as discussed in further detail below.

A. Claimants Apply The Appropriate Standards For Assessing Damages

946. As noted above and in Claimants' Memorial,[1486] with respect to Peru's TPA violations, Claimants rely on customary international law and apply the *Chorzów Factory* principles. These principles provide that Claimants are entitled to full compensation based on the Mamacocha Project's FMV as of the Valuation Date.[1487] In rebutting this argument, Peru argues that Claimants fail to distinguish between expropriation-based and non-expropriation based damages under the TPA, arguing that that latter do not necessarily call for FMV-based damages, particularly where the harm to the investment was not absolute.[1488] Peru does concur, however, that the *Chorzow Factory* case provides the standard for both expropriation and other treaty violations.[1489]

947. With respect to the breach of contract claims, Claimants rely on Peruvian statutory law, which provides that Claimants are entitled to lost profits and consequential damages—a quantum for which FMV provides an adequate proxy. In rebuttal, Peru argues that, as a matter of Peruvian law, damages can vary as a function of the actions of the breaching party.[1490] Also, relying upon its contention that the damages, if any, that can be attributed to

[1486] Memorial, ¶ 510.
[1487] Memorial, ¶ 530.
[1488] Counter-Memorial, ¶ 1072.
[1489] Counter-Memorial, ¶ 1083.
[1490] Counter-Memorial, ¶ 1073.

Peru fall short of the total destruction of the Mamacocha Project's total economic value, Peru argues that Claimants have failed to prove their case for damages based on FMV.

948. Seen as a whole, the virtual totality of Peru's damages rebuttal rests on the argument that the Measures, to the extent they caused any harm to the Project, did not cause a degree of harm equivalent to the total destruction of the Mamacocha Project. Because the evidence in this case overwhelmingly establishes the total or effectively total destruction of the economic value of the Mamacocha Project,[1491] the FMV standard provides the appropriate methodology for assessing damages in this case.

1. Claimants Apply The Correct Standard Of Damages For Breaches Of The TPA

949. With respect to the standard for Treaty-based damages, Peru incorrectly argues that Claimants rely on the expropriation standard for their non-expropriation-based treaty damages. To the contrary, Claimants' memorial begins with the following statement: "The TPA is silent on the remedies for breaches of FET, unlawful expropriation, and the most-favored nation clause. In the absence of *lex specialis*, Tribunals look to the applicable rules of customary international law."[1492] Relying on the principles set forth in *Chorzow Factory*, Claimants expressly note that those principles "have been consistently applied and extended by tribunals *for other treaty breaches that damage or destroy the value of an investment*."[1493]

[1491] *See* Section IV, *supra*; Section VII.B, *infra*.
[1492] Memorial, ¶ 510.
[1493] Memorial, ¶ 512 (citing to *National Grid v. Argentina*, Award, ¶ 72 (CL-0041) (citing principles of international law set out in *Chorzów Factory* to award full compensation regardless of the nature of the treaty breach); *Gold Reserve Inc. v. Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 681 (CL-0031) (finding fair market value approach to treaty violations provided appropriate means to "wipe out" the consequences of the host country's treaty breaches, including FET violations) (emphasis added).

950. The *Chorzow Factory* principles routinely have been relied upon by tribunals as the appropriate standard for compensation for non-expropriation or other treaty violations.[1494] Indeed, Peru ultimately comes to the same conclusion as Claimants, admitting that *Chorzow Factory* provides the appropriate compensation methodology.[1495] The *Chorzow Factory* principles provide that the damages to which Claimants are entitled must, as far as possible, "wipe-out" the consequences of the Measures.

951. Unable to dispute that *Chorzow Factory* provides the appropriate standard, Peru tries to make the case that "in the event the Tribunal decides that Peru breached its obligations under articles [10.4 and 10.5] of the Treaty, no grounds whatsoever exist on which to apply the compensation standard applicable in expropriation cases (*i.e.*, the fair market value standard)." But in making this argument, Peru not only fails to cite to any authority in support, it also ignores the cases cited by Claimants, including for example, *CMS v. Argentina*, where the tribunal was "persuaded that the cumulative nature of the breaches discussed here *is best dealt with by resorting to the standard of fair market value.*"[1496]

952. Indeed, the tribunal in *CMS v. Argentina* goes on to specifically address Peru's argument regarding the use of a standard generally associated with expropriation for other types of treaty breaches, stating "[w]hile this standard [FMV] figures prominently in respect of

[1494] *See, e.g., ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013 (CL-0087); *Rusoro Mining Ltd. v. The Bolivarian Republic of Venezuela,* Award, August 22, 2016 (CL-0088); *CME v. Czech Republic*, Partial Award (CL-0022); *National Grid P.L.C. v. Argentina*, UNCITRAL, Award, November 3, 2008 (CL-0041); *Flughafen Zürich A.G. and Gestión e Ingeneria IDC S.A. v. Bolivaran Republic of Venezuela,* ICSID Case No. ARB/10/19, Award, November 18, 2014 (CL-0029).
[1495] Counter-Memorial, ¶ 1083.
[1496] Memorial, ¶ 516 (citing *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 410 (CL-0023)) (emphasis added).

expropriation, *it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses*."[1497]

953. Other cases support Claimants' application of *Chorzow Factory* and the FMV standard as the appropriate measure of damages for cases involving other treaty breaches, as well as an indirect expropriation.[1498]

954. Looking to create new authority where none exists, Peru cites to cases where the Claimants' investment was only partially destroyed. Specifically, Peru relies on *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*,[1499] which does not—as happened here—involve the total destruction of the value of the underlying investment. Indeed, the tribunal in *Compañia de Aguas del Aconquija* expressly acknowledges that the measure of damages could have been different if the investment had been destroyed instead of merely impaired, stating:

> [T]he level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different for a case where the same government expropriates the foreign investment. *The difference will generally turn on whether the investment has merely been impaired or destroyed*."[1500]

That is the heart of the dispute—whether the Mamacocha Project was effectively destroyed—not the legal standard employed for compensation.

[1497] Memorial, ¶ 516 (citing *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 410 (CL-0023)) (emphasis added).
[1498] *See, e.g., National Grid v. Argentina* UNCITRAL, Award, November 3, 2008 (CL-0041) (citing *Chorzow Factory* and awarding to award full compensation regardless of nature of treaty breach); *Gold Reserve v. Venezuela* ¶ 681 (CL-0031) (finding that fair market value approach to non-expropriation treaty violations provided appropriate means to "wipe out" the consequences of the host country's treaty breaches, including FET violations); *Murphy v. Ecuador II*, Partial Final Award, ¶ 425 (CL-0040) "violation of an obligation under international law by a state entails the State's international responsibility. The Tribunal is satisfied that the principle of full reparation applies to breaches of investment treaties unrelated to expropriations.").
[1499] Counter-Memorial, ¶ 1073.
[1500] *Vivendi v. Argentina (II)*, ICSID Case No. ARB/97/3, Award, August 20, 2007 (CL-0064) (emphasis added).

955. It is beyond dispute that the Project had considerable economic value prior to the Measures, as quantified by Claimants' damages experts.[1501] And although Peru argues that the Project still retained some residual value after the Measures, Peru presents no credible evidence to support that assertion. By contrast, Claimants conclusively demonstrate that over the course of an eighteen-month period from March 2017 to December 2018, Peru's Measures deprived Latam Hydro's covered investments of effectively all of their economic value.[1502] As already noted in Claimants' Memorial, although certain easements and other rights retained by CHM are technically transferable, the absence of any viable market for the sale of those rights renders them effectively worthless.[1503]

2. Peruvian Law Supports Claimants' Damages Claims For Breach Of Contract

956. As an initial matter, the Parties are in full agreement that the applicable standard for contract violations is established by reference to the RER Contract and Peruvian law.[1504] The Parties disagree, however, on how Peruvian law should be applied to the facts in this dispute. As established in **Section V**, *supra*, Claimants argue that under Article 1432 of Peru's Civil Code, CHM's performance under the RER Contract became impossible due to Peru's material failure to meet its contractual obligations.[1505] Damages in this context are determined by reference to Article 1321, which provides that compensation for such a breach includes both consequential damages and lost profits. [1506]

[1501] *See generally,* BRG Report I and BRG Report II, *passim*.
[1502] Memorial, ¶¶ 358 *et seq*.; *see also,* Section VII.B, *infra*.
[1503] Memorial, n.950; Jacobson I, ¶ 91.
[1504] Counter-Memorial, ¶ 1071.
[1505] *See* Section V, *supra*; *see also* Memorial, ¶¶ 518 *et seq.* Article 1432 of the Peruvian Civil Code provides: "If performance is impossible due to the fault of the debtor, the contract is fully terminated and the latter cannot demand the consideration and is subject to compensation for damages. When the impossibility is attributable to the creditor, the contract is fully terminated. However, said creditor must pay the consideration, corresponding to the rights and actions that have remained relative to the provision." Peruvian Civil Code of 1984 (CL-0149).
[1506] Article 1321 of the Peruvian Civil Code provides: "The person who does not execute his obligations due to fraud, gross negligence or negligence is subject to pay compensation for damages. The compensation for the non-

957. In rebuttal, Peru argues that for liability to attach under Article 1432, the impossibility of performance (caused by the wrongful act) must be absolute.[1507] As is the case with Treaty damages, Peru's argument is constructed upon the flawed premise that the harm, if any, caused by Peru's actions did not destroy all or effectively all of the value of the Mamacocha Project. Peru further argues that for damages under Article 1321 to apply, Claimants must show intentional harm, or at a minimum, gross negligence. Under Article 1321, Peru argues, if Claimants can only show negligence, damages would be limited to foreseeable harm.

