

ICSID CASE No. ARB/21/29

**INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES**

KALOTI METALS & LOGISTICS, LLC,

Claimant,

v.

THE REPUBLIC OF PERU,

Respondent.

CLAIMANT'S MEMORIAL

Claimant's counsel
Hernando Díaz-Candia
Ramón A. Azpúrua-Núñez
Mikel Del Valle
Gabriella Hormazabal
WDA Legal
848 Brickell Ave, Suite 1000
Miami, Florida 33131
United States of America

Dated: March 16, 2022

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Followed by:

Appendix A to Claimant’s Memorial of March 16, 2022
Summarized (non-exhaustive) chronological table of some relevant events.

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

I. INTRODUCTION AND SUMMARY

1. This case is not about whether the gold industry has a “shady” underside—it does. This case is not about whether the gold industry is susceptible to money laundering—it is. Nor is this case about whether a country has a right to take reasonable, proportionate, and temporary measures against a company pending a decision to charge, in accordance with due process of law.

2. Here, the legally relevant question is whether Peru violated international law by prolonging the temporary seizure of Claimant’s property, placing KML in legal limbo by not charging it with any crimes or making it indirectly subject to a pseudo trial for close to eight years, while denying it the opportunity to challenge the ongoing seizures—all the while ruining Claimant’s reputation in Peru and abroad, choking KML’s business, and eventually running it into the ground. And the answer to this question is “yes.”

3. Kaloti Metals & Logistics, LLC is a gold processing and trading company, based in Miami, Florida. From its roots in the United States of America, Claimant expanded into the Latin American market, and into Peru in particular. As an attractive, stable market, Peru was a logical choice for a company looking to grow its business while keeping its investment risk low. KML began buying gold in Peru and selling it to overseas buyers at a small profit margin. Although it maintained a relatively small footprint, KML established a highly lucrative business model, allowing it to grow from US\$ 800,815,532.00 in turnover in sales revenue in its first year of operation in Peru, to US\$ 1,332,970,387.00 in its second year.

4. Beginning in 2013, the Peruvian customs authority, Superintendencia Nacional de Aduanas y de Administración Tributaria (SUNAT), began seizing some of Claimant’s gold

assets it had purchased in Peru, which were being prepared for export to foreign purchasers at the time of the seizures. In total, SUNAT seized five shipments reaching a sum of US\$ 26,099,826.00 (at February 2022 market prices). While, SUNAT initially characterized those seizures as being “temporary immobilizations,” they were anything but. For close to eight years, SUNAT consistently refused to return Claimant’s gold, citing criminal investigations and proceedings against certain gold suppliers in Peru as the reason for its continued holding of Claimant’s property. However, Peru was unable to articulate a rational connection between the suppliers being investigated and KML; nor was Claimant able to have its day in court. When KML attempted to intervene and assert its property rights in the underlying criminal proceedings, a Peruvian court denied Claimant’s application on the ground that it was not a party to the proceeding—a perfect Catch-22. Peru has thus kept Claimant locked in a legal black box, without any indication of when—if ever—Claimant’s exile to a legal “No Man’s Land” will end.

5. Peru’s actions had significant consequences on KML’s ability to continue expanding and growing its business in Peru. Reputation is a key currency in business, and when SUNAT seized Claimant’s gold and began feeding baseless rumors to the press about KML being involved in money laundering, it torpedoed the relationships of trust that Claimant had developed with its sellers and buyers, permanently crippling KML. It cast a sinister cloud of doubt over KML, injected considerable uncertainty into KML’s operations, and saddled the Claimant with an enormous debt, the financing of which eventually drove KML into the ground.

6. A natural question for the Tribunal to ask is—why? Why did Peru do this? What motivated its actions? The answer is not clear. It could be that SUNAT allowed itself to be influenced against KML—a foreign investor—by domestic companies who did not like that KML was undercutting them in the gold market by offering lower prices. It could be that SUNAT was overly aggressive in seizing KML’s assets, and then could not think of an appropriate way to return Claimant’s property without facing embarrassment. It is also possible that this is the result of irrational bureaucratic contortions, but unmotivated by any sinister intentions. The lack of an answer to this question highlights a central problem in

this case, and one that KML asks the Tribunal to keep in mind at all times: Peru's lack of transparency. This negligent omission has led to a devastating information asymmetry, with Peru knowing everything about its actions and intentions, while Claimant has been left to feel around in the dark as best it could.

7. This lack of transparency—and the uncertainty that it created—is what ultimately destroyed KML's operations in Peru. Predictability and stability are the key requirements of any successful investment, and it is precisely these that Peru wiped out from under Claimant's feet. How could Claimant persuade its foreign buyers to do business with it, when it could not guarantee that a customer's shipment of gold would not be seized by SUNAT—as had happened on five occasions—just as it was getting ready for export? How could Claimant clear its name that had been tarnished by reporting journalists, when the State affirmatively denied KML judicial recourse to reclaim its property? How could KML keep servicing its debt for the seized gold when it had no idea when—or if—it would ever recover that gold?

8. The actions and omissions of Peru in (1) not concluding investigations in a timely manner; (2) arbitrarily mentioning KML in general, supervening anti-money laundering investigations; and (3) targeting the financial resources and reputation of KML, caused KML to incur: lost profits, the indirect expropriation of its gold, and the indirect expropriation of its entire enterprise as a going concern business. Peru breached its TPA with the United States through violations that became actionable when their economic effects (damages to KML) were incurred and became irreversible on November 30, 2018.

9. During the course of these proceedings, Peru and its first-rate lawyers will no-doubt give a careful, detailed explanation of the State's position. They will submit meticulously crafted submissions, witness statements, expert reports, and documents justifying the State's actions. Claimant asks the Tribunal to remember, however, that no such explanations or justifications were ever given to KML during the eight-year period following the first seizure of Claimant's gold. Peru's lack of transparency also means that there are gaps in the story that Claimant is unable to tell. This should not be held against KML.

10. International investment law has grown in sophistication over the past few decades, and international investment arbitration has proliferated during that same period. Allegations of State violations have become ever-more creative, aggressive, and nuanced. Many claims are hyper-technical; some are quite fantastical. This case, however, brings the Tribunal back to the essence of investment protection: an obligation to respect investors' property, and a duty to give them due process and access to justice. Peru failed to provide these two bedrock, foundational protections, and KML is therefore entitled to compensation as a result.

II. STATEMENT OF FACTS

A. The Claimant

11. The Claimant is Kaloti Metals & Logistics, LLC (KML). KML is a limited liability company organized and existing under the laws of the State of Florida, United States of America; which since 2011 and until 2018 had substantial business activities in the territory of such country.¹ KML was formed by [REDACTED], a United States citizen,² who since the company's inception has been its sole manager with full corporate authority to bind KML.³ KML has its registered office at [REDACTED], United States of America.⁴ [REDACTED], [REDACTED] and [REDACTED] are the owners (*members*, as the term is used in Florida corporate law) of KML.⁵

B. KML's founder and manager

12. As KML's sole manager,⁶ [REDACTED] has always been an honest, hardworking individual including since he arrived in the United States in the early 1980s.⁷

¹ KML transaction summary of purchases between 2012 and 2018, C-0030-ENG.

² U.S. passports of [REDACTED], C-0003-ENG and AK-0001-ENG.

³ KML Articles of Incorporation, C-0002-ENG.

⁴ *Id.*

⁵ KML Operating agreement, C-0102-ENG; and the 2018 Florida Statutes, Title XXXVI. Chapter 605, Florida Revised Limited Liability Company Act, CL-0077-ENG.

⁶ KML Articles of Incorporation, C-0002-ENG; and KML Operating Agreement, C-0102-ENG.

⁷ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 2, 6-8, C-0103-ENG.

(continued...)

His background—including his significant activities with KML—has been widely and publicly documented by reputable newspapers in the State of Florida.⁸

13. As of today, ██████████ continues actively doing business in the State of Florida, including in the gold sector;⁹ and he has never been indicted or charged, much less convicted, of any crime, anywhere in the world. He has given a well-documented witness statement in this arbitration (**C-0103-ENG**) and has planned to be available for examination at the hearing by Peru and the Arbitral Tribunal in 2023.

C. KML's seven years of operations in Peru

14. In 2012, KML made its first investments in Peru, through the purchase of relatively small quantities of gold.¹⁰ KML's investments in Peru increased exponentially in 2013.¹¹ Despite the 2013-14 temporary seizures of gold, KML continued to invest in Peru, purchasing gold, including up until 2018.¹² The analysis—made by a qualified, independent Quantum Expert¹³—established a financial track record for KML as a going concern business for at least seven years:

⁸ “*Kaloti Metals & Logistics buys and sells gold*”. Miami Herald article., **C-0045-ENG**.

⁹ Witness Statement-██████████-Claimant's Memorial-ENG, at ¶ 10, **C-0103-ENG**.

¹⁰ KML transaction summary of all purchases between 2012 and 2018, at pp. 2-4, **C-0030-ENG**.

¹¹ *Id.* at pp. 5-7.

¹² *Id.* at pp. 8-20.

¹³ *See infra* at ¶ 162.

5.9 In international arbitration cases the principle against speculative damages (i.e., principle of reasonable certainty) does not require a proof of damages to a certainty.⁸⁴ In this matter, reasonable certainty is best gauged by the commodity nature of the business operation, the high demand from customers for precious metals, Claimant's operational record of accomplishment, lack of explicit exposure to the country risk, and the financial feasibility of Claimant's Investment. In this regard, the following facts are known with certainty in this matter, and elaborated in further detail below:

- KML is a successful company with an established record of accomplishment since 2011;
- KML has experienced a constant high demand from international and domestic customers for its precious metals;
- KML had extremely high financial feasibility given its low cost of funding and high volume/churn trading operations at assured margin; and,
- The gold trading industry (including prices, margins, and costs) presents very few difficulties as to projections once a company has successfully established its market presence.

5.11 I understand that KML began investing in Peru in early 2012. Its primary business included importing and exporting gold to and from the United States and Latin America, as well as providing customers with assaying, or purity-testing services. I understand that most of the final products were sold to the related [REDACTED]. I understand that [REDACTED] often would make prepayments on the future deliveries. These prepayments ensured a low level of borrowing by KML.⁸⁵

5.27 Based on evidence from prior periods, despite being a relatively young enterprise, KML established itself as a respectful business, with an established earning capacity.¹²⁰

KML's strategy of high turnover and lower profit margin (compared to its competitors) allowed it to compete effectively against incumbents in the market.¹²¹

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 5.9, 5.11, 5.27).

15. The business of KML in Peru was organized in part through continuous relationships with reputable Peruvian suppliers of gold, including—among many others— [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED] ([REDACTED]). Those suppliers were registered and in good standing with the Peruvian government when KML purchased gold from them.¹⁴ KML also conducted independent compliance due diligence reviews about them,¹⁵ based on KML’s robust compliance and anti-money laundering manual.¹⁶

16. KML was financially cash-flow positive in 2012, 2013, 2016 and 2017. The company obtained turnover in sales of US\$ 417,487.10 (in 2011); US\$ 800,815,532.00 (in 2012); US\$ 1,332,970,387.00 (in 2013); and US\$ 795,314,234.00 (in 2014).

5.24 As expressed in the witness statement of [REDACTED] demand for gold from KML’s customers exceeded the amount of gold supplied.¹¹² Per Mr. [REDACTED]’s statement, KML was not constrained by a lack of customers. The biggest risk to KML was its access to the Peruvian and other markets, access to precious metals (i.e., physical supply) and access to financial institutions (i.e., banks).¹¹³ Prior to the Measures in 2013, this risk was limited, as reflected in the company’s 2013 gain in market share to 9.25 percent in only its second year of operations in Peru.¹¹⁴ Further, KML’s risk associated with its trading operations was as non-existent due to the high demand for its product, coupled with a single customer demanding 45,000 kilograms of gold from Peru.¹¹⁵

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶5.24).

¹⁴ *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), **C-0010-SPA**; and Witness Statement-[REDACTED]-Claimant’s Memorial-ENG, at ¶ 30, **C-0103-ENG**.

¹⁵ KML compliance department periodic review of suppliers, **C-0033-ENG**; and Witness Statement-[REDACTED]-Claimant’s Memorial-ENG, at ¶ 18-19, **C-0104-ENG**.

¹⁶ KML AML/CFT program manual, **C-0025-ENG**.
(continued...)

17. KML operated until 2018¹⁷ and bought gold in Peru until, and including, such year.¹⁸ In 2018, however, due to (1) the ruinous financial condition caused by KML's inability to turn into cash the gold temporarily seized by Peru in 2013 and 2014, (2) the reputational harm caused by adverse news about investigations arbitrarily prolonged and extended by Peru, and (3) the fact that KML had to, but could not, repay substantial debts to [REDACTED], KML became insolvent and was forced to terminate all operations on November 30, 2018.

6.11 30 November 2018 corresponds to the conclusion (termination) of all KML's operating activities in Peru and other regions in which the company was active before.¹⁴⁵ In other words, on this date KML became de facto bankrupt - the FMV of all assets owned by KML became significantly lower than total liabilities and KML was unable to pay off its debts.¹⁴⁶

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶6.11).

a. Growth of KML

18. Beginning in 2012, KML significantly researched and conducted its due diligence about the Peruvian gold market.¹⁹ The due diligence included several trips to Lima by Mr. [REDACTED] that year, during which he met with lawyers, competitors, and people transacting business in the gold sector.²⁰ In addition to Peru having very significant proven reserves of gold, KML found that Peru had implemented a seemingly ideal legal structure for buyers of gold (like KML) to be able to trace the origin of the mineral and the activities

¹⁷ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 57, **C-0103-ENG**.

¹⁸ KML transaction summary of all purchases between 2012 and 2018, **C-0030-ENG**.

¹⁹ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 17-24, **C-0103-ENG**; and analysis of the Peruvian gold market, **AK-0002-ENG**.

²⁰ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 17-18, 20, **C-0103-ENG**.
(continued...)

of suppliers.²¹ It gave great comfort to KML that suppliers (sellers of gold in Peru) needed to be registered and in good standing with the Peruvian government; and that Peru did not pose significant legal obstacles for foreign investors to export gold from Peru.²²

2. Republic of Peru

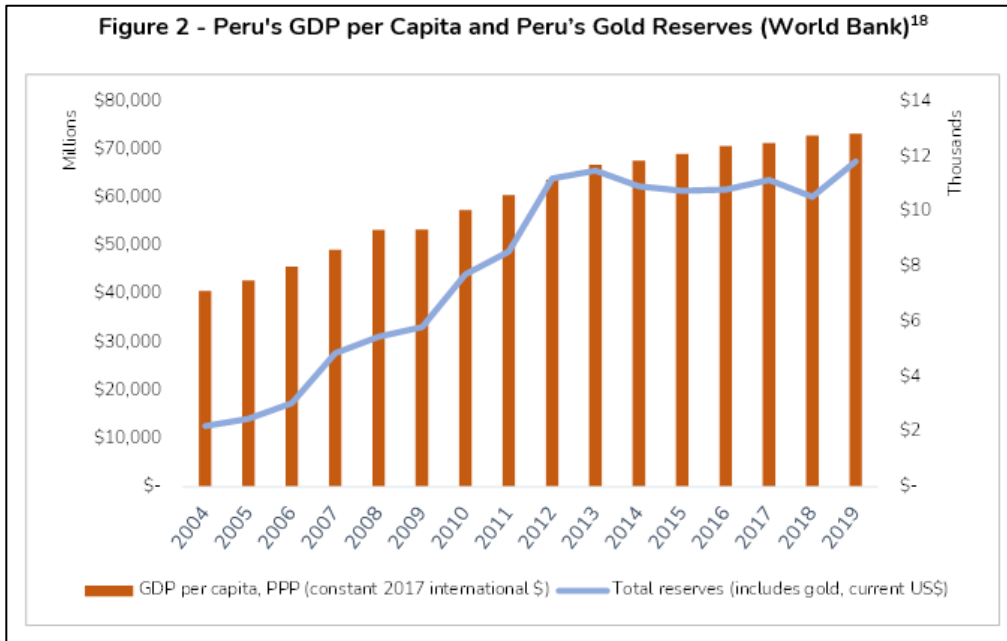
3.9 Respondent in this matter is the Republic of Peru, a sovereign nation. Peru is known for its wide range of mineral resources which are located in its mountainous and coastal areas. In 2018 Peru was the sixth largest producer of gold in the world.¹³ In addition, Peru is the world's second largest producer of copper and silver.¹⁴ Peru is the country with the third-largest reserves of copper, zinc and molybdenum, and it sits on the fifth place in terms of gold reserves.¹⁵

3.10 Between 2009 and 2013, the Peruvian economy experienced a steady growth of 5.6 percent per year.¹⁶ Most of the country's growth was fueled by its mineral exports coupled with higher commodity prices.

3.11 Figure 2 which follows, illustrates the link between Peru's growth in gross domestic product ("GDP") per capita and the value of its gold mineral reserves. It further illustrates a low level of the additional return (premium) demanded by investors to compensate them for the risk of investing in Peru.¹⁷

²¹ All the plans of KML were consistent and compatible with information publicly available at the time (2012), about doing business in Peru. *See, e.g.*, Private Investment Promotion Agency – PwC doing deals in Peru, **C-0115-ENG**.

²² Decree No. 1105 which establishes provisions for the formalization process of small-scale and artisanal mining activities, **CL-0003-SPA**; and the National Plan for the regularization of small-scale mining, **C-0044-SPA**.



Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶¶3.9-3.11).

19. KML opened and equipped a physical office in Lima ([REDACTED]), with capabilities to weight and assay gold for subsequent export to the United States.



Evidence:

C-0029 (KML assaying operations of gold and silver in Peru). Pictures of KML's office in Lima, taken in or around 2014.

C-0036 (X-Ray machines and scales sent by KML to Peru for gold processing purposes).

20. KML also rented an apartment in Lima to house expatriate and travelling personnel ([REDACTED]), Lima, Peru),²³ shown in the following image.



Evidence:

C-0035-ENG/SPA (KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, at pp. 14).

21. Further, KML hired local employees in Peru,²⁴ and a compliance officer, [REDACTED], who was placed in charge of specifically improving KML's compliance program to tailor it to the gold industry in Latin America. [REDACTED] worked for KML in Miami and beginning in 2013 made several trips to Peru to (1) personally learn more about the Peruvian gold market, and (2) train local employees in compliance and anti-money

²³ KML lease agreement, payment vouchers and picture of apartment in Lima, Peru, **C-0035-ENG/SPA**.

²⁴ Employment agreements between KML and [REDACTED], **C-0037-SPA**.

(continued...)

laundering matters.²⁵ KML developed a very robust compliance and anti-money laundering manual in order to operate in Peru safely and legitimately.²⁶

22. As [REDACTED] explains in his witness statement, KML's successful track record and significant growth in Peru was the product of several factors:

- KML had a captive demand for gold and, consequently, access to reliable financing for its investments and expansion (growth) in Peru. This came primarily from [REDACTED], a very large and financially sound worldwide conglomerate.²⁷
- The demand of gold by [REDACTED] also made KML able to know with certainty at which prices the gold was going to be resold by KML. Consequently, KML was able to negotiate prices for purchase of gold in Peru with a greater confidence of profit.²⁸
- KML was able to offer suppliers (sellers of gold in Peru) a better price and very prompt payment, much more attractive than what other buyers of gold (competitors of KML) could offer.²⁹
- The legal framework in Peru enabled KML to trace sellers of gold and the origin of minerals, relying on a governmental registration system.³⁰
- KML had several additional competitive advantages, including:
 - a. A base in Lima, from which it was able to establish its own physical operations, giving KML greater contacts and local interactions in Peru.
 - b. A compliance and anti-money laundering program specifically tailored for the gold industry in Latin America.

²⁵ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶10, C-0104-ENG.

²⁶ KML AML/CFT program manual, C-0025-ENG.

²⁷ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 13-14, 32, C-0103-ENG; and Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 21, C-0105-SPA.

²⁸ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 37, C-0103-ENG; and Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 20, C-0105-SPA.

²⁹ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 33-34, C-0103-ENG; and Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶¶ 22, 31, C-0105-SPA.

³⁰ Decree No. 1105 which establishes provisions for the formalization process of small-scale and artisanal mining activities, CL-0003-SPA; and the National Plan for the regularization of small-scale mining, C-0044-SPA.

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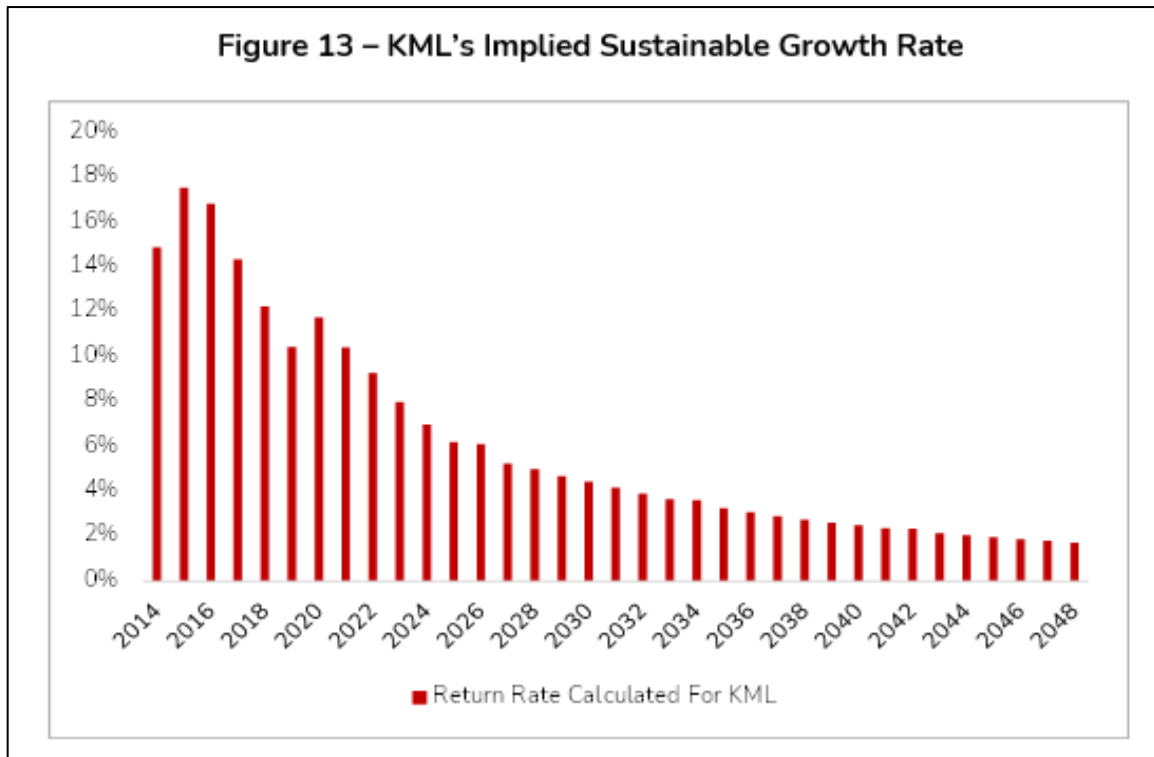
23. Based on the foregoing, in 2013, KML was able to buy and process approximately 9.25% of the gold produced in Peru, with the legitimate expectation of buying up to 45 tons of gold per year in that country.³¹

6.24 Based on the actual data points, as of year-end 2013, at the onset of the Measures, KML purchased approximately 9.25 percent of the total gold produced in Peru.¹⁶⁸ Based on the witness statement from [REDACTED] the Claimant's expectations were to at the very least double the quantities purchased from Peru by end of next year (2014) – continuous growth in purchases of precious metals.

6.25 Based on total demand from Dubai, [REDACTED]'s expectations were to employ his pragmatic market strategy and obtain, on an annual basis, 45,000 kilograms of gold from Peru's gold market (being conservative, however, my model assumes much less than 45,000 kilograms of gold purchased by KML in Peru).¹⁶⁹ In my opinion, and based on the actual performance of KML, such expectation was reasonable and well

grounded. The remaining portion of the gold would have been primarily acquired from other Latin America's countries, Caribbean and the United States.¹⁷⁰

³¹ [REDACTED] letter to KML dated September 10, 2013, C-0047-ENG.



Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)- Claimant’s Memorial-ENG, ¶¶ 6.24-6.25, figure 13).

b. KML’s business

24. KML hired local employees in Peru to manage and monitor the entire supply chain, which included: customer review, negotiations, purchase, storage, transportation, assay and resale of gold.³² KML conducted its business with numerous Peruvian precious metals producers who served as suppliers. As mentioned above, some of the most prominent suppliers included [REDACTED].

25. [REDACTED] provided transportation and storage for KML’s precious metals.³³ KML’s operation in Peru exposed the company to minimal

³² Employment agreements between KML and [REDACTED], C-0037-SPA.

³³ Lease agreement between [REDACTED] and KML, C-0028-SPA.

risk. As part of its strategy, KML executed purchases of gold from Peruvian suppliers, who delivered the gold to KML's facilities in Lima. After receiving the metals, KMLs' local Peruvian employees tested the weight and purity of the metals and prepared them to be exported to the United States to be sold to refineries, including especially to [REDACTED].

26. During 2013 KML turned approximately US\$1.33 *billion* worth of precious metals, with the vast majority of transactions being for gold. KML resold the gold so efficiently, that in 2013 end-of-the-year total inventory on-hand amounted to less than a day's worth of KML sales. This indicated that the demand for KML's products was high, and KML's inventory management was very effective.³⁴

27. In 2013, KML was very profitable. In 2014 and beyond, profitability continued, but suffered. Due to the nature of KML's investment and its well-established profit margin, it is reasonable to conclude that absent Peru's measures its continuous activity in Peru would have remained profitable well after November 30, 2018 (date on which KML was forced to terminate its operations).³⁵

28. KML established a gold price fixing strategy on all purchases. When KML bought gold in Peru, KML already knew the price at which such gold was going to be resold.³⁶ KML's profitability was always secured because the fixed resale price of gold was always higher than the acquisition price:

³⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶5.15, C-0106-ENG.

³⁵ *Id.* at ¶5.19.

³⁶ Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 20, C-0105-SPA.

peruano. De hecho, yo, como *head trader*, cuando negociaba un precio con vendedores de oro en Perú, en la inmensa mayoría de los casos ya tenía certeza del precio al cual KML iba a revender ese mismo oro a [REDACTED]

Evidence:

C-0105-SPA (Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶20).

29. Even when the gold industry was exposed to price volatility, KML's strategy maintained a continuous profit margin. That is because KML's cost-plus business model strategy did not leave KML exposed to commodity price fluctuations which could negatively affect profit margins.³⁷ This is so, because KML had the ability to fix gold's selling price beforehand, ensuring profits in all gold transactions. In addition to KML's pricing strategy, KML's previous metal acquisition and resales were based on a single currency (U.S. dollar); and KML benefited from a low lead time from order to payment.³⁸ The arrangement of KML with [REDACTED] improved KML's working capital, and ensured a low cost of both financing and debt in comparison to KML's gold turnover.³⁹

30. KML's share of the Peruvian gold market and its profits were expected to grow. Plans to invest more in Peru were critical for its future outlook, based in part on the constant pressure by [REDACTED] for KML to buy more gold in Peru.⁴⁰ KML's expectations were also grounded on its continuing success in building new networks, and on its prior performance in other markets.⁴¹

³⁷ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG., at ¶5.20, C-0106-ENG.

³⁸ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 34, C-0103-ENG; and Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 22, 31, C-0105-SPA.

³⁹ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶5.21, C-0106-ENG.

⁴⁰ Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶ 23, C-0105-SPA; and [REDACTED] letter to KML dated September 10, 2013, C-0047-ENG.

⁴¹ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶3.20, C-0106-ENG.

(continued...)

31. Demand for gold from KML's customers always exceeded the amount of gold supplied.⁴² KML was never constrained by a lack of buyers.⁴³ The only business risk to KML was its access to the Peruvian gold, and access to financial institutions (*i.e.*, banks). This risk was limited, as reflected in the company's 2013 gain in market share to 9.25% in only its second year of operations in Peru. Further, KML's risk associated with its trading operations was non-existent due to the high demand for its product, coupled with a single customer demanding 45,000 kilograms of gold per year from Peru.⁴⁴ Gold trading operations are less subject to ordinary supply-demand dynamics or market fluctuations, unlike other metals and commodities and most consumer products.⁴⁵

32. KML was able to pass many of its costs to its customers. As a result, KML reported profits and positive free cash flows as early as 2012 and 2013; and as late as 2017. KML established itself as an enterprise with a proven earning capacity.⁴⁶ KML's strategy of high turnover and lower profit margin (compared to its competitors) allowed KML to compete effectively and very successfully in the Peruvian gold market.

33. KML had three main sources of income: (1) sales to refineries (a.k.a., refinery income);⁴⁷ (2) profit on fixing; and (3) "other income." Sales to refineries was the most substantial component of KML's sales revenue.⁴⁸ Profit on fixing represented a fixed profit margin (similar to a brokerage fee), on the gold and other metals that KML purchased and resold.⁴⁹ "Other income" included ten different income streams, the majority of which was interest accrued from customers, transfer fees from customers, miscellaneous other income, commissions earned, and shipping charges.⁵⁰

⁴² Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶¶ 20, 22-23, C-0105-SPA; and Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 23, C-0103-ENG.

⁴³ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 22, C-0104-ENG.

⁴⁴ [REDACTED] letter to KML dated September 10, 2013, C-0047-ENG.

⁴⁵ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG., at ¶5.25, C-0106-ENG.

⁴⁶ *Id.* at ¶5.27.

⁴⁷ For clarity, KML did not itself refine gold. KML, however, planned to start a gold refining operation in Peru (Minutes of KML granting permission to study the opportunity to establish a gold refinery in Peru), C-0049-ENG.

⁴⁸ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶6.41, C-0106-ENG.

⁴⁹ *Id.* at ¶6.42.

⁵⁰ *Id.* at ¶6.44.

c. KML’s business at the time of the damages caused by Peru

34. KML was subject to a discriminatory, unfair and inequitable treatment by Peru, which caused lost profits to KML. KML was also progressively and indirectly expropriated by Peru, both as to inventory of gold seized by Peru, and as to KML’s going concern enterprise. The damages to KML occurred—were incurred—on November 30, 2018, when the company terminated its operations and lost all economic value permanently and irreversibly. Prior to such date, the year-end financial statements of KML reflected some losses in a broad accounting sense (for instance, KML was cash-flow negative in 2014 and 2015);⁵¹ however, from a legal standpoint, and for purposes of the TPA, such lost-profit damages were incurred *in* 2018.

Table 4 - Grossed-Up Damages to KML With Inventory Value as of the Report Date⁸

Summary of (Grossed-Up) Damages to KML	
Present Value of Lost Profits	\$ 19,558,011
Value of Expropriated Business (Enterprise Value (EV))	\$ 67,087,747
Damages Before Pre-Award Interest and Seized Inventory	\$ 86,645,758
Pre-Award Interest Through March 2022	11,039,101
Total Damages With Pre-Award Interest, Before Inventory	\$ 97,684,859
Value of Seized Inventory Close to the Report Date	\$ 26,099,826
Total Damages Including Pre-Award Interest	\$ 123,784,685

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, table 4).