958. Claimants' case for the effective destruction of the economic value of the Mamacocha Project is set forth in detail above at **Section II**, *supra*, and **Section IV.B** *supra*. As described in greater detail below, the Measures had the effect of rendering impossible Claimants' performance under the RER Contract. The Measures, notes Claimants' Peruvian law expert, Dr. Eduardo Benavides, "not only breached the RER Contract, but also made it impossible to perform the Contract."[1508] Thus, the condition precedent for the applicability of Article 1432 has been satisfied as a matter of Peruvian law.[1509] Article 1432 of the Peruvian Civil Code provides unequivocally that "[i]f performance [of the contract] is impossible due to the fault of the debtor, the contract is fully terminated and the latter . . . is liable for compensation for damages."[1510] Here, the impossibility of performance is directly caused by the Measures. Accordingly, as articulated in the Second Benavides Report: "[t]he enforcement of the rule contained in the

performance of the obligation or for its partial, late or defective compliance, includes both consequential damages and lost profits, inasmuch as they are an immediate and direct consequence of such non-execution/non-performance. If the non-performance or partial, late or defective fulfillment of the obligation, is due to negligence, the compensation is limited to the damage that could be foreseen at the time of the breach." Peruvian Civil Code of 1984 (CL-0149).

[1507] Counter-Memorial, ¶ 1093.

[1508] *See* Benavides II, ¶ 274 ("The interferences by the RGA, MINEM and the Arequipa Prosecutor's Office that have caused the Project to fail are objective, supervening and irresistible.")

[1509] *See* Section V, *supra*.

[1510] Peruvian Civil Code of 1984, Article 1432 (CL-0149).

second paragraph of Article 1432 of the Civil Code is compatible with Article 1321 of the Civil code, and, therefore, CHM can seek the full compensation of any damages caused by the State[.]"[1511]

B. Peru's Defenses Concerning Causation Are Baseless And Must Be Rejected

959. As Peru acknowledges in its Counter-Memorial,[1512] it is well-established in investment arbitration jurisprudence that "[p]roof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established."[1513] Further elaborating upon this standard, the *Lemire v. Ukraine II* tribunal said that "[i]f it can be proven that in the normal course of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other."[1514] This standard is straightforward and easily met here. As to "cause," Claimants have indeed established in **Sections IV.A-IV.B** that Peru breached the TPA through the seven (7) Measures from March 2017 through December 2018. The effect of those measures, beginning with the RGA Lawsuit and culminating in the Lima Arbitration and subsequent denial of CHM's Third Extension Request, rendered it impossible for CHM to meet the COS by the deadline under Addendum 2 of the RER Contract.

960. The logical link between "cause" and "effect" has everything to do with the required progression of milestones under the RER Contract. The Project's economic value was in many ways inextricably tied to the RER Contract's commercial operation date.[1515] Indeed, if the Project did not achieve commercial operation by the COS, the RER Contract could be terminated

[1511] *See* Benavides II, ¶ 19.
[1512] *See* Counter-Memorial, ¶ 1114.
[1513] *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 157 (RL-0028).
[1514] *Lemire v. Ukraine II*, ¶ 169.
[1515] *See* Section II.A.1, *supra*.

by Peru.[1516] Without the RER Contract, there is no Guaranteed Revenue Concession. Without this Concession, there is no way to secure the project finance loan that is needed to build the Mamacocha Project.[1517] It is for this reason that the RGA Lawsuit was so devastating and, on its own, substantially deprived the Mamacocha Project of its economic value. When the Lawsuit was filed on March 14, 2017, Claimants were on the verge of obtaining a project finance loan from DEG and were well on pace to build the Project and achieve commercial operation by the contractual deadline of March 14, 2020.[1518] But the Lawsuit froze all financial negotiations because it challenged the underlying environmental permits for the Project. Without these permits, the Project's power-generation and transmission concessions would be voided and the Project would have to re-start its permitting efforts from scratch.[1519]

961. In an attempt to escape liability under the TPA and RER Contract, Peru raises several alleged intervening factors that contributed to the Mamacocha Project's ultimate demise. In particular, Peru argues that: (1) CHM's lack of financing cannot be blamed on the state;[1520] (2) Claimants failed to establish that they could have achieved the actual COS date absent the Measures;[1521] and (3) the termination of the RER Contract did not frustrate the Mamacocha Project.[1522] These arguments are incorrect both on the facts and as a matter of law.

[1516] *See* Section II.A.1, *supra*.
[1517] *See* Section II.H.1, *supra*.
[1518] *See* Section II.B, *supra*.
[1519] *See* Section II.B, *supra*.
[1520] Counter-Memorial, ¶ 1122.
[1521] Counter-Memorial, ¶ 201.
[1522] Counter-Memorial, ¶ 365.

1. CHM's Inability To Obtain Financing Was Directly Caused By The Measures

a. The Financing Structure Chosen By Claimants Was Neither Unusual Nor Risky

962. The evidence establishes that all Parties anticipated that the Project would be funded in large part through non-recourse project finance. The first, and most obvious piece of evidence to support this is the RER Contract itself, which at Clause 1.4.9 defines "Financial Closing" as follows:

> "**Financial Closing**" means the date on *which the entire RER project financing contract* is signed by all parties involved in the financing and all the conditions under such contract are met to make disbursements."[1523]

963. Interpreting this provision, Dr. Whalen opines:

> In my experience, this definition [of Financial Closing in the RER Contract] is consistent with the expectation of a concession grantor and a concessionaire that the concessionaire will raise third-party project financing. As such, the "Financial Closing" milestone date in the works schedule would be the date that the financing contract was signed "by all the parties involved in the financing" and that conditions precedent to the project financing disbursements were met. I understand Peru argues in its Counter-Memorial that MINEM never expected the concessionaire to obtain project financing. In my opinion as a project financier, this definition contradicts Peru's argument.[1524]

964. Accordingly, this definition alone establishes that the Parties did not intend for the concessionaire to self-finance the Project or for the concessionaire to rely on commercial credit facilities.

965. The Mamacocha Project was linked to Peru's implementation in 2008 of a regulatory framework the purpose of which was to incentivize and promote private sector

[1523] RER Contract ¶ 1.4.9 (emphasis added)
[1524] Whalen I, ¶ 4.2.12.

investment in the renewable energy sector, *i.e.*, the RER Program. The structure of Peru's RER Program was carefully designed to make the project attractive to third-party project financing. As Claimants' distinguished project finance expert Dr. Whalen explains:

> [T]he RER Contract anticipated and was purposefully structured to be suitable for the use of third-party project financing. *I have seen few comparable programs that reflect as much careful design and purposeful effort to be compatible with international project finance parameters as the RER Program.* This reflects, I believe, the strong interest of Peru at the time to attract substantial inward flows of international project finance capital to support this program.[1525]

966. Moreover, as Claimants establish in greater detail at **Section II.H.1**, it was not at all unusual for Claimants to have pursued parallel and simultaneous equity capital and debt financing strategies. As Dr. Whalen explains, this practice is actually "typical" in renewable energy projects:

> It is typical, in my experience, for IPP developers to pursue parallel and simultaneous equity capital and debt financing strategies. This is because:
>
> (I) many IPP developers seek partners with complementary capabilities in constructing or operating the project;
>
> (II) many IPP developers seek to redeploy capital invested in early-stage developments into other early-stage development opportunities in their portfolio; and
>
> (III) the work required to support the due diligence and the structuring of terms and conditions for project equity investors is substantially similar to the activities necessary to secure the support of project finance debt providers.[1526]

967. Accordingly, Peru cannot credibly be heard to complain that Claimant's chosen financing structure was unusual or unanticipated—it was spelled out in the RER Contract, embedded in the underlying RER Program, and reflective of industry custom and practice.

[1525] Whalen I, ¶ 4.2.20.
[1526] Whalen I, ¶ 4.3.3.

b. Claimants Would Have Been Able to Achieve Financial Close Absent the Measures

968. As Claimants establish in **Section II.B**, Claimants negotiations with DEG, Innergex and GCZ were at an advanced stage at the time of the RGA Lawsuit, and the timelines exchanged in those negotiations confirmed the Parties' common understanding that CHM would achieve Financial Close by May 2017 and that construction would begin no later than July 1, 2017. The filing of the RGA Lawsuit was the triggering event that caused DEG, Innergex and GCZ to step away from the negotiating table. Matters were made worse with the filing of a criminal action by regional authorities. Peru does not refute that CHM was on the path to Financial Close prior to the measures, nor could it. While it makes the unsubstantiated argument that Financial Close would not have been attained absent the measures—a purely speculative position—it is crystal clear that once the Measures took place, Financial Close was impossible, as Dr. Whalen explains:

> These governmental actions [i.e., Peru's delays in approving the Civil Works Authorization and commencement of the RGA lawsuit] represented fundamental barriers to any external lender that relied upon the project's performance, as they would jeopardize the Mamacocha Project's ability to meet its RER Contract milestone schedule.
>
> It would be unreasonable for CHM or DEG to proceed with the project financing if there was fundamental uncertainty on whether the Mamacocha Project would be able to secure the effectiveness of its foundational permits and authorizations.[1527]

969. Again, Peru offers no evidence other than its speculation that Financial Close could not have been timely achieved. Against this is the irrefutable fact that the Measures foreclosed any ability to reach financial close.

[1527] Whalen I, ¶ 2.1.5.