35. If Peru had finished ongoing investigations and returned the gold to KML before November 30, 2018, KML would have been able to sell such gold at a profit (at prices actually much higher than when the gold was seized in 2013 and 2014). Also, KML would

⁵¹ KML tax filings, tax returns and financial statements, **C-0042-ENG**.

have been able to reinvest (as it was KML's ordinary course of business in Peru) in even more purchases and resales of gold, more than making up (financially) in excess for the accounting profits lost in prior years. Until 2018, KML had a legitimate expectation that the seized gold was going to be, as it should have been, returned by Peru.⁵²

36. When KML incurred damages in 2018, and as compared to prior years, KML was affected by: (1) lower quantities of gold purchased (loss of market share) in Peru and worldwide, (2) higher cost on a per unit basis, (3) higher financing cost, and (4) higher and costlier working capital.⁵³ The Quantum Expert retained by KML in this arbitration has confirmed, from his independent economic analysis, that on November 30, 2018, the measures by Peru (explained below) resulted in a permanent and irreversible economic loss for KML, as such date corresponds to KML's insolvency and the end of its operations:

6.10 I understand that Claimant's Counsel in this matter argues that Peru has committed an unlawful and indirect (progressive) expropriation of Claimant's business beginning with some temporary Measures in November 2013.¹⁴³ From my independent economic analysis, I confirmed that by 30 November 2018, the Measures resulted in a permanent and irreversible economic loss for KML; this date corresponds to KML's insolvency and an end of its operations.¹⁴⁴

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶6.10).

37. In 2018, the fair market value of all assets owned by KML became significantly lower than total liabilities, and KML was unable to pay off its debts. On November 30, 2018, KML's equity as depicted in its balance sheet turned to negative US\$ 13,649,821.⁵⁴

⁵² Legal Opinion-██████████-Claimant's Memorial-SPA, question N° 9, **C-0107-SPA**; Witness Statement-██████████-Claimant's Memorial-SPA, at ¶ 29, **C-0105-SPA**; and Witness Statement-██████████-Claimant's Memorial-ENG, at ¶ 57, **C-0103-ENG**.

⁵³ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG., at ¶6.3, **C-0106-ENG**.

⁵⁴ *Id.* at ¶6.12.

d. KML’s inventory of gold (seized by Peru)

38. When KML terminated all its business activities and operations on November 30, 2018, the following inventory of gold property of KML (seized by Peru in 2013-14) had not been returned to KML (nor has it been returned as of this day). To the best of KML’s knowledge and belief, Peru has never questioned KML’s legal title to this gold:

Seller	Net Weight Declared (Grams)	Gross Weight Declared (Grams)
Purchase No. 1: ██████████	104,353.78	111,545.37
Purchase No. 2: ██████████	91,972.06	98,591.20
Purchase No. 3: ██████████	36,393.96	38,600.90
Purchase No. 4: ██████████	118,737.74	126,775.30
Purchase No. 5: ██████████	97,825.00	99,843.22
Total in Grams	449,282.54	475,335.99

39. The five purchases of gold identified above were made as follows:

- Purchase 1.** On or about November 27, 2013, KML purchased 111,545.37 grams (gross weight) of gold from ██████████,⁵⁵ a company which at the time was duly registered with the Registry of the Ministry of Mining and Energy in Peru. Before delivery, KML verified that ██████████’s business information was up-to-date and accurate, and confirmed, upon delivery, that the gold was legally sourced, and provided all documentation required under Peruvian law. For example, KML obtained and delivered: (i) bills of lading (*guías de remisión*) describing the items shipped as well as their origin and destination; (ii) a Declaration of the Origin of Material (*Declaración jurada de procedencia de mineral aurífero*), confirming the lawful origin of the gold; (iii) “*Anexo N° 5*,” a declaration in which the exporter confirms company information; and (iv) a certificate of assay from a certified

⁵⁵ ██████████ document package, at pp. 59-63, C-0006-ENG/SPA.
(continued...)

laboratory in Peru attesting to the purity of the gold to be sold (collectively, the Supporting Documentation).⁵⁶

- **Purchases 2, 3 and 4.** Pursuant to contracts with KML, between January 7 and 8 of 2014, [REDACTED], [REDACTED], and [REDACTED], delivered gold shipments weighing approximately 98,592.00 grams,⁵⁷ 38,600.90 grams,⁵⁸ and 126,775.30 grams,⁵⁹ respectively, to KML at its [REDACTED] facility. All three of these suppliers were, at all times relevant, duly registered with the Registry of the Ministry of Mining and Energy in Peru.⁶⁰ Just as with prior shipments, before delivery, KML verified that the suppliers' business information was up-to-date and accurate; and confirmed, upon delivery, that all requirements relating to the source of the gold were met and all supporting documentation was provided.⁶¹

- **Purchase 5.** On January 8, 2014, [REDACTED] sold 99,843.22 grams of gold to KML for a price of US\$ 4,150,000.⁶² Specifically, [REDACTED] agreed to deliver to KML a cargo of gold consisting of 46,698.72 grams of gold and 53,144.50 grams of gold, respectively.⁶³ [REDACTED] was also a company which at the time was duly registered with the Registry of the Ministry of Mining and Energy in Peru. On such date, [REDACTED] delivered the gold cargo to KML through the company [REDACTED], hired by KML, as stated in collection service voucher No. 10584355; and sent invoices No. 0001-000025 and 0001-000026 to KML.⁶⁴

⁵⁶ *Id.* at pp. 36-42 (*guías de remisión*); at pp. 34-35 (*Declaración jurada de procedencia de mineral aurífero*); at pp. 49 (*Anexo N° 5*); and at pp. 47-48 (Certificates of assay).

⁵⁷ [REDACTED] document package, at pp. 24-27, C-0007-ENG/SPA.

⁵⁸ [REDACTED] document package, at pp. 18, C-0009-ENG/SPA.

⁵⁹ [REDACTED] document package, at pp. 36-54, C-0008-ENG/SPA.

⁶⁰ *Registro Especial de Comercializadores y Procesadores de Oro (RECPO)*, C-0010-SPA.

⁶¹ [REDACTED] document package, at pp. 24-27, C-0007-ENG/SPA; [REDACTED]

[REDACTED] document package, at pp. 18, C-0009-ENG/SPA; [REDACTED]

[REDACTED] document package, at pp. 36-54, C-0008-ENG/SPA.

⁶² [REDACTED] document package, at pp. 63-68, C-0008-ENG/SPA.

⁶³ Resolution No. 4, dated October 11, 2018, issued by the Third Civil Chamber of the Supreme Court of Peru, at pp. 4, C-0110-SPA.

⁶⁴ *Id.*

40. KML appropriately conducted due diligence on compliance and anti-money laundering for the five purchases of gold.

18. As part of my job at KML, I personally reviewed and confirmed the legality and legitimacy of such purchases and the background of the suppliers.

19. There were two main objectives to this process of revision. The first objective was to identify the shareholders of the company. To do so, we researched the supplier for its Ultimate Beneficial Owner (“UBO”), to find the actual human individuals that were the owners. Once identified, we requested legible and current I.D.’s for all shareholders (some countries have online tools to confirm authenticity of said I.D.’s). After that, we would run a background check on all shareholder using the “World-Check” tool by [REDACTED]. The second objective was to ensure that the precious metals being offered derived from legitimate sources and had all the proper

permits, licenses, registers, etc. These documents were also checked for authenticity using tools offered by the different countries where we conducted business.

Evidence:

C-0104-ENG (Witness Statement-[REDACTED]-Claimant’s Memorial-ENG, ¶ 18-19).

41. The foregoing inventory legally belongs to KML as its true owner; and as of today, the legal obligation by Peru to return it to KML has not ceased under Peruvian law (although for purposes of the TPA such inventory has been indirectly expropriated by Peru).

9. Legalmente, bajo el derecho peruano, y a la fecha de hoy ¿Podría o debería Perú devolver el oro inmovilizado a KML?

Respuesta corta: Sí.

Desarrollo de respuesta:

9.1. Si el sustento de dicha inmovilización son las decisiones emitidas sucesivamente por el 12° Juzgado Penal del Callao y el 6° Juzgado Penal del Callao; entonces las autoridades peruanas competentes deberían proceder a la devolución del oro afectado a KML; no solo por los elementos de arbitrariedad e infracción a la ley que hemos referido a lo largo de este informe, sino también por haber excedido los márgenes temporales previstos en la ley.

La dilación del Estado peruano en devolver el oro ha excedido todo parámetro de razonabilidad y proporcionalidad, y ha sido, en mi criterio, arbitraria e irracional. El principio de proporcionalidad, en tanto prohibición de exceso, ha sido reconocido por nutrida y consistente jurisprudencia del Tribunal Constitucional como *principio general del derecho* derivado del artículo 200° de la Constitución Política del Perú (Exhibit CL-0002-ENG). Así, entre otras, las sentencias constitucionales recaídas en el Exp. N° 0010-2002-AI-TC (Exhibit CL-0012-SPA), 408-1997-AA (Exhibit CL-0015-SPA), 1209-2006-AA/TC (Exhibit CL-0016-SPA), reconocen que estos parámetros (razonabilidad y proporcionalidad) son de cumplimiento obligatorio por todo funcionario o agente público.

Evidence:

C-0107-SPA (Legal Opinion-[REDACTED]-Claimant's Memorial-SPA, question N° 9).

e. KML's going concern enterprise

42. KML operated as a company for seven years in Peru, investing a significant sum of money to purchase gold in Peru, and setting a physical operation in that country.⁶⁵ Consequently, KML obtained a significant market share in the Peruvian gold market. It should be noted that KML was able to be extremely profitable as early as 2013,⁶⁶ while growing its business significantly, a feature that is not common in early-stages of projects.

⁶⁵ KML transaction summary of all purchases between 2012 and 2018, C-0030-ENG.

⁶⁶ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 2.11, 4.12, C-0106-ENG.

43. *But for Peru's breaches of the TPA, KML would have had the resources needed to continue operating indefinitely in that country, with the ability to make enough money and stay afloat well after 2018. KML operated beyond merely an initial stage in Peru; it invested confidently in advertising and growing there:*⁶⁷



⁶⁷ Witness Statement- [REDACTED]-Claimant's Memorial-ENG, at ¶ 13, C-0104-ENG.



Evidence:

C-0026-ENG (Records of participation of KML in the International Gold & Silver Symposium, at pp. 1, 3, 5).

C-0099-ENG (Tweet from KML's official account about its participation in *Expomina Peru* 2014).

44. KML attracted suppliers of gold, established a solid presence in the market, and had constant demand for its products.⁶⁸ KML's income increased rapidly, especially in 2013. The operating history of KML contains information that can be used in its valuation as of November 30, 2018.

45. KML projected purchases of gold in Peru of at least 45 tons per year.⁶⁹ Those projections have been verified by an impartial expert.⁷⁰ Although KML was unable to recover some documentation,⁷¹ the growth KML obtained from 2012 to 2013 attests, on its own, to KML's reasonable expectations and ability to grow in revenue. Moreover, the price at which KML was able to sell its products or services could be determined with reasonable certainty.⁷²

46. KML's expansion plan could be (and was) financed with cash generated by the same company. KML even considered starting a gold refining operation in Peru.⁷³ If additional cash was required for projections beyond 2018, there would have been no uncertainties regarding the availability of financing based on the captive demand by [REDACTED]. Finally, it is possible to calculate a significant weighted average cost of capital (WACC) beyond 2018, including a reasonable country risk premium, that fairly represents the political risk in Peru.⁷⁴ KML was active in a sector (purchase and resale of gold for export) with regulatory pressure that was predictable.⁷⁵ It was possible to determine the impact of regulatory standards on future cash flows with a minimum degree of certainty.

⁶⁸ [REDACTED] letter to KML dated September 10, 2013, **C-0047-ENG**.

⁶⁹ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶¶ 17-18, 20, 23, 32, **C-0103-ENG**.

⁷⁰ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 6.29-6.30 and Figure 13 (KML's Implied Sustainable Growth Rate), **C-0106-ENG**.

⁷¹ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 19, **C-0103-ENG**.

⁷² Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶5.20, **C-0106-ENG**.

⁷³ Minutes of KML granting permission to study the opportunity to establish a gold refinery in Peru, **C-0049-ENG**.

⁷⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 6.80-6.84, **C-0106-ENG**.

⁷⁵ Legal Opinion-[REDACTED]-Claimant's Memorial-SPA, at pp. 4-5, **C-0107-SPA**.

(continued...)

D. Peru's measures

47. Peru has breached the TPA. For easier reference and visualization, some key facts regarding the breaches of the TPA by Peru have been summarized on a chronological table, segregated (where applicable) for the five purchases of gold (inventory) referenced above, temporarily immobilized by Peru between 2013 and 2014.⁷⁶ Such table is annexed, below, as appendix A to this memorial, and is incorporated herein by reference.

48. It must be stressed, once again, that the seizures of gold initiated by Peru against KML in 2013-14 were, intrinsically, and pursuant to Peruvian law, temporary or interim in nature; also, Peru's legal obligation to return the gold to KML has not ceased as of today.⁷⁷ Second, the facts in this case prove a clear unbreakable linkage on the continuing character of the acts and omissions by Peru, and—therefore—the composite nature of Peru's breaches of the TPA, which imply that the totality of acts by Peru must be considered as a unity that climaxed on November 30, 2018.⁷⁸

⁷⁶ In this arbitration and for purposes of the TPA, Peru must not be allowed to benefit from alleged excuses, reasons, or documents purportedly justifying its measures, if those were not properly notified by Peru to KML by November 30, 2018. Peru's lack of transparency has led to a devastating information asymmetry, with Peru knowing everything about its actions and intentions, while KML has been left to feel around in the dark as best it could.

⁷⁷ Legal Opinion-██████████-Claimant's Memorial-SPA, at ¶ 2.1, 9.1, C-0107-SPA.

⁷⁸ See ILC Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), CL-0040-ENG. Art. 15 thereof, provides the following criteria for composite acts:

“Article 15. Breach consisting of a composite act

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

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

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

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

Commentary

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

(continued...)

a. Initial seizing (temporary immobilization) of KML's gold

49. The five shipments of gold (inventory) owned by KML (as referenced above), were temporarily immobilized by Peru in late 2013 and early 2014.⁷⁹ This initial seizing was carried by Peru mostly with the excuse of investigating the origin of the gold purchased by KML and, in other cases, based on anti-money laundering investigations against third parties. As isolated, in and of themselves, these initial immobilizations did not raise to the level of a breach of the TPA by Peru:

- **Purchase No. 1 (from [REDACTED] [REDACTED]), 104.35 (net) / 111.54 (gross) kilograms of gold.** This temporary immobilization was initiated on November 29, 2013, pursuant to orders from Peru, based on alleged incomplete waybill and documentation.⁸⁰ Documents requested by Peru were provided several times,⁸¹ even as Peru kept requesting additional evidence,⁸² seemingly to prolong the immobilization. As of 2022, Peru has not returned this gold to KML.
- **Purchase No. 2 (from [REDACTED]), 91.97 (net) / 98.59 (gross) kilograms of gold.** This temporary immobilization was initiated on January 08-10, 2014, based

[...]

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

⁷⁹ KML completed its due diligence and compliance review before making these five purchases of gold, and confirmed that all the sellers were in good standing with the Peruvian government. Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 18, **C-0104-ENG**.

⁸⁰ Immobilization Orders N° 316-0300-2013-001479 and N° 316-0300-2013-001497, at pp. 1-2, **C-0040-SPA**; Report No. 316-0300-2013-001288, November 29, 2013, **C-0055-SPA**; Notice N° 406-2013-SUNAT/3X3200, December 2, 2013, **C-0056-SPA**; and Petition submitted to lift immobilization declared by immobilization order N° 316-0300-2013-001479, December 2, 2013, **C-0057-SPA**.

⁸¹ Communication sent by [REDACTED] to SUNAT in reference to notice No. 424-2013-SUNAT, December 9, 2013, **C-0061-SPA**; and clarification provided by [REDACTED] to [REDACTED] (customs agent) requesting that the gold subject to seizure under Order No. 0230072504966 be released since it was the property of an unrelated third party (i.e., KML), **C-0065-SPA**.

⁸² SUNAT's ruling ordering the extension of the immobilization order No. 3016-0300-2013-001479 and 3016-0300-2013-001497, December 27, 2013, **C-0064-SPA**.

(continued...)

on requests by Peru for information about the origin of the gold.⁸³ The information requested by Peru was provided.⁸⁴ KML unsuccessfully tried to intervene voluntarily in this investigation on August 05, 2014.⁸⁵ On October 25, 2016, Peru seemed to change its alleged motive for the immobilization.⁸⁶ As of 2022, Peru has not returned this gold to KML.

- **Purchase No. 3 (from [REDACTED]), 36.39 (net) / 38.60 (gross) kilograms of gold.** This temporary immobilization was initiated on January 09-10, 2014, based on a so-called “risk profile” prepared by Peru.⁸⁷ Documents requested by Peru were duly provided,⁸⁸ but on April 09, 2014, Peru alleged that [REDACTED] did not deliver sufficient documentation about the origin of the gold, and referred the issue to a criminal prosecutor.⁸⁹ Peru later turned this immobilization into a tax and anti-money laundering judicial investigation against two individuals unrelated to KML.⁹⁰ KML (as owner of the gold) tried to voluntarily intervene in the judicial proceedings, but was denied access to the case and deprived of due process.⁹¹ On April 09, 2018, Peru closed the judicial investigation (without indictments or convictions);⁹² however, as of 2022, Peru has not returned this gold to KML.

⁸³ Immobilization Order N° 316-0300-2014-000110 and N° 316-0300-2014-000111, at pp. 3-4, **C-0040-SPA**; Report of Inspection N° 316-0300-2014-000038, January 10, 2014, **C-0069-SPA**; and [REDACTED]. Report of Inspection N° 316-0300-2014-000039, January 10, 2014, **C-0070-SPA**.

⁸⁴ [REDACTED] reply to Notice N° 028-2014-SUNAT/3X3200, January 16, 2014, **C-0081-SPA**; also, see [REDACTED]'s petition to SUNAT dated January 20, 2014, requesting the lifting of immobilization order No. 316-0300-2014-000110 arguing that the gold is the property of KML, an unrelated third party, **C-0082-SPA**.

⁸⁵ Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, August 05, 2014, **C-0092-SPA**.

⁸⁶ Attestation No. 002-2016-DIRILA/PNP-DIVINESP-D4, October 25, 2016, **C-0095-SPA**.

⁸⁷ Request for Preliminary Investigation for the crime of money laundering filed by the Public Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain Proceedings before the Ninth Provincial Criminal Prosecutor's Office of Callao, **C-0068-SPA**; and Immobilization orders No. 316-0300-2014-000021, at pp. 11, **C-0040-SPA**.

⁸⁸ Petition submitted by [REDACTED] requesting the lift of immobilization order No. 316-0300-2014-000002, January 21, 2014, **C-0083-SPA**.

⁸⁹ Informe (report) N° 303-2014-SUNAT-3X3200, April 09, 2014, **C-0084-SPA**.

⁹⁰ Resolution No. 01, issued by the 9th Provincial Criminal Prosecutor's Office of Callao, April 21, 2014, **C-0087-SPA**.

⁹¹ Decision from the *Cuarta Sala Penal Reos Libre*, **C-0016-SPA**.

⁹² Order of conclusion of preliminary investigation issued by the 1st Criminal Court of Callao, April 09, 2018, **C-0096-SPA**.

(continued...)

- **Purchase No. 4 (from [REDACTED]), 118.73 (net) / 126.77 (gross) kilograms of gold.** This temporary immobilization was initiated on January 07, 2014, based on a preliminary investigation by Peru against a third party (unrelated to KML or, to the best of KML's knowledge and belief, [REDACTED]), [REDACTED].⁹³ The immobilization orders were issued on January 09, 2014,⁹⁴ and the case was transferred by Peru to a criminal court, which on March 11, 2014, issued a new immobilization order.⁹⁵ Three years later, on January 09, 2017, Peru issued a new order of continuation of the investigation against parties unrelated to KML.⁹⁶ As of 2022, Peru has not returned this gold to KML.

- **Purchase No. 5 (from [REDACTED]), 97.82 (net) / 99.84 (gross) kilograms of gold.** This temporary immobilization was initiated on March 13, 2014, based on an investigation by Peru against [REDACTED] for the alleged commission of the crime of money laundering, in connection with illegal mining.⁹⁷ The immobilization was reissued by a Peruvian court on March 20, 2015, based on an investigation for alleged money laundering.⁹⁸ On October 11, 2018, a Peruvian court acknowledged that the gold was the property of KML.⁹⁹ As of 2022, Peru has not returned this gold to KML.

50. To the best of KML's knowledge and belief, as of today Peru has not made a final determination about the origin of any of the five purchases of gold identified above, or any

⁹³ Preliminary Investigation Extension Order notified to KML by the 1st supraprovincial Corporate Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain, Case No. 50601570101-2014-1-0, **C-0067-SPA**.

⁹⁴ Immobilization orders No. 316-0300-2014-000020, 316-0300-2014-000021 and 316-0300-2014-000022, pp. 5-10, **C-0040-SPA**.

⁹⁵ Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 36, **C-0101-SPA**.

⁹⁶ *Id.*

⁹⁷ *Id.* at pp. 163.

⁹⁸ Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 163, **C-0101-SPA**.

⁹⁹ Resolution No. 4, dated October 11, 2018, issued by the Third Civil Chamber of the Supreme Court of Peru, **C-0110-SPA**.

(continued...)

permanent legal consequence affecting the mineral. KML's gold is, *de facto*, in a legal limbo or black hole arbitrarily created by Peru.

51. After the foregoing five temporary immobilizations, Peru allowed KML to continue purchasing gold, which KML actually did until 2018.¹⁰⁰ No immobilizations of additional KML gold were ever initiated by Peru after 2014. This means, implicitly but undoubtedly, that KML was not found guilty of any wrongdoing, and that Peru did not impose formal sanctions against KML.

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

Evidence:

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

b. Subsequent supervening investigations mentioning KML

52. In 2013 and 2014, Peru was under enormous international and media pressure to put an end to alleged illegal and predatory mining of gold, especially because of a scandal involving the company [REDACTED] (which was completely unrelated to KML).¹⁰¹ Peru also implemented a pernicious compensation incentive program for public servants, rewarding them based on results obtained against private companies.¹⁰² Combined, those factors may have given rise to a voracious and overzealous enforcement environment, that led to arbitrary actions against KML. In addition, competitors of KML most likely did not

¹⁰⁰ KML transaction summary of all purchases between 2012 and 2018, C-0030-ENG.

¹⁰¹ [REDACTED] see also, Netflix series *Dirty Money*, *Dirty Gold* episode, season 2, episode 4. Documentary directed by Stephen T. Maing and written by Nurkan Aydogan, C-0098-ENG.

¹⁰² Act No. 29.816 (Act for the strengthening of SUNAT), dated December 21, 2011, at Arts. 11, 12, 13(f), CL-0041-SPA.

like the success that KML actually obtained in the Peruvian gold market in 2013. Be that as it may, and whatever the underlying reason was, KML was objectively the victim of Peru's arbitrary measures.

53. If Peru had diligently conducted and concluded the investigations involving KML's five purchases of gold temporarily seized in 2013-14, no breach of the TPA would have occurred. Peru could have returned the gold to KML, or, alternatively, concluded that the gold was going to be permanently (as opposed to temporarily) seized, which would have opened the way to certain legal avenues for KML to pursue. To the best of KML's knowledge and belief, that never occurred.

54. Peru unnecessarily and unreasonably prolonged the temporary seizures of KML's gold:

La dilación del Estado peruano en devolver el oro ha excedido todo parámetro de razonabilidad y proporcionalidad, y ha sido, en mi criterio, arbitraria e irracional. El principio de proporcionalidad, en tanto prohibición de exceso, ha sido reconocido por nutrida y consistente jurisprudencia del Tribunal Constitucional como *principio general del derecho* derivado del artículo 200° de la Constitución Política del Perú (Exhibit CL-0002-ENG). Así, entre otras, las sentencias constitucionales recaídas en el Exp. N° 0010-2002-AI-TC (Exhibit CL-0012-SPA), 408-1997-AA (Exhibit CL-0015-SPA), 1209-2006-AA/TC (Exhibit CL-0016-SPA), reconocen que **estos parámetros (razonabilidad y proporcionalidad) son de cumplimiento obligatorio por todo funcionario o agente público.**

Evidence:

C-0107-SPA (Legal Opinion- [REDACTED]-Claimant's Memorial-SPA, question N°9).

55. As part of its voracious desire to extend and prolong the temporary seizures of KML's gold (presumably to buy time until a reason to effect a permanent seizure could be found), Peru began altering the reasons for some of the seizures. For instance, Purchases No. 4 and 5 of gold (as identified above) were initially seized by Peru based on an investigation regarding their supporting paperwork; nevertheless, Peru later turned them into judicial anti-money laundering investigations against third parties unrelated to

KML.¹⁰³ Peru also mentioned KML in generic money laundering investigations, not specifically or directly connected to the temporarily seized gold, perhaps as a way to eventually try to circle back to permanently seize KML's gold.

56. These supervening investigations included: (1) prosecutorial order No. 19 issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, in which KML is specifically mentioned as being under investigation for the crime of money laundering in connection with illegal mining;¹⁰⁴ and, (2) resolution No. 1, fiscal folder No. 42-2014, of the same prosecutor's office, for the commission of the crime of money laundering in which KML is also expressly mentioned as investigated.¹⁰⁵

57. KML was entitled to rely on Peru's legal system of registration of gold producers and distributors.¹⁰⁶ KML cooperated fully with Peru's investigations.¹⁰⁷ It was Peru who—alone—had the burden of proving any alleged or suspected illicit origin of gold, or the existence of money laundering or corruption. KML did not, and does not, have the legal burden of proving its innocence:

¹⁰³ Preliminary Investigation Extension Order notified to KML by the 1st supraprovincial Corporate Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain, Case No. 50601570101-2014-1-0, **C-0067-SPA**; and Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 163, **C-0101-SPA**.

¹⁰⁴ Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 3, **C-0101-SPA**.

¹⁰⁵ Prosecutorial Resolution No. 1, fiscal folder No. 42-2014, of the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 3, **C-0052-SPA**.

¹⁰⁶ Decree No. 1105 which establishes provisions for the formalization process of small-scale and artisanal mining activities, **CL-0003-SPA**; National Plan for the regularization of small-scale mining, **C-0044-SPA**; and *Registro Especial de Comercializadores y Procesadores de Oro* (RECPO), **C-0010-SPA**.

¹⁰⁷ See *infra*, ¶ 115.

e inmovilización del oro de KML desde el año 2013. KML no tenía la carga de probar la

legalidad del oro comprado a los proveedores, siendo que, en investigaciones penales y administrativas, el Estado peruano tiene la carga de demostrar su ilegalidad. Dicha carga no se ha cumplido.

Evidence:

C-0107-SPA (Legal Opinion-[REDACTED]-Claimant's Memorial-SPA, Resumen Ejecutivo, pp. 9-10).

c. Statements against KML

58. The ancillary or supervening investigations in which Peru arbitrarily mentioned KML, starting in 2015,¹⁰⁸ presumably as a way to prolong the immobilization of KML's gold, had the obviously foreseeable consequence of being replicated by the media.¹⁰⁹

Por ejemplo, el oro incautado en Callao era propiedad de seis exportadoras peruanas, y se aprestaba para ser enviado por aire a una refinería de oro con sede en Italia, y a tres en Estados Unidos, una de las cuales era Kaloti Metals & Logistics.

InSight Crime no logró descubrir cuál de las empresas exportaba para Kaloti. Pero de las seis, tres han negociado con Kaloti desde 2012, según datos de exportación obtenidos de los entes comerciales; [REDACTED]

¹⁰⁸ Prosecutorial Resolution No. 1, fiscal folder No. 42-2014, of the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 3, C-0052-SPA; and Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 3, C-0101-SPA.

¹⁰⁹ [REDACTED]

¿Y es correcto decir que Kaloti no puede afirmar con ninguna certeza que no estuviera a punto de importar oro ilegal antes de su decomiso en Callao?

"Eso hace parte de la investigación en curso; eso no se ha establecido", replicó Rodríguez. "Las autoridades están actuando con base en sus presunciones y hay un debido proceso que se requiere para esta investigación y eso es lo que tenemos que respetar".

Pero, ¿puede Kaloti negar los informes que aparecen en los medios peruanos sobre la inclusión de la empresa en las investigaciones de las autoridades peruanas

"Son investigaciones en desarrollo, y no se ha publicado nada hasta el momento que diga que las autoridades ya tienen algo seguro, por eso quedamos algo sorprendidos en la forma como ciertos medios de noticias obtuvieron y divulgaron cierta información que francamente es privilegiada", comentó Rodríguez.

US Companies Importing Dirty Gold from Illegal Mining Operations in Peru

[US Companies Importing Dirty Gold from Illegal Mining Operations in Peru \(earthisland.org\)](http://earthisland.org)

Correction/clarification: This story has been modified since its original posting. Kaloti Metals is not "a branch" of the [REDACTED] as we originally reported; it is an independent, US-registered corporation that has a close partnership with its parent company in Dubai. We regret the error. As originally reported, Kaloti Metals did not respond to an initial request for comment. Kaloti Metals insists it does not import gold from Madre de Dios, and the story now includes a statement from the company.

A 2014 study by the Swiss nonprofit Society for Threatened Peoples reported that Kaloti Metals, a Miami-based associate company of the [REDACTED], as well as [REDACTED] and [REDACTED], also based in Miami, were accused of importing gold from exporters who sourced the metal in [REDACTED].

After \$18 million worth of gold, destined for Kaloti Metals, [REDACTED] and [REDACTED] in the United States, was seized by customs officials in Lima recently, a Peruvian weekly, *Ojo Publico*, reported that regular flights from neighboring Bolivia, carrying gold smuggled across the border from [REDACTED] was making its way onto Miami.

The article said that the shipments, equivalent to 35 metric tons of gold, “were dispatched to US refineries [REDACTED] and Kaloti Metals and Logistics.” [REDACTED] did not respond to requests for comment.

Evidence:

C-0051-ENG/SPA (News articles and books that replicated negative facts unfairly linked to KML by Peru, at pp. 16, 19, 31-32).

59. The foregoing news—attributable to, or traceable to actions of, Peru—caused multiple suppliers of gold to stop selling minerals to KML. The following suppliers sold gold to KML in 2013 or 2014, but refused to do so thereafter: [REDACTED]

[REDACTED]

[REDACTED].¹¹⁰ After Peru continued to hold on to KML’s seized gold, refusing to finish investigations in 2015, in 2016 the following companies also stopped providing (selling) gold to KML: [REDACTED]

[REDACTED]

¹¹¹

60. In 2017, and for the same reasons, the following companies stopped providing (selling) gold to KML: [REDACTED]

[REDACTED].¹¹² Finally, in 2018 the following companies stopped providing (selling) gold to KML:

¹¹⁰ KML’s list of transactions and suppliers from 2011 to 2018, at pp. 5-9, C-0050-ENG.

¹¹¹ *Id.* at pp. 11-15.

¹¹² *Id.* at pp. 16-18.

(continued...)