970. Peru further argues that the Measures "did not prevent Latam Hydro from investing additional capital in CH Mamacocha at all," suggesting that the Measures would not have prevented Latam Hydro from self-funding the Project, and then speculating that Latam Hydro "was unwilling or unable to contribute the necessary capital to CH Mamacocha in the actual scenario."[1528] This latter argument is a red herring. Absent the Measures, there was no need for self-funding, as CHM would have secured project financing. As Dr. Whalen unequivocally states: "but for the actions taken by the Peruvian Government . . . . it is highly likely CHM would have successfully achieved its project financing."[1529] It is equally true that in light of the Measures, "there was no realistic equity or debt financing alternative available for the Mamacocha Project, which fundamentally was conceived and structured on the basis of the RER Program and its awarded RER Contract."[1530]

971. The notion that the Measures did not prevent Latam Hydro from independently funding the project is facially absurd, as it assumes that Latam Hydro would not have been affected by the Measures in the same manner as any other investor/lender. But this is not the case. The very same factors that made the Mamacocha Project bankable to lenders (*i.e.*, the guaranteed revenue streams) made it attractive to developers. Moreover, as with a project finance lender, the only security Latam Hydro would have had it if was self-funding the Mamacocha Project was the revenue from future cash flows expected to be generated by the Project, as there was nothing else with which to secure the loan/investment. Because, among other things, the Measures destroyed the benefits of the guaranteed revenue streams and the Regional Government lawsuits put in question the Project's ability to secure the requisite

[1528] Counter-Memorial, ¶ 1126.
[1529] Whalen I, ¶ 7.1.2.
[1530] Whalen I, ¶ 7.1.3.

permits, so too was destroyed any economic rationale for further investment at that level[1531]—this was as true for Latam Hydro post-Measures as it was for any other lender/investor. Accordingly, post-Measures, self-funding was not an option.

2. Absent The Measures, Claimants Would Have Timely Begun Construction, And Achieved The COS Date Set Forth In Addendum No. 2

972. As pointed out above at **Section II.H.3**, Respondent's argument that Claimants could not have timely begun construction of the Project is unsubstantiated and wrong.[1532]

973. **First**, Claimants, DEG, and Innergex were each relying on the construction schedule prepared by GCZ—it was reviewed by each of those parties and reflects their mutual understanding that construction would start no later than July 1, 2017.

974. **Second**, Mr. Jacobson's testimony establishes that if the contractor, GCZ, had believed that it would not have ample time to timely complete the Project, the sponsors or Innergex would have paid for early mobilization to bring forward the start date into June or even May.

975. **Third**, Respondent's contention that the 33-month construction schedule was a "base case" scenario is false. Peru's reliance on the Hatch report ignores the fact that Hatch was a consultant for DEG, and as the lender's consultant, "it is reasonable to assume that the Hatch Report provides a conservative assessment which includes additional safety margins to protect the lender."[1533] By contrast, GCZ's construction schedule was not influenced by a need to build in safety margins and, as the actual contractor (that was highly experienced with building renewable energy projects in the mountains of Peru), had every reason to be able to accurately

[1531] Indeed, Latam Hydro did continue to invest post-Measures in a good faith effort to preserve the Project in the event the Measures could be reversed, but self-funding the entirety of the project in light of the Measures was simply not possible.
[1532] *See* Section II.H.3, *supra*.
[1533] Whalen I, ¶ 7.2.9.

predict its own construction timeline. GCZ estimated that the Project would be built in 26 months. Pöyry's estimate of a 26-month construction schedule corroborates GCZ's projection.

976. Moreover, as testified to by Messrs. Jacobson and Bartrina, claimants could have accelerated the construction schedule if necessary by increasing their construction budget.

977. Claimants' construction and delay expert, Mr. John McTyre, concludes that Claimants' reliance on GCZ's and Pöyry's construction schedules was entirely reasonable:

> In summary the 26-month construction schedule put forth by Pöyry and GCZ is more reliable than the schedule presented by Hatch because both Pöyry and GCZ have more relevant experience than Hatch. In addition, there were several options available to CHM to insure timely completion of the construction.[1534]

978. Finally, Peru's own damages expert hypothesized and adopted a 30.3 month construction schedule that would have been the "baseline scenario" for this project.[1535]

979. Accordingly, documentary evidence and expert testimony establishes that construction was on track to achieve COS on or about August 29, 2019—well before the COS deadline and with more than enough of a cushion to achieve timely COS even if construction had taken significantly longer.

a. Peru Offers No Evidence That The Ayo Community Would Have Stopped Achievement Of The Actual COS Date

980. As noted above at **Sections II.B** and **II.H.4**, *supra*, Respondent exaggerates the effect of the Amparo Action filed by Mr. Begazo López to create the false impression that it posed an existential threat to the Project. As set forth above, none of the parties viewed the Amparo Action as anything more than a nuisance. DEG's local counsel, CMS Grau, reviewed

[1534] HKA Report II, ¶ 99.
[1535] Versant Report I, ¶ 41.

the Amparo Action and concluded that its likelihood of success was "remote." The Amparo Action played no role in the demise of the Mamacocha Project.[1536]

3. Peru's Interferences Regarding The RER Contract Frustrated The Mamacocha Project

981. Peru argues that claimed interferences with the RER Contract did not frustrate the Mamacocha Project, on the unsubstantiated theory that CHM could, absent the RER Contract, simply have sold its energy directly into the spot market or sold it under long term-term electricity supply contracts.[1537] This unproven argument is yet another red herring.

982. As noted above, without the RER Contract and the guaranteed revenue streams it provided, there was no Mamacocha Project. The Tribunal should not have to speculate whether the Mamacocha Project could have functioned absent the RER Contract since its very genesis was tied to that agreement and the RER Program. As Dr. Whalen points out:

> The Mamacocha Project was intrinsically conceived of in the context of the RER Program and based on the RER Contract. As identified by the World Bank in 2008 (working in cooperation with the MINEM), a Peruvian small-scale hydroelectrical project was unlikely to be an attractive opportunity [because] "an adequate tariff is an essential ingredient of a successful renewable energy program."[1538]

983. The business that Peru posits—one that would sell directly into the spot market—comprises a fundamental reconceptualization of the Mamacocha Project and has no connection to reality. It is not a business model that was ever considered by CHM, DEG, Innergex, or any of the entities involved in this Project.

[1536] The same is true of the administrative lawsuit filed by David Gerónimo Miranda Soto cited by Respondents. To date, there has been no ruling on the Proceedings and Peru has presented no evidence that the action had or would have had a discernable impact on the Project. *See* Section II.H.4, *supra*.
[1537] Counter-Memorial, ¶ 818.
[1538] Whalen I, ¶ 7.5.3.

C. BRG's Calculation Of The FMV Of The Mamacocha Project Is Accurate and Reasonable

984. As noted above, the Parties agree that the use of a DCF analysis provides the appropriate means to calculate the FMV of the Mamacocha Project.[1539] The difference between the Parties rests in their respective application of the DCF approach. Peru's damages expert claims to have identified several errors in BRG's DCF model, such that BRG's US $35.310 million value should be reduced by more than a factor of 10 to just US $3.381 million. As BRG's Second Report demonstrates in detail, the Versant Report is merely a results-oriented report that does not stand up to serious scrutiny.

985. At the most basic level, Versant's conclusions are contradicted by the basic facts in the case. The development of the Mamacocha Project was overseen by sophisticated investors who subjected the Project to numerous rounds of due diligence, which were in turn conducted by highly respected and recognized industry experts: CESEL Ingenieros, Pöyry, Norconsult, Innergex, DEG, and Hatch.[1540] The Project's contractor, GCZ, had previous experience building hydroelectric projects in Peru.[1541] As of the date of the Measures, Claimants had already invested more than US $10 million into the Project. The notion that Claimants, together with their sophisticated potential partners, would have been committed to a venture worth only US $3.38 million defies logic and common sense. If Versant's FMV assessment were correct, any continued investment in the Mamacocha Project would have resulted in a negative return.[1542] And yet, but for the Measures, Claimants, Innergex, and DEG were fully committed to moving forward with the Project. The Versant Report can be dismissed as a whole because it espouses a

[1539] Counter-Memorial, ¶ 1142.
[1540] BRG Report II, ¶ 9.
[1541] BRG Report II, ¶ 21; *see also*, Bartrina I, ¶ 46.
[1542] BRG Report II, ¶ 125.

ridiculous conclusion that is wholly inconsistent with the commercial reality facing all the parties at the time.[1543]

986. To support its valuation, Peru identifies a series of six "corrections" to BRG's Report, which, taken cumulatively, purport to result in the reduction of value of the Mamacocha Project to a negligible amount. Each of those purported corrections is addressed below, as are the errors in Peru's approach.

1. Peru's "First Correction" Is Premised On A Fundamental Error And Should Be Ignored

987. Peru's first "correction" of the BRG Report addresses the issue of BRG's distribution of construction costs over time and the amount of those costs. It seeks to reduce the value of BRG's DCF model by US $ 1.118 million.[1544] Specifically, the Versant Report challenges BRG's use of Pöyry's 2014 Phase II feasibility study to apply a 12.5% cost contingency to the road construction cost in the 2016 GCZ bid, arguing that the more appropriate basis to assess access road construction cost risk was the Hatch Report. Versant is wrong.

988. As explained in BRG's First Report, developers do not share the same perspective as financiers or investors. The 12.5% cost contingency estimated by Pöyry for civil engineering works was provided by a firm hired by Claimants for the specific purpose of determining the feasibility of the project. They had no incentive to over- or under-state the risk attendant to the road's construction, but rather only to accurately determine where to best build the road and assess the risk attendant to its construction.

[1543] Some tribunals have utilized sunk costs analyses as a "reality check" to verify the reasonableness of a DCF analysis. *See, e.g., Foresight Luxembourg Solar 1 S.A.R.L., et al. v. Kingdom of Spain*, SCC Case No. 2015/150 Final Award, November 14, 2018 ¶ 535 (CL-0091) ("The majority of the Tribunal agrees with the *Eiser* tribunal that the amount invested can serve as a 'reality check' on the reasonableness of a damages assessment."). Here, the discrepancy between Peru's DCF analysis and its own sunk costs analysis is enough to render quite suspect the validity of Peru's DCF approach.