34. Luego del escándalo en Perú, las ventas cayeron en picada y las operaciones disminuyeron de gran manera. Los sueldos de cargos como el mío (*head trader*), que en gran parte

eran compensados por comisiones, se vieron fuertemente afectados. Mis ingresos se redujeron aproximadamente en un 75%. Nunca se volvió a alcanzar un estado de estabilidad en el cual se lograra encarrilar nuevamente el flujo de transacciones y las proyecciones de crecimiento. Aunque el [REDACTED] me continuaba presionando para comprar más oro en Perú, muchos proveedores dejaron de suministrar oro a KML, alegando que les preocupaba tratar con KML porque esta estaba investigada por el gobierno de Perú. Específicamente, las empresas [REDACTED] [REDACTED] entre otras, dejaron de vender oro a KML a partir de 2015 (Exhibit C-0050-ENG). Varios bancos cerraron las cuentas de KML (Exhibit C-0027-ENG) y sus representantes me explicaron, aunque oralmente, que eso se debía a las investigaciones relacionadas con Perú.

* * *

¹¹³ *Id.* at pp. 19-20.

3.17 I understand that Claimant alleges that the actions of the Peruvian government resulted in numerous cancellations of its supply contracts as well as the loss of financing arrangements with many banks which further limited KML's purchases of gold. As a result of the gold inventory seizure and the alleged disinformation propagated by Peru, which allegedly tarnished both Mr. Kaloti's and KML's reputation and resulted in a loss of business opportunity, KML's business was severely hindered, and after many years of struggle, went de facto bankrupt in 2018.²⁷

3.24 Claimant alleges that Respondent's actions, namely involving KML in unrelated money laundering investigations, and a propaganda campaign against KML in Peru which spread worldwide, together with the prolonged impossibility to convert the gold seized by Peru in 2013 and 2014 into cash, also decreased its business opportunities in other countries.⁴⁰ In aggregate, as I understand, Peru's alleged actions resulted in KML losing its gold inventory, losing contracts with previous suppliers, losing partnerships with various financial institutions, and its ultimate demise in 2018.⁴¹

Evidence:

C-0105-SPA (Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶34).

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 3.17, 3.23).

61. As evidenced, KML continued to have solid demand for gold, especially from [REDACTED],¹¹⁴ but KML's ability to buy (source) gold was adversely affected by Peru's actions. After 2014, many suppliers stopped selling gold to KML because of an unfair, and unreasonably long, cloud of suspicion created by Peru against KML.

62. The only plausible explanation for Peru holding on to KML's seized gold (based on alleged money laundering investigations), but at the same Peru allowing KML to buy and sell Peruvian gold until 2018, was that Peru was fabricating excuses to keep such seized gold. Why would government authorities reasonably convinced that a company was, or

¹¹⁴ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶54, **C-0103-ENG**; and Witness Statement-[REDACTED]-Claimant's Memorial-SPA, at ¶¶ 34-35, **C-0105-SPA**.

may have been, involved in money laundering allow such company to operate for several years in the same market and activities suspected?

63. To the best of KML's knowledge and belief, KML was never indicted or convicted of any wrongdoing in Peru (or anywhere else); and no final determination has been made by Peru as of today (more than eight years after the first temporary immobilization) regarding KML's seized gold. Further, Peru has not made any formal connection of specific money laundering as to the five purchases of gold seized in 2013-14. Peru had, and has been unable to meet, a clear legal burden of proof.¹¹⁵

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

65. The same unfair, and unreasonably long, cloud of suspicion created by Peru against KML caused financial institutions to stop dealing with KML, beginning in April 2014, as follows:

- [REDACTED] informed KML of closure of account ending in 2129, by letter dated April 1, 2014, sent by [REDACTED].¹¹⁶
- [REDACTED] informed KML of closure of account ending in 7480, by letter dated October 28, 2014, sent by [REDACTED].¹¹⁷
- [REDACTED] informed KML of closure of account ending in 0767, by letter dated March 23, 2016, sent by [REDACTED].¹¹⁸
- [REDACTED] informed KML of closure of account ending in 9066, by letter dated July 5, 2016, sent by [REDACTED].¹¹⁹

¹¹⁵ Legal Opinion-[REDACTED]-Claimant's Memorial-SPA, question N° 7, C-0107-SPA.

¹¹⁶ Notice of closure of bank accounts of KML, at pp. 8, C-0027-ENG.

¹¹⁷ *Id.* at pp. 7.

¹¹⁸ *Id.* at pp. 6.

¹¹⁹ *Id.* at pp. 5.

(continued...)

- [REDACTED] informed KML of closure of account ending in 8298, by letter dated December 30, 2016.¹²⁰
- [REDACTED] informed KML of closure of account ending in 5362, by letter dated March 30, 2017, sent by [REDACTED].¹²¹
- [REDACTED] informed KML of closure of account ending in 2224, by letter dated May 26, 2017, sent by [REDACTED].¹²²
- [REDACTED] informed KML of closure of [REDACTED] deposit account ending in 4447, by letter dated August 8, 2018.¹²³

66. All of the letters from the foregoing banks contain language that is customary in account closures based on compliance reasons. The only reason for KML, or [REDACTED], to have been flagged in compliance reviews (performed by financial institutions) was directly and exclusively attributable to Peru.¹²⁴ It can be reasonably concluded that the actions by Peru were the factual and proximate cause of, or at least a very substantial reason for, KML being booted by multiple financial institutions.

67. Without ample access to financial institutions, KML could not continue its legitimate strategy (actually proven to have been successful and effective in 2013) of paying sellers of Peruvian gold very promptly and at prices better than those paid by KML's competitors.

¹²⁰ *Id.* at pp. 4.

¹²¹ *Id.* at pp. 3.

¹²² *Id.* at pp. 2.

¹²³ *Id.* at pp. 1.

¹²⁴ Arbitral tribunals in the past have recognized the causal connection of damages to investors by SUNAT's temporary or interim measures. *See Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011), at ¶ 270 (“[E]l Tribunal ha declarado la existencia de un nexo causal directo entre las acciones de la SUNAT al trabar las medidas cautelares preventivas y la destrucción de la viabilidad económica de TSG.”), **CL-0080-SPA**.

54. Many local companies and providers would not deal with KML because the company was allegedly involved in corruption in Peru (Exhibit C-0050-ENG). Because of the arbitrary actions of Peru, many press articles connected KML to unfounded allegations of money-laundering and corruption, while the case of [REDACTED] (which is unrelated to KML) attracted particular attention in Peru and the United States (Exhibit C-0051-ENG/SPA). Many banks and suppliers (sellers of gold) became concerned and reluctant to deal, or be in business, with KML. (Exhibit C-

0027-ENG) which in practice made it impossible for KML to reach its target of buying 45 tons of gold per year in Peru. The main driver of KML's very safe profits was based on volume of gold and quick resale, mainly to [REDACTED].

55. With banks closing KML's account, it became impossible to continue paying suppliers promptly (faster than our competitors, as we did in 2013). Banks would not lend money to KML if KML's accounts were being closed. Without U.S. bank accounts, and a global media scandal which Peru unfairly connected to KML, many suppliers (sellers of gold) all over the world did not want to deal with KML. The cash-flow of KML was also adversely affected by the impossibility of selling (and turning into cash) the gold unfairly seized by Peru in 2013 and 2014. The worldwide operations of KML were crippled by the actions of Peru. KML could not effectively operate in other markets due to Peru's adverse marketing efforts (attacking KML's reputation) and misinformation against KML.

Evidence:

C-0103-ENG (Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 54-55).

d. Arbitrary and unreasonable extension of the seizing (temporary immobilization) of KML's gold

68. As it has been clearly and unequivocally stated by a very reputable, independent Peruvian legal expert, based on Peruvian law, the investigations and temporary immobilizations of gold (initiated by Peru against KML in 2013-14) far exceed all reasonably acceptable parameters.¹²⁵

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

70. If Peru had finished ongoing investigations and returned the gold to KML within a reasonable timeframe, KML would have been able to sell such gold at a handsome profit (at prices actually much higher than when the gold was seized in 2013 and 2014). Also, KML would have been able to reinvest (as it was KML's ordinary course of business in Peru) in even more purchases and resales of gold, more than making up (financially) in excess for the accounting losses of prior years. Before becoming insolvent, KML had a legitimate expectation that the seized gold was going to be, as it should have been, returned by Peru.¹²⁶

71. Peru has been known to act arbitrarily in connection with the extension and duration of gold immobilizations. In other cases having a resemblance to the situation of KML, some Peruvian courts have adjudicated that SUNAT should return immobilized gold to its legitimate owner.¹²⁷ Precedents prove, first, that SUNAT can be arbitrary, overzealous and

¹²⁵ Legal Opinion- [REDACTED]-Claimant's Memorial-SPA, question N°9, **C-0107-SPA**.

¹²⁶ Legal Opinion- [REDACTED]-Claimant's Memorial-SPA, question N° 9, **C-0107-SPA**; Witness Statement- [REDACTED]-Claimant's Memorial-SPA, at ¶ 29, **C-0105-SPA**; and Witness Statement- [REDACTED]-Claimant's Memorial-ENG, at ¶ 57, **C-0103-ENG**.

¹²⁷ Resolution N° 14 of the 20th Specialized Contentious-Administrative Court of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file N° 08717-2019-0-1801-JR-CA-20, **C-0111-SPA**; and Resolution No. 21 of the 6th Specialized Court in Administrative Litigation of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file No. 8717-2019, **C-0112-SPA**.

(continued...)

capricious;¹²⁸ second, that other investors have received a different treatment, more favorable than the one which Peru dispensed to KML; and third, that Peru has the practice of leaking details of criminal investigations (especially in the gold industry) to the media.¹²⁹

III. JURISDICTION

72. The ground for jurisdiction under the TPA is strong and straightforward. Jurisdiction is based on KML being incorporated, and having substantial business activities, in the United States of America, both when the investments were made and when the treaty violations occurred. KML's ability to invoke the substantive and procedural protections offered under the TPA is based on having established that:

- KML is an “enterprise of a Party” (*i.e.*, the United States of America) within the requirements and definitions provided in Article 10.28, and Annex 1.3 of the TPA (jurisdiction *ratione personae*);¹³⁰
- KML's investments in Peru are considered an “investment” within the definition provided in article 10.28 of the TPA (jurisdiction *ratione materiae*);
- The measures by Peru happened while the TPA was applicable, and KML owned the investments (jurisdiction *ratione temporis*);
- KML has fulfilled the TPA's requirements to initiate arbitration (within the statute of limitations); and
- ICSID has jurisdiction over this dispute under Article 25 of the ICSID Convention.

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

73. KML meets the requirements to be a protected investor under the TPA. Under Article 10.28 of the TPA an “investor of a Party” is “a Party or state enterprise thereof, or

¹²⁸ Arbitral tribunals in the past have recognized the causal connection of damages to investors by SUNAT's temporary or interim measures. See *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011), at ¶ 270 (“*el Tribunal ha declarado la existencia de un nexo causal directo entre las acciones de la SUNAT al trabar las medidas cautelares preventivas y la destrucción de la viabilidad económica de TSG.*”), **CL-0080-SPA**.

¹²⁹ “*Raúl Linares dice que no está implicado en el caso Cuellos Blancos*”, article by Peruvian newspaper *Gestión*, **C-0114-SPA**.

¹³⁰ TPA, at Art. 10.28 & Annex. 1.3, **CL-0001-ENG**.

(continued...)

a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party.”¹³¹

74. Article 10.28 also defines enterprise of a party as “an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.”

75. And under Article 1.3 of the TPA an enterprise is “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.”¹³²

76. KML is an “enterprise” of the U.S. because:

- KML is a limited liability company incorporated under the laws of the State of Florida, United States of America;¹³³
- At all times relevant, KML maintained its principal place of business at [REDACTED], United States of America, and continues to maintain said address as its registered office;
- KML, at all times relevant, maintained substantial business activities in the U.S. prior to ceasing operations; and
- KML made investments in Peru, which is a party to the TPA.¹³⁴

77. Therefore, KML is a United States “enterprise” that has made an investment in Peru and thus qualifies as a protected “Investor”¹³⁵ under the TPA.¹³⁶ In its definition of investor, the TPA should be read in good faith according to its text and the ordinary meaning of words.

78. The TPA does not impose requirements about the U.S. nationality of owners (members or shareholders) of enterprises (investors). Pursuant to Article 10.10 of the TPA,

¹³¹ *Id.* at Art. 10.28.

¹³² *Id.*

¹³³ KML Articles of Incorporation, C-0002-ENG; and TPA, at Art. 10.28, CL-0001-ENG.

¹³⁴ See discussion *supra*-Part II.

¹³⁵ See TPA at Art. 1.3 & Art. 10.28, CL-0001-ENG.

¹³⁶ Peru cannot deny KML benefits of the Treaty pursuant to Article 10.12 of the TPA, which sets forth the only and exclusive basis for a denial of benefits. No other legal basis can be imported by Peru into this case for such denial. See *Id.* at Art. 10.12.

Peru could not require that KML appoint to senior management positions natural persons of any particular nationality. In this case, however, the founder and sole manager of KML, [REDACTED], is a U.S. citizen resident of the State of Florida, United States of America.

79. KML is not controlled by persons nationals of a State that does not maintain diplomatic relations with Peru; nor States with respect to which Peru prohibits transactions.¹³⁷

B. *Ratione Materia*: KML's claims arise out of its investments that are protected by the TPA

80. This dispute arises out of investments KML made in Peru that are protected under the TPA. Article 10.28 of the TPA defines investment as:

[E]very asset that an investor owns or control directly or indirectly, that has the characteristic of an investment including such characteristics as the commitment of capital or other resources, the expectation of gain or profit or the assumption of the risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debenture, other debit instrument, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

¹³⁷ *Id.* at Art. 10.12.1, CL-0001-ENG; [REDACTED]'s US Passport, C-0003-ENG; [REDACTED], Canada Passport, C-0004-ENG; and [REDACTED]'s Kingdom of Jordan Passport, C-0011-ENG.

(h) other tangible or intangible, movable or immovable property, and related property rights such as leases, mortgages, liens, and pledges [...].

81. At all relevant times of the measures complained of in this arbitration (since the first temporary gold seizure occurred on November 29, 2013; to July 23, 2018; October 11, 2018; and November 30, 2018), KML directly controlled protected investments, including, but not limited to, tangible movable objects such as gold, and its infrastructure for testing and selling gold.

C. *Ratione Temporis*: Peru and KML have consented to arbitration under the TPA and the ICSID Convention

82. Peru is a Contracting Party to the TPA. Peru signed the TPA on April 12, 2006, approved it on June 28, 2006, and it entered into force on February 1, 2009.¹³⁸ Article 10.17 of the TPA explicitly provides Peru's consent to submit claims under the TPA to arbitration, and states as follows:

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute [...].

D. KML has fulfilled the TPA's requirements to initiate arbitration

83. Chapter 10, Section B of the TPA provides the Investor-State Dispute Settlement mechanisms which govern this dispute.¹³⁹ Under Article 10.15 of the TPA, KML and Peru were required to attempt to resolve any investor-state dispute through consultation and negotiation.¹⁴⁰ KML, after sending its Notice of Intent on April 8, 2019, tried to engage in

¹³⁸ Statement of U.S. Trade Representative regarding the TPA entering into force, **C-0018-ENG**; and Peruvian legal gazettes regarding the TPA entering into force, **C-0019-SPA**.

¹³⁹ TPA, at Chapter 10, Section B, **CL-0001-ENG**.

¹⁴⁰ *Id.* at Art. 10.15.

(continued...)

good faith negotiations with Peru pursuant to Article 10.15 of the TPA. Peru ignored KML's approach.¹⁴¹

84. Article 10.16 of the TPA provides the following regarding submitting claims to arbitration:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach [...].