[1544] Counter-Memorial, ¶¶ 1144 (citing Versant Report I, ¶¶ 42-45) and ¶ 1146.

989. And this is precisely what happened—the optimal location and layout of the Mamacocha Project, including the location and design of the access road—was determined by Pöyry.[1545] Thus, there is no question that the civil engineering contingency determined by the company that had designed the Project and the access road took into account the access road issues when determining the 12.5% contingency. Respondent fails to point to any evidence suggesting otherwise.

990. By contrast, Versant's preferred assessment from the Hatch Report does not provide an appropriate risk adjustment. Hatch was engaged by DEG, which as the financier, does not share the same perspective on risk assessment as CHM. As discussed above in **Section II.H.3**, *supra,* and as explained by Dr. Whalen, it is reasonable to assume that the Hatch Report provides a conservative assessment which includes additional safety margins to protect the lender. As explained by Dr. Whalen:

> a. When lenders are exposed to project completion risks, it is not unusual for a lenders' technical consultant to recommend adjustments to sponsors' construction budgets and schedules to reflect lenders' more conservative, lower risk thresholds.[1546]

Accordingly, Versant's use of the Hatch estimate of the risk adjustment for the access road was inappropriate for the determination of the FMV of the Mamacocha Project.[1547]

991. Peru's "First Correction" also asserts that BRG erred by assuming the constructions costs would be evenly distributed.[1548] As an initial matter, BRG employed an even distribution because this approach was consistent with the Innergex model; there was no better

[1545] Pöyry (Peru) SAC, *Feasibility Study- PHASE II- Laguna Azul*, August 2014, pp. 9, 11-12, 82 (BRG-0006).
[1546] *See* Whalen I, ¶ 7.2.9.
[1547] BRG Report II, ¶ 106
[1548] Counter-Memorial, ¶ 1144.

source available to BRG on what the drawdown schedule would have been for the construction budget and timeline used in BRG's DCF analysis.[1549]

992. Versant argues for the use of the Hatch Report's contingency estimate as a reference because it "describes the distribution of construction costs over time based on the contract with GCZ."[1550] But, as BRG demonstrates, Versant's approach is fundamentally flawed. Versant estimates the drawdown schedule from the Hatch Report using the adjusted GCZ construction budget of $46.40 million, which results in a drawdown schedule of 56.6% in the first 12 months, 41.6% in the second 12 months, and 1.8% in the last two months, during a construction timeline of 26 months.[1551] Versant then, erroneously, applies this drawdown schedule to the direct construction costs in their DCF evaluation, but then it presumes a 30.3 month construction timeline.[1552] Because the construction timelines differ, Versant should have recalculated how their estimated 26-month drawdown schedule would have been distributed over a 30.3 month period, but they did not, thereby creating errors in its presumed distribution of costs. As BRG demonstrates, reallocating the direct construction costs over a 30.3-month construction timeline results in a drawdown schedule comparable to the one modeled in BRG's original report.[1553]

993. Accordingly, Peru's "first correction" is based on: (1) an erroneous and unsupported assumption that the DEG Report did not appropriately consider the construction risk attendant to the access road, and (2) an erroneous application of a 26-month drawdown schedule

[1549] BRG Report II, ¶ 109.
[1550] Counter-Memorial, ¶ 1145.
[1551] BRG Report II, ¶ 110.
[1552] BRG Report II, ¶ 111.
[1553] BRG Report II, ¶¶ 111-12.

to a 30.3 month construction timeline. BRG and Claimants thus stand behind their original calculations and respectfully urge the Tribunal to disregard Peru's "first correction."

2. Peru's "Second Correction" Comprises Three Adjustments To BRG's DCF Analysis, Of Which Only One Has Any Merit

994. Peru proposes three adjustments to BRG's DCF model based on the Versant Report that would reduce the value of BRG's DCF model by US $1.013 million.[1554] **First**, Versant corrects an error to the DCF Model that applied the Award Tariff to the entire energy volume production projected in its assessment. BRG also identified this error in its Second Report. It has been corrected and the corrected figures are included in BRG's updated assessment of Claimants' damages.

995. **Second**, Versant argues that BRG overstated the price of electricity guaranteed by the RER Contract by not including a discount to account for lower production attributable to "dry" years, *i.e.*, years in which the hydrology of the Mamacocha Project would be insufficient to generate the amount of energy required for the contracted-for level of production.[1555] Versant's logic is inherently flawed—their argument for the inclusion of a discount for "dry" years ignores the possibility of increased production during "wet" years. The simple reality is that neither Versant nor BRG can identify which years will be dry and which will be wet.[1556] BRG's approach, therefore, was to "not apply a discount to the price of electricity under the RER Contract" because "the average electricity generation output of the Mamacocha Project, as studied contemporaneously by third-party engineering firms, is the appropriate metric for determining the electricity generated by the Project" and "the average output is greater than the

[1554] Counter-Memorial, ¶ 1147 *et seq*.
[1555] Counter-Memorial, ¶ 1149.
[1556] As to trends in hydrology based on historical fluctuations, these were in fact incorporated into the analysis that determined mean production. BRG Report II, ¶¶ 96-98.

required generation."[1557] This approach leads to a more accurate estimate of future hydrologic impact on water flow and concomitant electricity production and is consistent with the industry standard approach used by equity investors and lenders alike.[1558]

996. Moreover, as set forth in BRG's Second Report, the monomic price of electricity in Peru was expected to converge with the price set forth in the RER Contract[1559] during the final years of the RER Contract, which would decrease any detrimental impact of dry years, and would amplify the beneficial impact of wet years. Since the mean annual energy output of the Project (*i.e.*, 134,720 MWh) was expected to exceed the amount of energy purchased by Peru under the RER Contract (*i.e.*, 130,000 MWh), the expectation was that, on average, the Mamacocha Project would always be able to satisfy its production obligation under the RER Contract.[1560]

997. **Third**, Versant purports to correct BRG's DCF model to reduce the guaranteed energy sales to 17 years from 20 years in accordance with the termination date of December 31, 2036, which had not been extended by Addendum 2. On the merits of this case, Claimants disagree with Peru that the Addendum 2 did not have the effect of preserving the 20-year term of the RER Contract.[1561] Nevertheless, as already noted above, by year 17 of the Project, the monomic price of electricity was expected to have met or even exceeded the price under the RER Contract.[1562] There is no value in this "correction" because the projected spot price and the RER Contract price (also called the "Award Fee") were expected to converge at or around year 17 of the Project, rendering irrelevant any difference between the spot price and the RER Contract

[1557] BRG Report II, ¶ 17.
[1558] Bartrina II, n.157.
[1559] RER Contract, Clause 1.4.45 (C-0002).
[1560] BRG Report II, ¶ 94.
[1561] *See* Section II.A.2, *supra*.
[1562] BRG Report II, ¶ 98 and Figure 4.

price from that point forward. Put differently, based on the BAES spot price projections, the Project would derive no less revenue from the spot market than it would from the RER Contract Price from year 17 forward.

3. Peru's "Third Correction" Correctly Identifies A Formula Error Which BRG Corrects In Its Second Report

998. Peru's third correction relates to a formula error in BRG's Report which resulted in the failure to deduct certain taxes in their DCF calculations, which Peru argues should reduce the value of the BRG DCF model by US $2.330 million. BRG has corrected this error and updated its calculation.

4. Peru's "Fourth Correction" Excluding Cash Flows Pertaining To The Performance Bond Ignores The Demonstrated Economic Impact Of The Performance Bond

999. Peru's fourth correction relates to the Performance Bonds,[1563] which Peru maintains should not be included in the BRG's damages calculations, which would have the effect of reducing BRG's DCF model by US $4.282 million. Peru's experts exclude cash flows pertaining to the Performance Bonds from its DCF model for two reasons: (1) with respect to the bond associated with the RER Contract, the US $5 million in cash collateral allegedly was provided by Messrs. Jacobson and Bengier in their personal capacities rather than by Claimants,[1564] and (2) the Performance Bonds purportedly have not been enforced.[1565] But both of these assumptions by Versant are incorrect for several reasons.

[1563] There is a second performance bond in addition to the bond associated with the RER Contract. This second performance bond is associated with the transmission line from the Mamacocha Project to the Chipmo substation. Peru also contests the inclusion of this second performance bond in Claimants' damages analysis. Versant Report, ¶ 149. This second performance bond is included in BRG's analysis because its execution would be tied to the termination of the Project due to the Measures, and therefore it is properly included for the reasons set forth in this subsection. *See* BRG Report I, ¶¶ 165-66, BRG Report II, ¶127 and n.17.
[1564] Counter-Memorial, ¶ 1155.
[1565] Counter-Memorial, ¶ 1156.

1000. With respect to Peru's first point, BRG's position regarding the release of the Performance Bond associated with the RER Contract is consistent with the FMV definition provided in its First Report, which was accepted by Versant.[1566] Consistent with that definition of FMV, any change in ownership of the Project, either in whole or in part, as allowed by the RER Contract[1567] would require the buyer to provide corresponding funding to assume the Performance Bond (thereby releasing CHM of its commitment). As such, the determination of the FMV of the Project must consider the RER Contract's Performance Bond.[1568]

1001. This economic reality is demonstrated by Innergex's offer, pursuant to which in exchange for a 70% equity stake in CHM, Innergex was obligated to assume 70% of the Performance Bond.[1569] Concomitantly, any buyer willing to acquire the entirety of the Project would have been required to assume responsibility for the entirety of the Performance Bond, thereby releasing those funds back to Claimants.[1570]

1002. As for Peru's arguments that the cash collateral for the Performance Bond was put up by Messrs. Jacobson and Bengier, there is no economic difference between the receipt of the Performance Bond guarantee by Claimants versus its receipt by Messrs. Jacobson and Bengier.[1571] This is because Messrs. Jacobson and Bengier had an agreement with Latam Hydro whereby the release of the Performance Bond would have been contributed to Latam Hydro as

[1566] BRG Report II, ¶ 89.
[1567] RER Contract, Clause 12.1 (C-0002).
[1568] By the same logic, any buyer willing to acquire 100% of the Mamacocha Project would also be required to assume responsibility for the second performance bond of US $ 71,500 for the transmission line, hence the inclusion of this second performance bond in BRG's analysis. *See* BRG Report II, ¶ 91.
[1569] BRG Report II, ¶ 103; *see also* Investment Agreement relating to Mamacocha Hydro S.R.L between Latam Energy Chile SPA and Innergex Renewable Energy Inc., dated June 24, 2016, p. 6 (BRG-0043).
[1570] BRG Report II, ¶ 91.
[1571] BRG Report II, ¶ 92.

an additional capital contribution.[1572] Accordingly, the funds ultimately would have accrued to Claimants had the Project been completed and the Performance Bond released.

1003. With respect to Peru's second point, Versant also argues that because Peru has not yet executed the Performance Bond, Claimants have not yet suffered a loss.[1573] This is wrong for several reasons. **First**, Claimants already have suffered a loss because under Clause 11.6 of the RER Contract, they have not been able to terminate the bond, despite the destruction of the Project by Respondent. **Second**, contrary to Versant's baseless assumption, Peru has undertaken the equivalent sanction to calling the bond. On or about February 23, 2021, OSINERGMIN notified CHM that it was imposing an administrative penalty by increasing the bond by 20% due to CHM's failure to reach Financial Closing by the milestone date set forth in the Works Schedule. OSINERGMIN sent this notice after the project had been destroyed by Respondent's Measures. This unlawful attempt to increase the bond demonstrates Respondent's intent to exercise its purported authority under Clauses 8.3 and 8.4 to increase and call the performance bonds. Accordingly, BRG was justified, under the facts, to take into account the value of the performance bond in its calculation of FMV.

1004. In addition, even apart from the fact that Claimants cannot unilaterally cancel the Performance Bonds or access the funds backing up the Performance Bonds due to the provisions of Clause 11.6, neither Peru nor Versant have stated that Peru does not expect to execute the Performance Bonds when this arbitration is concluded, unless the Tribunal issues the Declaratory Relief requested by Claimants requiring MINEM to release the bond to Claimants. To the contrary, Respondent's actions demonstrate that Peru can reasonably be expected to execute the

[1572] BRG Report II, ¶ 15(c)(ii) (*citing* LATAM Hydro LLC Amended and Restated Operating Agreement, dated 31 December 2015, p. 24 (BRG-0101)).
[1573] Counter-Memorial, ¶ 1156.

bonds whenever this arbitration ends. Indeed, in its Counter-Memorial Peru expressly "reserves its right to enforce the Performance Bond . . . once this arbitration concludes . . . ."[1574] Bottom line: the performance bonds are not a hypothetical damage, as Peru and Versant would have the Tribunal believe.

1005. For these reasons, the inclusion of the value of the Performance Bond in BRG's FMV analysis is wholly appropriate, and Versant's unsupported "Fourth Correction" should be disregarded.[1575]

5. Peru's "Fifth Correction" Which Seeks To Exclude From BRG's DCF Model Offsets For Actual Costs Incurred By Claimants Between The Valuation Date Until December 2018 Would Unfairly Penalize Claimants For Continuing To Invest In The Mamacocha Project

1006. Peru's fifth correction relates to the exclusion by Peru's experts of certain offsets to the Mamacocha Project's construction costs to account for expenses incurred by the CHM, Latam Hydro, and Greinvest America between 2017 and 2019.[1576] Versant calculates the value of these offsets to be approximately US $8.222 million.

1007. In calculating the value of Claimant's investments into the Mamacocha project, BRG nets out certain expenses incurred by CHM, Latam Hydro, and Greinvest America between the Valuation Date and December 2018. These expenses fall into the two categories: (1) anticipated costs (*i.e.*, costs that were included in the budget) and (2) unanticipated costs (*i.e.*, costs that were not included in the budget).[1577] With respect to anticipated costs, to the extent that these costs were actually incurred by Claimants, an offset must be included against those

[1574] Counter-Memorial, ¶ 1211.
[1575] To the extent that the Performance Bonds are released to Claimants at some future point in time, Claimants undertake to adjust their damages claims to take this into account.
[1576] *See* Counter-Memorial, ¶ 1158.
[1577] Unanticipated costs included costs incurred by Claimants after March 2017 but before the December 2018 measures, in their attempt to continue developing the Project despite Peru's interference.

expected costs because failure to do so would result in a double counting of those expenses against Claimants' investment value. As set forth in BRG's Second Report:

> when calculating damages as the difference between the but-for world and the actual world, it would be inappropriate to include expected costs in the but-for world without recognizing that those costs were incurred in the real world. Ignoring this offset would penalize Claimants for their continued investment in the Mamacocha Project.[1578]

In addition, BRG includes an offset against expenses for unanticipated costs post-dating the Valuation Date. This is done because these costs were plainly ¨but for¨ expenses incurred by Claimants in a good faith effort to preserve the value of their investment.

1008. Peru argues that these offsets should be excluded because they could not impact the FMV as of March 2017, since they had not yet been incurred and the costs could not have impacted construction costs.[1579] But, as noted above, although the actual expenses included in the offsets were incurred after the Valuation Date, an offset is necessary because Claimants continued to invest in the Mamacocha Project and the Upstream Projects up until operations were wound down in December 2018.[1580] The inclusion of unanticipated costs is also appropriate because such costs would not have been incurred but for the Measures. Ignoring these actual expenses incurred by Claimants would penalize them for their continued investment in the Mamacocha Project.

1009. Accordingly, the offsets included by BRG in its First Report are wholly appropriate and their inclusion is consistent with BRG's FMV methodology. The sole exception to this is a correction made to BRG's model to account for inadvertent inclusion of certain costs attributable to, for example, legal fees relating to the Lima arbitration and the criminal

[1578] BRG Report II, ¶ 85.
[1579] Counter-Memorial, ¶ 1158.
[1580] BRG Report I, ¶ 84.

proceedings. Those costs and fees are instead included in BRG's calculation of "Additional Expenses" and this correction, which totals US $1.1 million, is reflected in BRG's Second Report.[1581]

6. Peru's "Sixth Correction" Is Based On A Fundamental Economic Error That Led Versant To Overstate The Appropriate Amount Of Risk For The Mamacocha Project

1010. Peru's "sixth correction" posits that BRG underestimated the discount rate applied to its analysis. Versant asserts that this "correction" requires the deduction of US $16.893 million from the FMV of the Project. Versant's analysis, however, is fundamentally flawed as it misrepresents and misapplies fundamental financial concepts of "rate of return" and the distinction between "levered" and "unlevered" cost of equity. "Levered cost of equity" is the rate of return required by an investor in order to take an equity position in a company that has debt. "Unlevered cost of equity" is the rate of return required by an investor in order to take an equity position in a company that does not have debt. The levered cost of equity is always higher than the unlevered cost of equity because of the increased chance that an investor will not see a return on its investment, since payment of debt is required regardless of a company's margins and, in the event of an insolvency, debt is preferred over equity.

1011. In the present case, the Parties at all times understood that the Project would be financed; that is, it would carry debt. Accordingly, in calculating the discount rate applicable to a FMV analysis, the appropriate cost of equity would be the levered cost of equity.

1012. Notwithstanding the above, Versant argues: "it is plainly obvious BRG's cost of equity is understated [because] BRG's baseline (unlevered) cost of equity (5.79%) is significantly lower than the observed cost of debt from the DEG loan (7.06%-7.36%)."[1582]

[1581] BRG Report II, ¶ 173.
[1582] Counter-Memorial, ¶ 1159.

Versant then argues that BRG's estimate of the appropriate discount rate for the Mamacocha Project "breaks the fundamental rules of finance" because, according to Versant, the cost of equity is always higher than the cost of debt.[1583]

1013. But Versant erroneously compares the cost of debt for the Mamacocha Project (7.36% during construction and 7.06% during operations), to the *unlevered* cost of equity of 5.79%.[1584] Because the figure of 5.79% is lower than 7.36% and 7.06%, Versant asserts that it has identified a fundamental error. The only errors are Versant's assumptions, calculations and understanding of basic financial principles.

1014. To support its assertion, Versant cherry picks a single sentence from a treatise by Professor Richard Brealey, which states "the cost of debt is always less than the cost of equity." But if one continues to read the balance of the paragraph from which that sentence is harvested, Versant's error becomes clear:[1585]

> The cost of debt is always less than the cost of equity. . . . The formula is dangerous, however, because it suggests that the average cost of capital could be reduced by substituting cheap debt for expensive equity. It doesn't work that way! As the debt ratio D/V increases, the cost of remaining equity also increases, offsetting the apparent advantage of more cheap debt.[1586]

What Professor Brealey is recognizing here is that the cost of equity increases as more debt is taken on—accordingly, the levered cost of equity will always be higher than the unlevered cost of equity.

1015. Professor Damodaran, similarly misquoted by Versant, also explains why the levered cost of equity is always higher than the unlevered cost of equity:

[1583] Counter-Memorial, ¶ 1159.
[1584] Counter-Memorial, ¶ 1159.
[1585] BRG Report II, ¶ 50.
[1586] BRG Report II, ¶ 50, citing Brealey, Richard; Myers, Allen, *Principles of Corporate Finance*, 11th Edition, p. 225 (BRG-00025) (also cited as VP-02).