85. The dispute described in this memorial concerns breaches of the TPA by Peru that caused damage to a protected investor, KML, and its qualifying investments, as required by Article 10.16 of the TPA. The damages suffered by KML are directly related to the lost profit caused by Peru's action, and to Peru's progressive and creeping expropriation of KML's gold and enterprise. As such, KML submitted a request for arbitration under Article 10.16 of the TPA.¹⁴²

E. KML has complied with the TPA's requirements to submit its claims to arbitration after negotiations with Peru failed

86. Article 10.16 of the TPA also requires—after negotiations fail—that the following be complied with prior to submitting a claim for arbitration:

2. 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:

¹⁴¹ E-mail between KML and Peru regarding negotiations, C-0020-SPA.

¹⁴² TPA, at Art. 10.16, CL-0001-ENG.

(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.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention [...].

87. Furthermore, Article 10.18(2) requires that KML “consents in writing to arbitration in accordance with the procedures set out in this Agreement” and that it consent in writing to waive “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.”¹⁴³

88. KML has complied with the TPA’s requirements for submission of its claims to arbitration as follows:

- On April 8, 2019, KML provided Peru with written notice of its intention to submit the present dispute - more than 90 days before submitting its claims to ICSID arbitration.¹⁴⁴ The April 8, 2019 notice also: (i) stated the name, addresses and place of incorporation; (ii) identified the provisions of the TPA alleged to have been breached and any other relevant provisions; (iii) summarized Peru’s breaches for each claim; (iv) stated the approximate value of its losses that resulted from Peru’s breaches; and (v) notified Peru of its election to submit its claims to arbitration as the only dispute resolution mechanism.¹⁴⁵

¹⁴³ *Id.* at Art. 10.16.

¹⁴⁴ KML’ April 8, 2019, Notice of Intent, C-0022-ENG.

¹⁴⁵ *Id.*

- At the time of filing the request for arbitration in 2021, six months had elapsed since the events giving rise to KML's claims.
- KML's request also complied with the TPA's prescription period found in Article 10.18 because it sent Peru notices on April 8, 2019, and December 1, 2020.¹⁴⁶ Claimant's statements of April 8, 2019, and December 1, 2020, provided sufficient notice to Peru to preserve evidence and be subject to arbitration. The TPA breaches by Peru were irreversibly consummated, and damages to Claimant accrued and became permanent (*i.e.*, ripe for arbitration), on November 30, 2018. Moreover, some actions and omissions by Peru constitute stand-alone breaches of the TPA which occurred (*i.e.*, became cognizable under the TPA) within three years from the date of submission of the request for arbitration to ICSID, including from the issuance of the decision from the Corte Superior de Justicia de Lima dated October 11, 2018, and the ruling of the First Criminal Liquidator Court of July 23, 2018.¹⁴⁷
- KML has consented in writing to arbitration in accordance with the procedures set out in the TPA as required by Article 10.18(2)(a).¹⁴⁸
- KML has waived 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 of the TPA as described herein, as required by Article 10.18(2)(b)(ii).¹⁴⁹ These waivers shall be interpreted as broadly as necessary to satisfy KML's requirements to submit any express waiver required by Article 10.28(2)(b) of the TPA.¹⁵⁰
- KML also is not currently pursuing resolution of this dispute before Peru's administrative tribunals or courts, or any other binding dispute settlement procedures.¹⁵¹

89. KML never alleged (for submission to adjudication) a breach of an obligation under Chapter 10 of the TPA in proceedings before a court or administrative tribunal of Peru. This memorial concerns an arbitration and treaty breaches culminated and consummated

¹⁴⁶ TPA, at Art. 10.18, **CL-0001-ENG**.

¹⁴⁷ [REDACTED]. Ruling of the 1st Criminal Liquidator Court, July 23, 2018, **C-0097-SPA**.

¹⁴⁸ TPA at Art. 10.18(2)(a), **CL-0001-ENG**.

¹⁴⁹ *Id.* at Art. 10.18(2)(b)(ii).

¹⁵⁰ KML's Consent and Waiver Form, **C-0023-ENG**; and TPA, at Art. 10.28(2)(b), **CL-0001-ENG**. *See also*, Unanimous Resolution of the Members of KML regarding internal actions to authorize the Request for Arbitration, **C-0021-ENG**.

¹⁵¹ KML's Consent and Waiver Form, **C-0023-ENG**.

(continued...)

on November 30, 2018. No documents or requests whatsoever were presented by KML to Peruvian courts thereafter.

90. KML complied with the three-year statute of limitations set forth in Article 10.18(1) of the TPA.¹⁵² Such article, combined with 10.16(1)(a) of the TPA,¹⁵³ makes clear that the statute of limitations started running only when two concurrent conditions were met: (1) KML acquired knowledge that Peru breached the TPA; ***and*** (2) KML incurred loss or damage (*sufrió pérdidas o daños*) as a result of such breach. The TPA makes clear that a breach of such treaty by Peru, without actual damages (not only knowledge of potential damages) to a claimant, does not trigger the clock for purposes of Article 10.16(1) thereunder.

91. While some of the measures by Peru against KML started in 2013-14, those measures were, pursuant to Peruvian law, intrinsically temporary or interim; not permanent.

2. ¿Las medidas de inmovilizaciones al oro propiedad de KML tenían (o debían tener) carácter temporal e interino, o, permanente?

Respuesta corta: Si. Las medidas de inmovilización al oro propiedad de KML, según el derecho peruano vigente, debieron tener un carácter temporal e interino. Sin embargo, las autoridades jurisdiccionales peruanas, al ignorar continua y persistentemente las peticiones formuladas por KML, han propiciado que -de facto- las medidas cautelares impuestas tengan carácter permanente.

Evidence:

C-0107-SPA (Legal Opinion- [REDACTED]-Claimant's Memorial-SPA, question N° 2).

¹⁵² TPA, at Art. 10.18(1), CL-0001-ENG.

¹⁵³ *Id.* at Art. 10.16(1)(a).

(continued...)

92. KML, having satisfied all the requirements to submit a claim to arbitration under the TPA, submitted this dispute exclusively to arbitration under Article 10.16(1)(a)(i)(A) of the TPA, based on Peru's breaches of Section A (Chapter 10) of such Treaty.¹⁵⁴

IV. LEGAL BASIS FOR KML'S CLAIMS

A. The law applicable to the dispute

93. The ICSID Convention and the Treaty determine the rules of law under which the claims asserted in this proceeding must be adjudicated. Under the choice-of-law rules of the Convention and the Treaty, the claims are governed by the TPA and general international law and—to the extent not inconsistent with both of the foregoing—by Peruvian law.

94. Article 42(1) of the ICSID Convention states the general rule of law applicable to the merits of a dispute submitted to ICSID arbitration:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.¹⁵⁵

95. **The U.S.-Peru TPA.** As the claims in this proceeding are for breach of the TPA; that is, for breaches of substantive obligations imposed on Peru by the Treaty, the main source of law for the adjudication of those claims is such Treaty. The TPA is the body of law agreed by Peru and the United States of America (for the benefit of U.S. investors) for the adjudication of claims for breach of the substantive obligations imposed by the Treaty.

96. General principles of international law are also applicable to the merits of the dispute, especially as they bear on the interpretation and application of the Treaty and the

¹⁵⁴ *Id.* at Art. 10.16(1)(a)(i)(A).

¹⁵⁵ Convention on the settlement of investment disputes between states and nationals of other states (ICSID Convention), at Art. 42 (1), **CL-0042-ENG**.
(continued...)

standards of investment protection that the Treaty sets forth.¹⁵⁶ In connection with the foregoing, Article 10.22.1 of the TPA provides that when an arbitration claim is submitted by a claimant, on its own behalf, due to a breach by a respondent of an obligation under Section A of the Treaty—which is this case—“the tribunal shall decide the issues in dispute in accordance with the Treaty and applicable rules of international law.”¹⁵⁷

97. All breaches of the TPA specified in this memorial must be considered in conjunction with Article 10.4 thereof, which contains a most favored nation clause.¹⁵⁸

98. **Customary international law.** Article 10.5 of the TPA further provides that customary international law is also applicable to the merits of the dispute, especially as it bears on the interpretation and application of the Treaty in furtherance of the notions of fair and equitable and full protection and security.

99. **Domestic Peruvian law.** Peruvian law, where applicable, provides that Peru had a duty to act reasonably and proportionally,¹⁵⁹ as confirmed by its own judicial jurisprudence.

¹⁵⁶ See Vienna Convention on the Law of Treaties (Vienna Convention), at Art. 3, **CL-0043-ENG**.

¹⁵⁷ TPA, at Art. 10.22, **CL-0001-ENG**.

¹⁵⁸ *Id.* at Art. 10.4 (“[M]ost-Favored-Nation Treatment: [...] Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. [...] Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”).

¹⁵⁹ Official English translation of the Political Constitution of Peru, at Art. 200, **CL-0002-ENG**; Ruling of the Constitutional Court in case No. 0010-2002-AI-TC, dated January 3, 2003, at ¶ 195, **CL-0012-SPA**; Peruvian Criminal Procedures Code, published on July 29, 2004, at Art. VI of the Preliminary Title and Art. 253.2, **CL-0005-SPA**; and Act N° 27444 (General Administrative Procedure Act) (modified by the legislative decree No. 1029 of 2008), published on April 11, 2001, at Arts. 238.1, 238.2 and IV, 1.4 of the Preliminary Title, **CL-0013-SPA**.

4. *Bajo el derecho peruano, ¿Tenía el Estado peruano (Administración Pública) una obligación de actuar de manera proporcional y racional aun en el supuesto de que el oro inmovilizado fuese ilegal o se sospechase su ilegalidad? Por ejemplo, ¿Debía la merca sospecha de ilegalidad estar debidamente fundada?*

Respuesta corta: Sí, bajo el derecho peruano, el Estado peruano (Administración Pública) tenía, y tiene, una obligación de actuar de manera proporcional y racional aun en el supuesto de que el oro inmovilizado fuese ilegal o sospechase de su ilegalidad; y la mera sospecha de ilegalidad estar debidamente fundada.

Evidence:

C-0107-SPA (Legal Opinion-[REDACTED]-Claimant's Memorial-SPA, question N° 4).

100. Under Peruvian law, Peru had the legal burden of proving any alleged or suspected wrongdoing by KML or third parties. Peru breached its own domestic laws.

En efecto, si tomamos en consideración que el procedimiento para la imposición de medidas limitativas al amparo de la Ley N° 27379 (Exhibit CL-0004-SPA) es *inaudita parte* y por lo tanto la defensa de la parte afectada no tiene intervención alguna (hasta que tenga habilitado

el derecho al recurso, luego de la ejecución de la medida anticipada), es evidente que la carga de acreditar la concurrencia de los presupuestos de aplicación de las medidas (necesidad, urgencia, vinculación con un hecho punible) corresponde a la parte requirente o solicitante de la tutela cautelar (esto es, el Ministerio Público).

Ahora, en lo que corresponde al proceso principal (en el que se debe determinar si el mineral incautado proviene de actividades de minería ilegal) la carga de la prueba, por imperio del principio de presunción de inocencia, también corresponde al órgano acusador (el Ministerio Público). Conviene reconocer que la acreditación de este elemento del delito de minería ilegal suele realizarse mediante indicios dentro de los cuáles se encuentra el de mala justificación, por lo que en la práctica forense si existe cierta carga probatoria generada indirectamente sobre el vendedor de la carga. No obstante, esa afirmación no implica -de modo alguno- aceptar que exista una especie de alteración de la carga de la prueba. La carga de la prueba corresponde al órgano acusador.

Evidence:

C-0107-SPA (Legal Opinion-[REDACTED]-Claimant's Memorial-SPA, at ¶7.1).

B. Peru failed to accord fair and equitable treatment to KML

101. Article 10.5 of the TPA requires Peru to provide fair and equitable treatment (FET) to investments made by U.S. investors.¹⁶⁰ That provision states:

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; and
 - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

102. The scope of the FET provision is further clarified by Annex 10-A of the TPA, which explains that the provision protects investments from a broad range of State measures, not only denial of justice:

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, *the customary international law minimum standard of treatment of aliens refers to all customary international law*

¹⁶⁰ On the Fair and Equitable Treatment matter, see *CME Czech Republic BV v. Czech Republic*, Ad Hoc-UNCITRAL, Partial Award and Separate Opinion (13 September 2001), IIC 61 (2001), 9 ICSID Reports 121, 237-38 (2006), at ¶¶ 611–613, **CL-0019-ENG**; and *Técnicas Medioambientales Tecmed SA v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), IIC 247 (2003), 10 ICSID Reports 134, 191-92, 203 (2006), at ¶¶ 154, **CL-0022-ENG**.

(continued...)

*principles that protect the economic rights and interests of aliens.*¹⁶¹

103. Expounding the meaning of minimum standard of treatment, the *Waste Management, Inc. v. Mexico (II)* tribunal noted:

Taken together, the *S.D. Meyers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.¹⁶²

104. Echoing the *Waste Management (II)* tribunal, the *RDC v. Guatemala* tribunal explained that measures violating fair and equitable treatment under the minimum standard include conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory . . . involves a lack of due process. . . a complete lack of transparency and candor in an administrative process” or a “breach of representations made by the host State which were reasonably relied on by the claimant.”¹⁶³

a. Peru breached its commitment to treat KML fairly and equitably when it denied justice to KML

105. This case goes to the essence of fair and equitable treatment that Peru promised investors; namely, due process and access to justice. These protections are bedrock foundations of the rule of law and represent the cornerstone of investment protection—

¹⁶¹ TPA, at Annex 10-A (emphasis added), **CL-0001-ENG**.

¹⁶² *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB (AF)/00/3, Award, April 30, 2004, at ¶¶ 98-99, **CL-0045-SPA**; see also, *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), IIC 152 (2006), at ¶¶ 132–148 (holding that the same government conduct violated BIT provisions requiring fair and equitable treatment and prohibiting discriminatory treatment), **CL-0021-ENG**.

¹⁶³ *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, at ¶ 219, **CL-0076-ENG**.
(continued...)

impartial and effective judicial remedies are the touchstones through which an investor may protect and assert its property rights.¹⁶⁴

106. “It is recognized in literature and jurisprudence that the duty to provide due process is part of the obligation to provide fair and equitable treatment.”¹⁶⁵ States violate their duty to offer such protections where they fail to “afford [investors] an adequate opportunity, within a reasonable time, to vindicate their legitimate rights.”¹⁶⁶ Denial of justice is generally procedural in nature. As the *Un glaube v. Costa Rica* tribunal put it, “the test for denial of justice [...] looks principally to procedural fairness.”¹⁶⁷

107. Canvassing scholarly authority on the issue, the *Lion v. Mexico* tribunal explained that:

[P]rocedural denial of justice can be classified in subtypes: the right to access justice (A.); the right to be heard and to present one’s case (B.); and the right to obtain a decision without undue delay (C.). These are some of the separate manifestations of denial of justice and, if committed against an alien, constitute international wrongs which can be imputed against the State.¹⁶⁸

108. Similarly, the *Krederi Ltd. v. Ukraine* tribunal has explained that “the right of access to the courts or other adjudicatory bodies is a basic aspect of due process. Refusing such access constitutes the classical case of denial of justice.”¹⁶⁹ Moreover, denial of justice “may also stem from overly long proceedings, pursuant to the old adage of ‘justice delayed, justice denied’.”¹⁷⁰ While each case must necessarily be examined with reference to its

¹⁶⁴ See, e.g., TPA, at Art. 10-5(2)(a) (highlighting the promise of due process and access to justice as central components of the Treaty’s fair and equitable treatment protections), **CL-0001-ENG**.

¹⁶⁵

¹⁶⁶ *Reinhard Hans Un glaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, at ¶ 272, **CL-0047-ENG**.