> As the company borrows more money, its equity becomes riskier. Even though it has the same operating assets (and income), it now has to make interest payments, and financial leverage magnifies the risk in equity earnings. Thus, the cost of equity is an increasing function of the debt ratio.[1587]

1016. Accordingly, even the authorities relied upon by Versant support the principle that the appropriate comparison for the required rate of return for an equity investor in a project with leverage is not the *unlevered* cost of equity, as incorrectly applied by Versant, but rather the *levered* cost of equity.[1588] And when one calculates the cost of equity using the effective level of debt for the Mamacocha Project, 63.16%, the levered cost of equity is 8.54%,[1589] which is above the cost of debt for the Project of 7.36% during construction and 7.06% during operations. Thus, correctly assessed, BRG's discount rate does not violate any fundamental rules of economics and is fundamentally sound. Accordingly, Peru's sixth correction should be disregarded.[1590]

1017. Peru's remaining criticisms of BRG's DCF methodology relating to the risk-free rate, the market risk premium, and unlevered beta are similarly flawed.

1018. **First**, with respect to the risk-free rate, which is the return on a security or portfolio of securities that has no default risk,[1591] Claimants' experts use the average daily yield of the 10-year U.S. Treasury bond over the twelve-month period ending on the Valuation Date.[1592] This approach properly accounts for a downward trend in market interest rates apparent at the time of the Valuation Date.[1593] Versant ignores that trend and relies instead on a point estimate that yields the second highest interest rate over the twenty-four (24) month period

[1587] BRG Report II, ¶ 51, citing A. Damodaran, *The Dark Side of Valuation: Valuing Young, Distressed, and Complex Businesses* (2nd ed., 2010), p. 336 (BRG-0020).
[1588] BRG Report II, ¶ 52.
[1589] BRG Report II, ¶ 52. These figures vary slightly from BRG's First Report due to updates to the cash flow calculations presented in BRG Report I.
[1590] BRG Report II, ¶ 66.
[1591] BRG Report II ¶ 55.
[1592] BRG Report II, ¶ 56.
[1593] BRG Report II, ¶ 15(a)i.

leading up to the Valuation date.[1594] As a result, Versant's risk-free rate is overstated causing them to undervalue the FMV of the Mamacocha Project.

1019. **Second**, with respect to the market risk premium, which is the difference between the expected rate of return on a market portfolio and the risk free rate (*i.e.*, the "price of risk"),[1595] BRG relies on a the long-term geometric average market risk premium of the S&P 500, which is a widely accepted methodology and is aligned with the average and median value of several highly reputable studies of the market risk premium that are contemporaneous with the Valuation Date.[1596] By contrast, Versant relies on a market risk premium that that tends towards the higher end of contemporaneous market risk premium estimates.[1597] Versant's overstatement of the market risk premium incorrectly and artificially decreases the FMV of the Mamacocha Project.

1020. **Third**, with respect to the unlevered beta, which measures a security's or a portfolio of securities' exposure to market risk (*i.e.*, the systemic risk of holding the equity),[1598] BRG uses a widely-accepted estimate provided by Professor Damodaran.[1599] Versant instead relies on an unreliable sample of companies, does not account for the benefits of the RER Contract, and double counts country risk.[1600] Again, this results in an overstatement of the unlevered beta for the Mamacocha Project and therefore an unwarranted decrease in the FMV of the Project.

[1594] BRG Report II, ¶ 15(a)i.
[1595] BRG Report II, ¶ 61.
[1596] BRG Report II, ¶ 15(a)ii.
[1597] BRG Report II, ¶ 15(a)ii.
[1598] BRG Report II, ¶ 67.
[1599] BRG Report II, ¶ 15(a)iii.
[1600] BRG Report II, ¶ 15(a)iii.

1021. Peru's and its experts' unsupported criticisms and improper adjustments relating to the risk-free rate, market-risk premium, and beta are fully addressed in detail in BRG's Second Report.[1601]

7. Peru's Argument That The Implied Value Of The Innergex Offer Supports Its "Corrections" To BRG's DCF Analysis Is Fundamentally Flawed

1022. Peru argues that its "corrected" DCF valuation is aligned with Innergex's February 2017 offer based on its experts' interpretation of that offer.[1602] Versant argues that BRG's US $26.93 million valuation of CHM from Innergex's offer is flawed because (1) it ignores the difference between pre-money and post-money value; (2) it miscalculates the implied post-money value of the Innergex Offer; and (3) the only relevant measure for the implied value of the Mamacocha Project is the pre-money value.[1603] Versant then applies three separate estimates based on the information supplied by Innergex: (1) the pre-money value of the Innergex Offer, which it claims equals US $8.84 million; (2) the value implied by the Innergex financial model, which it claims equals US $7.23 million, and (3) the value implied by the Innergex financial model after accounting for Pöyry's updated estimate of electricity generated by the Project, which it claims equals US $4.88 million.[1604] By using these flawed implied values, Versant then argues by extension that these valuations support its "corrected" DCF valuation of US $3.38 million.[1605]

1023. Versant's framework and conclusion suffers from at least two fatal flaws. *First*, as Versant explains, the pre-money value of a company is measured as the equity value of a

[1601] BRG Report II, §§ II.1.1, II.1.2, and II.1.3.
[1602] Counter-Memorial, ¶ 1163.
[1603] Versant Report I, ¶¶ 117, 125, and 122.
[1604] BRG Report II, ¶ 139.
[1605] Versant Report I, ¶ 131.

company *before* it receives an additional equity investment.[1606] But Versant inappropriately compares Versant's DCF analysis, which assumes an investment *would have been made*, to the value of the Project if Innergex had not invested. It thus compares apples and oranges. *Second*, Versant asserts that the appropriate metric for determining the value of the Project is the pre-money value of the Innergex offer because the offer was never executed[1607]—but the DCF model does not deal with real-world investment, it assesses the "but for" world where the Measures never happened and the investment went forward. Versant's framework is thus wholly irrelevant because it fails to address the actual damages scenario presented by Claimants, namely: what would have been the value of Claimants' investment if the Mamacocha Project had been developed absent the Measures? Versant's framework fails to address the only scenario before the Tribunal and thus should be disregarded.

1024. Versant's assessment of the Innergex offer is also wholly at odds with Versant's own DCF analysis, which, like BRG's model, assumes that the investment has been made. If one correctly includes Innergex's total expected investments in the calculation of Versant's "implied value" framework, then the implied value of the Project is approximately US $27 million[1608]—a far cry from the *de minimis* US $3.83 million that Versant unsuccessfully tries to justify with its flawed analysis.

1025. With respect to Versant's argument relating to the values implied by the Innergex financial model, Versant's calculations are unreliable, do not reflect the FMV of the Mamacocha Project, and cannot be used as a reasonableness check of Versant's flawed DCF analysis. In preparing its analysis, Versant mischaracterizes the Innergex financial model as an assessment of

[1606] Versant Report I, ¶ 118.
[1607] Versant Report I, ¶ 122.
[1608] BRG Report II, ¶ 147.

the Mamacocha Project's FMV.[1609] This is incorrect. Rather, the Innergex financial model was used to evaluate whether the Project would generate a sufficient IRR.[1610] As such, the Innergex Financial Model, properly understood, comprises a buyer's sensitivity analysis for ensuring that its investment would generate a sufficient return. Accordingly, Versant's comparison of purportedly implied values from the Innergex financial model and Versant's DCF analysis is fundamentally flawed and should be disregarded.[1611]

D. Peru's Claim That BRG's Investment Value Methodology Suffers From Fundamental Deficiencies Is Unfounded

1026. Peru agrees with BRG that the investment value method[1612] is not a substitute for a FMV analysis.[1613] As explained by BRG's First Report, the investment value method is an alternative damages method provided by Claimants in the event the Tribunal does not accept the DCF-based FMV valuation[1614] which, it turns out, is now supported both by Claimants' and Peru's respective experts.[1615] Nonetheless, Versant critiques BRG's Investment Value model on the following grounds: (1) it allegedly has no underlying support from the documentary record; (2) BRG allegedly erred by including the Performance Bonds in its damages calculation; (3) it inappropriately includes the Upstream Projects; and (4) BRG's prejudgment interest rate is too high and would unfairly provide Claimants a windfall. Each of these criticisms is unfounded.

[1609] BRG Report II, ¶ 149.
[1610] BRG Report II, ¶ 149; *see also* Sillen II, n.13.
[1611] BRG Report II, ¶ 149.
[1612] The Investment Value method is equal to the total amounts expended by Claimants over the course of the development of the Mamacocha Project and the Upstream Projects plus an update rate based on the return that Claimants would likely have received between the time these expenses were incurred and the date of BRG's Second Report, as a proxy for the date of the award, had the Claimants invested in a project with risks similar to the Mamacocha Project and absent the Measures. BRG Report II, ¶ 29.
[1613] Counter-Memorial, ¶ 1165.
[1614] BRG Report I, ¶ 160, BRG Report II, ¶ 29.
[1615] Counter-Memorial, ¶ 1142 ("The Parties, BRG, and Versant agree that DCF is an adequate method to determine the fair market value). *See also* Versant Report I, ¶ 37 ("We agree that the DCF is a suitable method in the present case. Although the Project was still at an early stage and did not yet have an established history of operations, there is sufficient information to assess the likely development costs, project financing, and future income generation potential.").

1027. **First**, Peru claims that Claimants have not validated the historical costs relied upon in BRG's First Report. All corroborating documents have been produced to Respondents. As stated by in Stefan Sillen's Second Witness Statement:

> 102. I disagree with Versant's contention that these records are "unreliable" because they were not accompanied by "audited financial statements, bank records, or other types of documents that would support the sunk cost amounts" in these records. These records contain an overwhelming amount of information about every expenditure that Claimants incurred during the relevant period. We maintained and updated these records in real time and in meticulous fashion. I can attest they faithfully reflect the cost figures for the Mamacocha and Upstream Projects during the relevant period.
>
> 103. In any event, I understand Claimants have now produced to Respondent financial documents for the relevant companies (including audited financials) in the relevant time period. I have reviewed those documents and believe they corroborate the accounting records Claimants previously provided.[1616]

1028. Accordingly, since it has access to the relevant materials, Peru is free to conduct its own analysis of these costs. Claimants have satisfied their burden in quantifying these costs and stand behind their determination of these historical expenses.