¹⁶⁷ *Id.* at ¶ 273.

¹⁶⁸ *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 9 September 2021, at ¶ 220, **CL-0048-ENG**.

¹⁶⁹ *Krederi v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, at ¶ 451, **CL-0049-ENG**.

¹⁷⁰ *Id.* at ¶ 449.

(continued...)

specific facts, “[I]t is generally accepted that overly long court proceedings, i.e. undue delay which does not result from the litigants’ actions or inaction, may amount to a denial of justice.”¹⁷¹

109. Denial of justice can be occasioned by the behavior of a State’s non-judicial authorities, not just its courts. According to the *Iberdrola v. Guatemala* tribunal:

Concluye el Tribunal que no solamente hay denegación de justicia en lo que respecta a las actuaciones de los órganos judiciales, sino también, entre otras hipótesis, cuando un Estado le impide a un inversionista el acceso a los tribunales judiciales de ese Estado; en ese supuesto habrá denegación de justicia aun si el acto proviene del poder ejecutivo o del legislativo.¹⁷²

110. In this context, the *TECO v. Guatemala* tribunal identified denial of justice under the minimum standard of treatment as “a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning.”¹⁷³

111. Peru’s measures—in the aggregate—combined to deny KML due and process and access to justice. Specifically, (1) SUNAT justified its seizure and holding of Claimant’s gold on the basis of *temporary* immobilization orders, which *effectively* became permanent on November 30, 2108, thereby depriving KML of its property without due process of law; and (2) the Peruvian investigative and prosecutorial authorities neither charged, nor exonerated, KML with criminal wrongdoing, thereby exposing Claimant to undue delay, and keeping it in a legal black hole in which it could not assert its rights, and which caused irreversible damage to Claimant’s investment. Denial of justice, like indirect expropriation, can be the result of composite acts, accumulating over time to bring about a violation of the relevant treaty:

¹⁷¹ *Id.* at ¶ 455.

¹⁷² *Iberdrola Energia S.A. v. Republic of Guatemala I*, ICSID Case No. ARB/09/5, Award, 17 August 2012, at ¶ 444, CL-0050-SPA.

¹⁷³ [REDACTED]

While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court.¹⁷⁴

a. Peru has permanently deprived KML of its property without due process of law

112. Peru's measures have deprived KML of the use and enjoyment of certain of its gold assets and have destroyed the viability and value of KML's operations. These deprivations amount to the imposition, by Peru, of a criminal sanction on an investor which was (1) never charged; (2) tried; or (3) convicted of having committed a crime. These measures amount to elemental denial of due process.

113. *Peru has denied Claimant the opportunity to present a good faith buyer defense.* Defendants who are caught up in money laundering investigations generally have the ability to articulate a *bona fide* purchaser (or "good faith purchaser") defense in order to show that they had no hand in the alleged wrongdoing.¹⁷⁵ A *bona fide* purchaser defense posits that the buyer acquired the asset without knowledge of any wrongdoing on the part of the seller. This defense is available in both common and civil law jurisdictions.

¹⁷⁴ *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction, 19 September 2008, at ¶ 91, **CL-0052-ENG**.

¹⁷⁵ See Arts. 913 and 914 of the Peruvian Civil Code, which set forth the presumption of good faith (Art. 913: "*La posesión de un bien hace presumir la posesión de sus accesorios. La posesión de un inmueble hace presumir la de los bienes muebles que se hallen en él*"; and Art. 914: "*Se presume la buena fe del poseedor, salvo prueba en contrario. La presunción a que se refiere este artículo no favorece al poseedor del bien inscrito a nombre de otra persona*"), **CL-0044-SPA**.

Ahora, en lo que corresponde al proceso principal (en el que se debe determinar si el mineral incautado proviene de actividades de minería ilegal) la carga de la prueba, por imperio del principio de presunción de inocencia, también corresponde al órgano acusador (el Ministerio Público). Conviene reconocer que la acreditación de este elemento del delito de minería ilegal suele realizarse mediante indicios dentro de los cuáles se encuentra el de mala justificación, por lo que en la práctica forense si existe cierta carga probatoria generada indirectamente sobre el vendedor de la carga. No obstante, esa afirmación no implica -de modo alguno- aceptar que exista una especie de alteración de la carga de la prueba. La carga de la prueba corresponde al órgano acusador.

7.2. Ahora, es importante resaltar que el referido indicio de mala justificación (que, insisto, no limita el principio de presunción de inocencia) alcanzaría, todo lo más, al vendedor del mineral y no al comprador (esto es, KML) cuya intervención viene amparada por la aplicación del principio de confianza, factor reconocido como excluyente de responsabilidad penal.

En ese orden de ideas, si el Estado Peruano, a través de la persecución penal a cargo del Ministerio Público, quisiera atribuir al comprador de mineral el delito de minería ilegal tendría que acreditar -más allá de toda duda razonable- no solo que el mineral tendría origen ilícito, sino que el comprador conocía de dicha condición. Esta posibilidad, dada las particularidades del presente caso, sería inviable.

Evidence:

C-0107-SPA (Legal Opinion- [REDACTED]-Claimant's Memorial-SPA, question N° 7).

114. At no point in time did Peru afford KML the opportunity to present a bona fide purchaser defense and thereby secure the release of its gold. As the *Infinito Gold v. Costa Rica* tribunal explained, circumstances in which an investor is denied an opportunity to “make his case” present archetypal denial of justice claims: “[A] lack of remedy within the host State’s judicial system that deprives an investor from a fair opportunity to plead its case or implies that access to justice is virtually non-existent would amount to a denial of justice.”¹⁷⁶ That high bar is met in this case.

¹⁷⁶ *Infinito Gold v. Costa Rica*, ICSID Case No. ARB/14/5, Award 3 June 2021, at ¶ 483, CL-0053-ENG.

DADO CUENTA; Al escrito de fojas 1178 presentado por el Abogado de la Empresa KALOTI METALS & LOGISTIC: No siendo parte procesal en el presente proceso: TÉNGASE por no presentado su recurso. Al escrito de fojas 1180.

* * *

investigación. Al escrito 28616-2015 presentado por la representante de la empresa KALOTI METALS & LOGISTIC: Que verificándose de autos que no es el recurso presentado ser titular de los lingotes de oro incautados: NO HA LUGAR a lo solicitado; REQUIERASE que señale domicilio dentro real y/o procesal dentro del radio urbano para los efectos de las ulteriores notificaciones. Al escrito N° 34004-2015: Agréguese a los autos los documentos que se adjuntan. Al escrito N° 38360-2015 presentado por la Empresa KALOTI METALS & LOGISTIC. Al principal y otrosí: Que no siendo parte en el presente proceso penal; NO HA LUGAR a las copias certificadas solicitadas. A los escritos N° 45822-2015 y N° 47506-2015: Agréguese a los

Evidence:

C-0016-SPA (Decision from the *Cuarta Sala Penal Reos Libre*).

C-0100-SPA (Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML's petitions, at pp. 2).

115. Multiple requests made by, or on behalf or for the benefit of KML, were simply *de facto* ignored by Peru (even though, to the best of KML's knowledge and belief, Peru has never formally questioned KML's legal title to the gold):

- December 27, 2013: Proprietary Excluding Intervention Claim in favor of KML sent by [REDACTED] to [REDACTED] in which they informed that the goods subject to seizure ordered by Order No. 0230072504966 effectively belonged to KML, requesting to lift the measure because the goods belonged to a third party unrelated to the procedure initiated by the tax administration.¹⁷⁷
- January 20, 2014: Written communication notarized by [REDACTED], addressed to SUNAT, requesting the lifting of the immobilization of the gold ordered by means

¹⁷⁷ [REDACTED]. Proprietary Excluding Intervention submitted by [REDACTED] in favor of KML, December 27, 2013, C-0065-SPA.
(continued...)

of the Immobilization Order No. 316-0300-2014-000110, because the gold was the property of KML.¹⁷⁸

- January 21, 2014: Written communication sent by [REDACTED] to SUNAT requesting the lifting of the immobilization of the gold ordered by means of the Immobilization Order No. 316-0300-2014-00002 because the gold was property of KML.¹⁷⁹
- February 12, 2014: [REDACTED] and KML requested the lifting of the immobilization act No. 316-0300-2014-000002 through file No. 000-ADS0DT-2014-109740-1.¹⁸⁰
- April 16, 2014: KML appealed (as the legitimate owner of the gold) in the money laundering investigation against [REDACTED].¹⁸¹
- April 29, 2014: KML filed a request before the Ninth Provincial Prosecutor's Office of Callao to dismiss SUNAT's provisional seizure.¹⁸²
- August 05, 2014: Written communication dated August 4, 2014, sent to the 11th Provincial Criminal District Prosecutor's Office of Callao, Case No. 140-2014 signed by KML, regarding the investigation against [REDACTED] for the alleged commission of money laundering, in which KML submits a legal opinion of [REDACTED] showing that KML is the legitimate owner of the immobilized gold (KML also appointed lawyers to represent it).¹⁸³
- August 05, 2014: KML's written submission to the Ninth Provincial Criminal Prosecutor's Office of Callao regarding an analysis prepared by [REDACTED] pertaining to the transfer of property title under Florida law to determine when ownership of the gold acquired by KML was transferred from the suppliers to KML.¹⁸⁴
- April 29, 2015: Petition submitted by KML before the Sixth Criminal Court of Callao for the return of gold bars.¹⁸⁵
- May 25, 2016: Petition filed by KML before the Judge of the Eighth Criminal Court of Callao requesting the lifting of the seizure.¹⁸⁶
- June 07, 2016: Petition submitted by KML before the Callao Transitory Criminal Court requesting the lifting of the seizure.¹⁸⁷

¹⁷⁸ Notarized petition submitted by [REDACTED] requesting the lift of immobilization order No. 316-0300-2014-000110, January 20, 2014, **C-0082-SPA**.

¹⁷⁹ Petition submitted by [REDACTED] requesting the lift of immobilization order No. 316-0300-2014-000002, January 21, 2014, **C-0083-SPA**.

¹⁸⁰ Informe (report) N° 303-2014-SUNAT-3X3200, April 09, 2014, at pp. 5, **C-0084-SPA**.

¹⁸¹ KML appeal as the legitimate owner of the gold in the money laundering investigation against [REDACTED], April 16, 2014, **C-0086-SPA**.

¹⁸² Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, April 29, 2014, **C-0089-SPA**.

¹⁸³ Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, August 05, 2014, **C-0092-SPA**.

¹⁸⁴ Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, August 05, 2014, **C-0093-SPA**.

¹⁸⁵ Petition before the *Sexto Juzgado Penal del Callao*, **C-0013-SPA**.

¹⁸⁶ Petition before the *Octavo Juzgado Penal del Callao*, **C-0014-SPA**.

¹⁸⁷ Petition before the *Juzgado Penal Transitorio del Callao*, **C-0015-SPA**.

116. *Peru's sanctioning of KML has no rational basis.* Peru purportedly seized KML's gold in connection with investigations of certain gold suppliers in Peru. But the seizure of KML's gold bears no rational connection to an investigation *against suppliers* or other third parties. Claimant's gold is Claimant's property; not the property of the suppliers, who transferred the gold to KML in exchange for payment. By sanctioning or adversely affecting KML, Peru has punished a third party with regard to whom the State has never once articulated a rational connection to the investigation and criminal proceedings.

117. *Peru's seizure of KML's assets has become de facto permanent without a court order making it so.* Although SUNAT initially seized KML's gold assets under temporary immobilization orders, it has now been *eight years* since those orders were issued by a Peruvian authority. By any objective standard, this makes a mockery of the term "temporary." Despite having become *de facto* permanent in 2018, KML has never been informed of any Peruvian court order or judgment making the seizure *de jure* permanent as a consequence of a conviction.

b. Peru failed to provide KML with fair and equitable treatment by holding a prosecutorial sword of Damocles over KML's head

118. The unreasonable length of time that Peru has taken to conclude the criminal proceedings and other investigations, and return KML's gold assets constitutes a violation of the TPA's fair and equitable treatment provision.

119. While KML recognizes that a State has the right to take prudential measures in connection with a criminal investigation, no State is permitted to hold a prosecutorial sword of Damocles over a party's head indefinitely. *This is especially so where an entity has not been made a defendant in a criminal proceeding*, and where the State has never articulated a clear and rational connection between the entity and the alleged wrongdoing. As Claimant's Peruvian law expert, [REDACTED], has demonstrated, Peruvian law establishes a limit to impose restrictive measures, this is: 90 days, that can be extended up

to 90 more days.¹⁸⁸ Peru’s act and omissions with respect to Claimant manifestly run afoul of these limits and exceeded all parameters of reasonability and proportionality.¹⁸⁹

c. Peru denied KML fair and equitable treatment by treating similarly-situated investors differently in judicial proceedings

120. Peru failed to accord KML fair and equitable treatment by failing to treat Claimant in the same way that it was treating other, similarly-situated investors. Discriminatory conduct is unlawful where “investors in like circumstances are subjected to different treatment without a reasonable justification.”¹⁹⁰ Such discriminatory measures can constitute a violation of the fair and equitable treatment standard. As the *Pey Casado v. Chile I* tribunal explained:

En la jurisprudencia internacional y en la doctrina consta que un tratamiento discriminatorio por parte de autoridades estatales hacia sus inversores extranjeros constituye una violación de la garantía de tratamiento “justo y equitativo” incluida en algunos tratados bilaterales de inversión.¹⁹¹

121. In 2013 and 2014, Peru carried out gold seizures against a number of purchasers in Peru, not just KML. Among these was [REDACTED], a company based in Willemstad, Curaçao. Like KML, [REDACTED] also purchased gold from suppliers, and later exported it for re-sale.

122. The Peruvian courts, however, treated [REDACTED] differently from KML. Instead of denying [REDACTED]’s request to intervene in proceedings—as they had done with Claimant here—the Peruvian courts allowed [REDACTED] to assert its rights, which [REDACTED] did. This resulted

¹⁸⁸ Act No. 27379 (Act regarding the procedure to adopt exceptional measures for the limitation of rights in preliminary investigations) dated December 21, 2000, at Art. 4, **CL-0004-SPA**; Legal Opinion-[REDACTED]-Claimant’s Memorial-SPA, question N°5 and N°9, **C-0107-SPA**.

¹⁸⁹ On reasonableness and proportionality, see *Tecmed v. Mexico*, at ¶¶ 122, **CL-0022-ENG**.

¹⁹⁰ *Muszynianka Spółka z Ograniczoną Odpowiedzialnością v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, at ¶ 515, **CL-0054-ENG**.

¹⁹¹ *Victor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Award I, 8 May 2008, at ¶ 670, **CL-0055-SPA**; see also *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, at ¶ 287 (“Various tribunals have held that a discriminatory conduct is a violation of the standard of the fair and equitable treatment.”), **CL-0056-ENG**. (continued...)

in two judgments that ordered SUNAT to return the gold that SUNAT had seized from [REDACTED].¹⁹² The courts held that the gold bars seized by SUNAT were [REDACTED]'s property prior to the seizure measure, therefore deeming the measure illegal and confirming the previous court decisions that had ordered their return.¹⁹³ To the best of Claimant's knowledge, SUNAT has failed to comply with this court order as well, representing an occasion on which SUNAT has ignored the plain language of a court order.