1029. **Second**, as previously noted, since the cash value corresponding to the performance bonds has been unavailable to Claimants from the time the bonds were deposited, and MINEM has threatened to execute the bonds, BRG properly included the corresponding costs in its damages calculation under the investment value approach. The sunk cost of its outlay plus Claimants' out-of-pocket costs for maintaining the bonds were necessary costs to sustain Claimants' investment in the Project. While Peru does not question whether Claimants made these outlays, Peru challenges inclusion of the Performance Bond costs as part of a calculation of sunk costs on the ground that the bonds have not yet been called by MINEM and hence, they are

[1616] Sillen II, ¶¶ 102-103.

not yet "costs" attributable to the Project. As demonstrated in this Section previously, Peru's argument misses the mark. Peru has made clear its intent to call the bonds as soon as it can.[1617] Under the RER Contract and Peruvian law, MINEM, as the beneficiary, has total control over the performance bonds. Claimants have no hope of recovering the Performance Bonds, unless this Tribunal orders their release. The bonds are as much part of Claimants' investment as the considerable costs it has incurred for engineering studies and the like. Should the Tribunal order the release to Claimants of the Performance Bonds as requested, Claimants would reduce its damages request to avoid any double recovery.

1030. **Third**, Peru argues that the Upstream Projects were unaffected by the Measures and therefore, are not appropriate expenses to include in Claimants' investment value calculation. Although BRG does not include the Upstream Projects in its DCF analysis because it is difficult to determine with a reasonable degree of accuracy the present discounted value of future income streams associated with the Upstream Projects, the case is very different when it comes to including costs already incurred, which are easily and accurately quantifiable. The record is clear that development of the Upstream Projects was expected to follow directly from and take advantage of development of the Mamacocha Project. Thus, any expenditures already made in relation to the Upstream Projects were lost when the Mamacocha Project was destroyed due to the government's Measures and are thus appropriately included in the investment value analysis.[1618]

[1617] *See* Counter-Memorial, ¶ 1211.
[1618] BRG Report II, ¶ 132.

1. The Update Rate Used By Claimants For The Investment Value Analysis Is Reasonable And Appropriate

1031. The Parties disagree on what "update rate" should be applied to update Claimants' investment cost. Application of an update rate to Claimants' investments is designed to compensate Claimants for the financial return that they would have received had they invested in the Mamacocha Project and Upstream Projects and it had prospered absent the Measures. In other words, it essentially replicates the earnings potential of Claimants' investment and ensures that Claimants are not damaged by the failure of its investment to have succeeded.

1032. Peru argues that using an update rate[1619] equal to the cost of equity capital (*i.e.*, 8.54%), as Claimants proposes, would provide Claimants a windfall by compensating them for risks they did not bear.[1620] Peru argues that the use of one of three other rates would be more appropriate: "(i) the interest rate on Respondent's USD-denominated government bonds [~3.6%]; (ii) the interest rate on investment grade corporate bonds [~2.8%]; or (iii) the risk-free rate based on US Treasury bonds [~1.9%]."[1621] As BRG explains, however, none of the alternative update rates proposed by Peru would account for Claimants' opportunity costs, nor would they accurately reflect the risk profile for Claimants' investment.[1622] BRG determined the update rate based on the cost of equity capital of a project with similar risks to the Mamacocha Project, which leads to a rate of 8.54%.[1623] Accordingly, the rate is not a windfall because it is based on a reasonable rate that is appropriately tied to the cost of equity capital, *i.e.*, the rate of return expected by Claimants on their investment and nothing more.

[1619] BRG Report II, ¶ 29. The update rate is "the return that Claimants would have likely earned between the time Claimants expended these amounts [i.e., the sunk costs in the Project] and the date of this Report, as a proxy for the date of award, had Claimants invested in a project with similar risks to the Mamacocha Project but without the negative effects of Peru's interference."
[1620] Versant Report I, ¶ 154.
[1621] Versant Report I, ¶ 154 and Table 24.
[1622] BRG Report II, ¶ 20.
[1623] BRG Report II, ¶ 30(a).

E. Claimants Are Entitled To The Additional Costs

1033. Peru argues that Claimants are not entitled to their Additional Costs, which Peru divides into three categories: (i) expenses, costs, and fees related to the Lima Arbitration; (ii) expenses, costs, and fees related to the RGA Lawsuit and the AEP's criminal proceedings, and (iii) expenses not specifically attributable to the development, construction, or operational activities of the Mamacocha Project (*i.e.*, the Upstream Projects).[1624] These amounts total US $2.41 million.

1034. With respect to points (i) and (ii), Claimants contend that the Lima Arbitration, RGA Lawsuit, and AEP's criminal proceedings each comprise part of the Measures undertaken by Peru which resulted in the destruction of the Mamacocha Project.[1625] Accordingly, the expenses undertaken in defending against these frivolous and unfounded actions comprise "but for" expenses that, consistent with the *Chorzow Factory* principles, should be included in any compensation awarded to Claimants.[1626] Claimants are, under the *Chorzow Factory* principles, fully untitled to those amounts in order to be put into the same financial position they would have been "but for" Peru's wrongful measures.

[1624] *See* Counter-Memorial, ¶ 1174.
[1625] *See* Section II, *supra*.
[1626] To be clear, Claimants do not seek a double recovery, and the to the extent that Claimants were to be paid an award of costs in respect of the Lima Arbitration or by the Peruvian Courts, this amount would be offset against Claimants' demands in these proceedings. The Lima Arbitration tribunal awarded PEN 78,385.72 (approximately $19,800) and US $8,000 to Respondent (C.H.Mamacocha S.R.L.) by order dated March 16, 2021. It determined that CHM's legal costs and expert fees were not "general costs" and therefore not reimbursable (one arbitrator dissented and would have permitted reimbursement of these costs). To date, MINEM had not paid this sum and the matter is being litigated in Lima. It is important to note, however, that the Lima Arbitration tribunal, in assessing its award on costs, did so only in the context of the proceedings that were immediately before it, which did not include the claims in this proceeding. By contrast, this Tribunal is tasked with approaching damages through the lens of the TPA and contract breaches that destroyed the economic value of the CHM Project. As such, because Claimant contends that the Lima Arbitration in and of itself comprised part of the Measures, it is wholly within the jurisdiction of this Tribunal to award damages relating to as yet unreimbursed fees and costs associated with the Lima Arbitration.

1035. With respect to point (iii), Peru argues for the exclusion of the Upstream Projects, as already set forth in Section D, above, the record is clear that any development of the Upstream Projects was tied to the development of the Mamacocha Project—to the extent the Mamacocha Project could not move forward, neither could the Upstream Projects. [1627] Thus, any expenditures already made in relation to the Upstream Projects were lost when the Mamacocha Project was destroyed due to the government's Measures and, consistent with the Chorzow Factory principles are "but for" expenses that must be compensated in order to "wipe out" the consequences of the Measures.[1628]

1036. Peru also argues one additional point on executive wages, which does not fall neatly into the three subcategories of costs it identifies. Peru argues executive wages are not compensable, citing to a single NAFTA case which held that "management who were involved in matters covered by the present claim were paid annual salaries that did not vary in respect of the issues or matters to which each of them devoted his or her working time."[1629] But the case cited by Peru is factually distinct—that matter involved an ongoing business, which was operational before, during and after the arbitration.[1630] Accordingly, it was staffed with executives who, in the course of their day-to-day work operating the company, also dealt with the issues that were subject to the NAFTA arbitration.[1631] Here, the facts are starkly different. The Mamacocha Project was a new project, the implementation of which was foiled by the

[1627] BRG Report II, ¶ 132.
[1628] Counter-Memorial, ¶ 1083 (*citing Chorzow Factory* and stating: "In explaining the kinds of damages that must be compensated as the result of an "illegal act", the Permanent Court of International Justice stated, in its decision in the *Factory at Chorzów* case, 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.'").
[1629] Counter-Memorial, ¶ 1178 (citing *Pope & Talbot v. Government of Canada*, UNCITRAL, Award, 31 May 2002, ¶ 82).
[1630] *Pope & Talbot v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶ 28
[1631] *Pope & Talbot v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶ 28 ¶ 28 *et. seq*., The arbitration involved a dispute over whether Canada's Export Control Regime violated Chapter 11 of NAFTA.

Measures. Accordingly, following the Measures, the monies expended on executive wages after the Valuation Date should be fully recoverable because they are directly traceable to the Measures—whether they were incurred in an effort to keep the Project alive after the Measures, or whether they were incurred in order to wind down the Project. Either way, these damages comprise expenses that must be compensated in order to put Claimants into the same financial position as they would have been "but for" Peru's wrongful measures.

F. Claimants Are Entitled To Pre-Award Interest On The FMV Valuation At The Commercially Reasonable Rate Proposed By Claimants

1037. The Parties agree that under both Peruvian and Treaty law, the Tribunal may grant pre-award interest.[1632] The Parties disagree, however, on what interest rate should be applied. In the Memorial, Claimants demonstrated that the pre-award interest should be based on the actual cost of debt for the Mamacocha Project, which also represents a proxy for Claimants' observed opportunity cost of funding.[1633] Claimants, therefore, proposed a pre-award interest rate of 7.06%, which was the DEG loan rate for the Mamacocha Project. This specific rate reflected what would have been Claimant's actual cost of debt during the Project and thus, constitutes the most commercially reasonable rate.[1634]

1038. Peru, however, claims that BRG's rate is not commercially reasonable and would result in Claimants earning a windfall by "providing Claimants with above-market interest rates and compensating them for risks they did not bear."[1635] In its Counter-Memorial, Peru argues for application of one of three alternative rates: (1) the risk-free rate (*i.e.*, ~2.3%); (2) the interest rate on investment grade corporate bonds (*i.e.*, ~2.9%); or (3) Peru's cost of debt (*i.e.*,

[1632] Counter-Memorial, ¶ 1183,
[1633] BRG Report II, ¶ 114.
[1634] BRG Report II, ¶ 116.
[1635] Versant Report I, ¶¶ 136-42. Versant does not specify which for which unborne risks it alleges Claimants would be rewarded.

~3.5%).[1636] Each of these alternative proposed rates fall at or below Peru's cost of debt, which would improperly incentivize Peru to delay payment of any award amount in favor of receiving a higher interest amount on its debt. The alternatives proposed by Peru are not commercially reasonable surrogates for the lost interest that Claimants would suffer before payment by Peru.[1637] Moreover, Claimants did not have the opportunity to borrow at the rates proposed by Peru—if they had, there is no reason there is no reason they would have agreed to the higher cost of debt provided by DEG. As Claimants' experts point out: "[i]t is unreasonable to seek to fulfill the principle of full reparation by compensating Claimants at borrowing rates to which they did not have access."[1638]

1039. As BRG explains in its Second Report, a pre-award interest rate should reflect Claimants' cost to carry the total damages amount from the Valuation Date up to the date of the award. [1639] In essence, BRG explains, it is the carrying cost for the Claimants' losses: "[p]rejudgment interest is implicit to the plaintiff's loss […] the carrying cost represents the implied cost of the plaintiff to fund its loss position."[1640] Awarding pre-award interest at Claimants' cost of debt meets this goal by fully compensating Claimants for their cost of carrying the losses incurred on the Project. Pre-award interest below Claimants' cost of debt would fail to compensate Claimants for their opportunity cost of borrowing. Thus, awarding pre-award interest at Claimants' cost of debt does not provide a windfall, but rather places them in the same position they would have been but for the Measures.[1641]

[1636] Versant Report I, ¶¶ 136-42.
[1637] BRG Report II, ¶ 20.
[1638] BRG Report II, ¶118.
[1639] BRG Report II, ¶ 117.
[1640] BRG Report II, ¶ 117 (*citing* S. Escher and K. Krueger, The Cost of Carry and Prejudgment Interest, Litigation Economics Review, 2003, p. 16 (BRG-0085)).
[1641] BRG Report II, ¶ 117.

G. Claimants' Award Should Not Be Subject To Additional Taxation

1040. Pointing to footnote 964 of Claimant's Memorial, Peru argues that Claimants "demand compensation net of taxes in Peru."[1642] But Claimants do not make any such demand. Rather, what footnote 964 actually states is: "BRG's damages calculations were assessed based on expected future cash flows after all taxes and contributions applicable as of the Valuation Date. Therefore, any Award that seeks to provide full compensation based on this damages assessment should not be subject to further taxes in Peru." Accordingly, what Claimants request is that no *additional* taxation be applied to any compensation because any applicable taxes have already been accounted for in the demand. Peru falsely complains that "Claimants have not identified—let along specifically quantified—the taxes that could apply to them if they were awarded damages in this arbitration." Section IV.3.6 of BRG's First Report, entitled "Taxes," specifically cites to the taxes that apply to BRG's damages calculations:

> 127. In order to calculate the FCFE, it is necessary to reduce pre-tax operating earnings, otherwise known as Earnings Before Taxes ("EBT") by the applicable amount of corporate income taxes. We calculate EBT for the Mamacocha Project by subtracting OPEX, depreciation and amortization, and interest payments from the revenues generated by the Project
>
> 128. Claimants negotiated a stability agreement with Peru, which protected the Mamacocha Project against changes in the Peruvian fiscal regime and lowered the Project's tax rate to 24% through 2024. From 2025 onwards, we assume that the corporate income tax in Peru applicable to the Mamacocha Project would be 29.5%. In order to calculate taxes, we apply these tax rates to the earnings before taxes for the Mamacocha Project to determine taxes in each year. We carry forward any tax credits coming from net operating losses generated by the Mamacocha Project on a 4-years-after-loss basis consistent with the applicable Peruvian fiscal regime
>
> 129. In addition, interest payments in Peru are subject to a 4.99% withholding tax. We deduct this withholding tax in our calculation of

[1642] Counter-Memorial, ¶ 192.

> FCFE. Finally, dividend distributions in Peru are subject to a 5.00% withholding tax. We deduct this withholding tax to determine the FCFE.[1643]

1041. In response to BRG's analysis of taxes, Peru's own expert states: "We agree with BRG's calculation of corporate income taxes and tax on interest payments."[1644] The only disagreement registered is that regarding the 5% withholding tax which BRG identified and corrected, as set forth above.[1645]

1042. Finally, all of the cases that Peru cites in its Counter-Memorial on this issue discuss a demand to "gross-up" an award to render it net of taxes. None of these cases are apposite because Claimants are not seeking any "gross up" of the award to counter the impact of taxes. Claimants' sole argument, as set forth above, is that all applicable taxes have been identified and accounted for, and therefore no additional taxes should apply.

H. Claimants Are Entitled To The Costs Of These Proceedings

1043. Peru argues that Claimants are not entitled to the costs of these proceedings because it has neither breached its obligations under the Treaty nor destroyed the value of Claimants' investments in the Mamacocha Project. Claimants' position is, of course, the opposite, and therefore its claims for the costs of these proceedings is maintained.

I. Claimants Are Entitled To Compound Post-Judgment Interest

1044. Peru admits that, at a minimum, Claimants are entitled to post-award interest at the same rate as the pre-award interest rate sought by Claimants.[1646] Without any authority to support its position, Peru asks that any award of post-judgment interest not be compounded. But

[1643] BRG Report I, ¶¶ 127-29.
[1644] Versant Report I, ¶ 70.
[1645] Versant Report I, ¶¶ 70-71.
[1646] Counter-Memorial, ¶ 1203.

tribunals have consistently held that a presumption exists in favor of compound interest.[1647] Accordingly, Peru's request should be rejected.

VIII. REQUEST FOR RELIEF

1045. Based on the foregoing, without limitation and reserving their right to supplement or revise these prayers for relief, including any further actions taken by Peru against Claimants, Claimants respectfully request that the Tribunal:

a. DECLARE that Peru has breached Articles 10.4, 10.5, and 10.7 of the TPA;

b. DECLARE that Peru has breached its obligations under the RER Contract, including Peru's obligations: (i) under Clauses 1.4.26, 1.4.37, 2.2.1, 4.3, 6.3, 11.3, and Addenda 3-6 of the RER Contract; (ii) to execute the RER Contract in accordance with the Peruvian law doctrines of good faith, *actos propios*, and *confianza legítima*; and (iii) to adhere to the review periods under the GLAP and TUPA, which form part of the governing law under the RER Contract;

c. DECLARE that the RER Contract is terminated and, with it, all of CHM's obligations and duties owed thereunder;

d. DECLARE that the Confidentiality Agreement is terminated and, with it, all of CHM's obligations and duties owed thereunder;

[1647] *See, e.g., Metalclad v. Mexico, Award*, ¶ 128 (CL-0037) ("So as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually."); *Pope & Talbot v. Government of Canada*, Award in Respect of Damages, ¶ 90 (CL-0046) ("[T]he Tribunal awards interest on the principal sum at the rate of 5% per annum compounded quarterly as an appropriate rate . . . ."); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award , July 21, 2017, ¶ 1125 (CL-0082) (finding that compound interest has been awarded more often than not and is becoming widely accepted as an appropriate and necessary component of compensation.); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award, November 27, 2013, ¶ 261 (CL-0093) ("[T]he standard of full reparation would not be met if an award were to deprive a Claimant of compound interest which would have been available on the sums awarded had they been paid in a timely manner.").

e. ORDER Peru to compensate Claimants for their losses resulting from Peru's breaches under the TPA, the RER Contract, Peruvian law, and international law, which, as of the date of this Memorial, amount to at least **US $45,620,000** but continue to increase due to the ongoing nature of Peru's unlawful breaches;

f. ORDER Peru to pay all costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs;

g. RECOMMEND that Peru cease and desist its harassment of CHM and its lawyer, [redacted], by terminating the AEP's criminal proceeding concerning CHM's environmental permit for the Mamacocha Project;[1648]

h. ORDER the parties to protect the *status quo* and not aggravate the dispute pending resolution of the ICSID arbitration;

i. ORDER that Peru may not call or collect any bond put up by either Claimant in relation to the Mamacocha and Upstream Projects, including the US $5 million bond under the RER Contract and the US $71,500 bond that CHM put up to obtain the final concession for the transmission line.

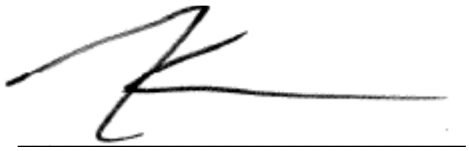
j. ORDER further relief as counsel may advise or the Tribunal may deem just and appropriate; and

k. AWARD such other relief as the Tribunal considers appropriate.

[1648] For the avoidance of doubt, Claimants do not seek provisional measures. As apparent from Peru's arguments in paragraphs 1213-1215 in its Counter-Memorial, Peru wrongly attempts to cast Claimants' request for a "recommendation" as a veiled attempt to request provisional measures. That is not the case. Claimants' merely request declaratory relief from the Tribunal, which recommends that Peru cease the harassment of [redacted]

July 20, 2021

Respectfully submitted,



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