123. There was no reason, in principle, for the Peruvian courts to treat these two investors differently. Both Claimant and [REDACTED] had gold seized under temporary immobilization orders in connection with purported anti-money laundering criminal investigations against certain gold suppliers in Peru. However, as shown above, Peruvian courts have indeed ruled in favor of [REDACTED] in several instances, while KML was never even allowed to participate in the legal proceedings in which its gold was at stake.

d. Peru denied KML fair and equitable treatment by treating domestic (Peruvian) purchasers of gold differently from foreign purchasers

124. Peru also breached Article 10.3 of the TPA.¹⁹⁴ Despite both foreign and international gold buyers being purchasers of gold from the same Peruvian supplier base, Peru treated foreign purchasers much worse than it did the domestic buyers. As [REDACTED] [REDACTED] has explained, SUNAT only pursued asset seizures against the foreign purchasers, while none of the domestic purchasers had any of their gold seized.¹⁹⁵ In principle, there is

¹⁹² Resolution N° 14 of the 20th Specialized Contentious-Administrative Court of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file N° 08717-2019-0-1801-JR-CA-20, **C-0111-SPA**; and Resolution N° 21 of the 6th Specialized Court in Administrative Litigation of Lima (Sub-specialty in tax and customs matters) of the Superior Court of Justice of Lima, file No. 8717-2019, **C-0112-SPA**.

¹⁹³ *Id.*

¹⁹⁴ TPA, Art. 10.3, **CL-0001-ENG** ([N]ational Treatment [...] Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. [...] Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”).

¹⁹⁵ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 48, **C-0103-ENG**.

no articulable reason for this difference in treatment—both the foreign and domestic (Peruvian) buyers were purchasing gold from the same suppliers.

48. I believe that the Peruvian government made sure that the gold was paid by KML first, as it preferred to affect, and accuse, foreign companies like KML, rather than Peruvian parties with local connections. KML did its homework correctly. The suppliers in Peru were paid by wire transfer from U.S. banks in Miami, and SUNAT (part of the Peruvian government) was well aware of that.

Evidence:

C-0103-ENG (Witness Statement- [REDACTED]-Claimant's Memorial-ENG, at ¶ 48).

125. It is therefore clear that Peru breached Article 10.3 of the TPA.

e. Peru's refusal to engage in discussions with KML following receipt of the notice of dispute represents a denial of fair and equitable treatment

126. KML sent the Special Commission representing the State in Investment Disputes a notice of dispute in connection with these claims on April 8, 2019.¹⁹⁶ KML received no response from Peru.

127. Under the TPA, the State has an affirmative obligation to engage in substantive discussions with a claimant in relation to a potential dispute. This obligation is all the more relevant here, where (1) an organ of the State (SUNAT) has been acting with virtually no transparency; and (2) where the same State agency has affirmatively disobeyed the rulings of the Peruvian courts.

128. In such situations, discussions triggered by the filing of a notice of intent take on particular importance because they have the potential to lead to constructive discussions that can help avoid—or narrow the scope of—a dispute. The Special Commission's

¹⁹⁶ KML April 8, 2019, Notice of Intent, **C-0022-ENG**.

obligation under the Treaty to engage in such negotiations is part of the commitment of transparency and good faith that Peru has committed to providing as part of the fair and equitable treatment standard of the Treaty.

129. The foregoing breaches of the fair and equitable standard, and related sub standards, specifically caused lost profits to KML, which are qualitatively and quantitatively separable from KML's expropriation claims. As further explained below in Section V, the lost profits claim has been quantified in US\$ 13,793,135, without pre or post award interest.¹⁹⁷

C. Peru's actions and omissions constitute an indirect expropriation of KML's assets, as well as its business enterprise

130. Peru's actions and omissions resulted in two distinct—but related—indirect expropriations for which Peru owes KML compensation. **First**, Peru's seizure of the five gold shipments constitutes an indirect expropriation of *certain of KML's assets*—namely, 449,282.54 net grams of gold. **Second**, the gold seizures triggered a downward spiral in KML's Peruvian business operations—all directly attributable to Peru's actions and omissions—from which the company never recovered. As a result, Peru's measures constitute an indirect expropriation of KML's business going concern, as well.

131. KML's two expropriation claims are separably cognizable from KML's lost profits claim because, under the TPA, the economic impact (lost profits), standing alone, may not have established that an indirect expropriation had occurred.¹⁹⁸ The indirect expropriation was materialized when KML was forced to terminate operations on November 30, 2018.

132. Conduct by Peru, very similar to the prolonged measures explained in this memorial, has been found to be expropriatory. In *Tza Yap Shum v. Peru*, an ICSID tribunal held that SUNAT indirectly expropriated a Chinese investor's investment in a Peruvian company by imposing interim measures that froze some of the company's assets, and

¹⁹⁷ This amount includes value lost profits in 2018; but excludes value of expropriated business, and the value of seized inventory (gold).

¹⁹⁸ TPA, Annex 10-B, at ¶ 3(a)(i), **CL-0001-ENG**; and *see LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), IIC 152 (2006), at ¶ 200 (holding that to constitute expropriation a deprivation of value has to be permanent and severe), **CL-0021-ENG**.
(continued...)

substantially impacted its ability to conduct business.¹⁹⁹ Just like KML is submitting in this memorial, the arbitral tribunal there found that Peru’s conduct was not in compliance with Peruvian law.

a. The concept of indirect expropriation

133. Article 10.7(1) of the TPA prohibits Peru from depriving investments of economic value without adequate compensation.²⁰⁰ Specifically, Article 10.7(1) provides that:

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 10.5.²⁰¹

134. Annex 10-B of the TPA provides additional guidance related to expropriation claims:

The Parties confirm their shared understanding that:

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

¹⁹⁹ See *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (5 July 2011), **CL-0080-SPA**.

²⁰⁰ See *Saluka Investments BV v. Czech Republic*, Partial Award (17 March 2006), PCA—UNCITRAL, IIC 210 (2006), at ¶ 266, **CL-0025-ENG**; and *Indirect Expropriation and its valuation in the BIT Generation*. W. Michael Reisman & Robert D. Sloane. Boston University School of Law (2004), **CL-0071-ENG**.

²⁰¹ TPA, Art. 10.7(1) (emphasis added), **CL-0001-ENG**.

indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.²⁰²

135. Indirect expropriation can occur in the form of a “creeping expropriation.” Here, the State takes a “a series of cumulative steps which, [...] together,” have the effect of substantially depriving the covered investments of their economic value. “The relevant focus of the inquiry for this purpose is the effect or result of the measure.” A “creeping expropriation is a particular type of indirect expropriation, which requires an inquiry into the particular facts” and the use of “creeping” to “describe this type of expropriation indicates that the entirety of the measures should be reviewed in the aggregate to determine their effect on the investment rather than each individual measure on its own.” As the *Siemens v. Argentina* tribunal explained:

[C]reeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.²⁰³

²⁰² *Id.* at Annex 10-B.

²⁰³ *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award (6 February 2007), at ¶ 263, CL-0018-ENG.

b. Peru's measures constitute an indirect expropriation of KML's gold assets (inventory)

136. Peru's cumulative measures over the past *eight years* compel the conclusion that Peru will not return the seized gold to KML, and that the gold has been indirectly expropriated by the State. The following sequence of actions and omissions demonstrate this:

- SUNAT seized five shipments of gold belonging to KML on the pretext that it needed to verify the origin for the gold. This was a baseless reason for the seizure because KML had already presented origin verification documents to SUNAT;²⁰⁴
- SUNAT's justification for the immobilization changed when it sought a court order for the gold shipments *on a different ground*. Later, SUNAT alleged that seizure of the gold was necessary to support a money-laundering investigation involving gold suppliers,²⁰⁵ but failed to articulate why KML—a buyer—was under suspicion of wrongdoing; in the meantime, the temporary and interim immobilizations of gold owned by KML continued, when they should have ceased, in the worst case, 180 days after they occurred;²⁰⁶
- Peru later mentioned, and generically included, KML in supervening anti-money laundering investigations without any rationale;²⁰⁷
- The Peruvian press began writing stories about the immobilizations affecting KML's five shipments, tarnishing Claimant's business reputation in Peru.²⁰⁸ Given that the alleged money-laundering investigation was strictly confidential, it stands

²⁰⁴ See *supra* at ¶ 40.

²⁰⁵ *Id.*

²⁰⁶ See Act No. 27379 (Act regarding the procedure to adopt exceptional measures for the limitation of rights in preliminary investigations) dated December 21, 2000, at Art. 4, **CL-0004-SPA**; and Legal Opinion-[REDACTED]-Claimant's Memorial-SPA, question N°5, **C-0107-SPA**.

²⁰⁷ Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 1-18, **C-0052-SPA**; [REDACTED].

²⁰⁸ News articles and books that replicated negative facts unfairly linked to KML by Peru, **C-0051-ENG/SPA**; see also *supra*, at ¶ 59.

(continued...)

- to reason that *the Peruvian Government was the source of these damaging leaks to the press* (as it seems to be Peru’s practice in other cases in the gold industry);²⁰⁹
- Despite the immobilizations of the gold, the Peruvian authorities have never stated specific facts explaining why KML was mentioned in supervening general investigations starting in 2015;
 - Neither [REDACTED] nor KML have ever been interviewed or questioned by authorities in connection with an alleged money-laundering investigation, or criminal proceedings;
 - [REDACTED] has never been arrested, and neither KML, nor [REDACTED] [REDACTED] have ever been indicted in connection with the alleged money-laundering investigation, or associated criminal proceedings;
 - Neither [REDACTED] nor KML have stood trial in connection with any alleged money-laundering criminal proceedings;
 - Neither [REDACTED] nor KML have ever pled guilty to any wrongdoing whatsoever in connection with any money-laundering investigation or criminal proceedings;
 - SUNAT has never informed KML when, or under what circumstances, the five immobilized gold shipments would be returned to Claimant;
 - In 2016, KML warned Peru that Peru’s actions could potentially become a future expropriation under the TPA (as it eventually happened on November 30, 2018).
 - When KML tried to intervene in criminal proceedings against certain gold suppliers, the court shut Claimant out, declaring that KML could not assert its rights because it was “not a party” to the criminal proceedings;²¹⁰
 - When KML sent a notice of dispute to the Peruvian Government in 2019, it received no response;²¹¹

²⁰⁹ “Raúl Linares dice que no está implicado en el caso Cuellos Blancos”, article by Peruvian newspaper *Gestión*, **C-0114-SPA**.

²¹⁰ Decision from the Cuarta Sala Penal Reos Libre, **C-0016-SPA**; and Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML's petitions, **C-0100-SPA**.

²¹¹ KML April 8, 2019, Notice of Intent, **C-0022-ENG**.

(continued...)

- A Peruvian court recognized KML’s ownership of at least part of the gold on October 11, 2018;²¹² and, more importantly, Peru has never formally questioned KML’s ownership of any of the seized gold;
- As explained above, the arbitrary, illegal and unreasonable nature of the measures taken by SUNAT has been recognized by Peruvian court decisions in cases similar to KML's;²¹³ and
- When KML submitted its Request for Arbitration in April 2021,²¹⁴ it received no response from the Peruvian Government in connection with its request for consultations. Peru has refused to engage in any discussions, negotiations or consultations with KML.

137. KML’s experience in Peru demonstrates an almost paradigmatic case of creeping expropriation, in which not one action—by itself—constitutes the expropriation, but taken together, the cumulative “steps [...] eventually [had] the effect of an expropriation” in 2018.²¹⁵

138. Analyzed against the framework of the Treaty’s Annex 10-B,²¹⁶ Peru’s actions and omissions amount to an indirect expropriation. There is no dispute that Claimant’s gold

²¹² Resolution No. 4, dated October 11, 2018, issued by the Third Civil Chamber of the Supreme Court of Peru, **C-0110-SPA**.

²¹³ See *supra* at ¶ 121-123.

²¹⁴ KML Request for Arbitration, dated April 30, 2021, **C-0001-ENG**.

²¹⁵ *Siemens v. Argentina*, Award, at ¶ 263, **CL-0018-ENG**.

²¹⁶ Annex 10-B of the TPA, **CL-0001-ENG**, provides:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(continued...)

assets have been seized by—and are in the custody of—Peru since 2013. This “outright seizure” may even go beyond what is required under Annex 10-B(3) for indirect expropriation, as it may closely resemble a *direct expropriation*, as defined under Annex 10-B(2).²¹⁷ Peru’s seizure of the gold has indisputably caused an “adverse effect” on Claimant, which has been entirely deprived of the use and enjoyment of its property during these eight to nine years.²¹⁸

139. Moreover, Peru’s actions have interfered with KML’s “distinct, reasonable investment-backed expectations.” *First*, Claimant’s hundreds of previous transactions with the same suppliers had led KML to reasonably believe that it would encounter no problems with buying, and later selling the gold. *Second*, KML purchased the gold from suppliers who were previously vetted by the State, and who appeared in a supplier database maintained by the Peruvian Government.²¹⁹

140. Finally, Peru’s actions do not constitute broadly applicable “non-discriminatory regulatory actions [...] designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment.” To the contrary, they represent discriminatory conduct against one company completely contradictory to the rule of law, and without a rational basis.

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

²¹⁷ *Id.* (“The first [type] is direct expropriation, *where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.*”) (Emphasis added).

²¹⁸ *Id.* at Annex 10-B(3)(a)(1).

²¹⁹ *See supra*, at ¶ 15.

(continued...)

141. This particular breach by Peru of the TPA caused damage to KML of US\$ 26,099,826, as explained below in Section V.²²⁰

c. Peru's measures constitute an indirect expropriation of a going concern enterprise

142. Peru's prolonged measures also brought about an indirect expropriation of the entirety of KML's business operations. Peru's drawn-out measures (1) led to a sharp decline in gold suppliers' willingness to sell to KML; (2) led to a decline in the amount of gold that [REDACTED] was able to buy from KML; and (3) placed an overwhelming debt-servicing burden on KML which eventually caused the company to collapse.

143. In order to understand the financial impact of the gold seizures on Claimant, it is important for the Tribunal to appreciate the precise nature of KML's business in Peru—how the company made money, and why it was competitive in the industry.

144. KML essentially transacted buying gold in Peru and selling it to buyers abroad. The difference between the price at which KML *purchased* the gold in Peru, and the price at which it *sold* the gold overseas represented KML's profit margin (and one of several sources of revenue) on any particular sale. KML's business strategy was simple: offer very attractive prices to its suppliers, and competitive prices to its buyers. While this strategy meant that KML earned less on each trade—its profit margin was smaller than the profit margin of its competitors—it earned the business of many sellers, and buyers. Claimant roughly earned a 1% profit margin on its transactions in Peru.²²¹

145. Because of its aggressive pricing, Claimant's only option for increasing overall profits was to buy and sell gold in substantial volumes. Critical to this model were (1) suppliers willing to sell large volumes of gold to Claimant; and (2) buyers willing to purchase those same large volumes. KML was fortunate in that it had both: a large number of suppliers in Peru, willing to sell substantial quantities of gold to Claimant, and a

²²⁰ Value of seized inventory (gold) close to today's date.

²²¹ To illustrate, on the purchase and resale of US\$ 100 million worth of gold, Claimant made approximately US\$ 1 million in profit; on the purchase and resale of US\$ 600 million worth of gold, Claimant made approximately US\$ 6 million in profit.

voracious buyer in [REDACTED], which essentially agreed to buy as much gold from KML as it could source. These two groups ensured the viability of Claimant’s low-margin, high-volume business model, leading to an increase in KML’s business: in 2013, KML turned approximately US\$ 1.33 *billion* worth of precious metals.²²²

146. KML borrowed money to finance its purchases of gold. Since Claimant paid its suppliers at the time of delivery—not resale—Claimant itself bore the risk of not being able to recover its investment in a particular purchase of gold up until the time a buyer made payment and took possession. This made Claimant an anomaly in an industry where middlemen typically only paid suppliers once *they themselves* had received payment from a buyer. Typically, this risk did not pose a considerable problem for KML because it relied on one principal buyer, [REDACTED] to quickly take possession of the gold, at which point Claimant was able to relinquish its risk.

147. Peru’s seizure of Claimant’s gold torpedoed Claimant’s commercial strategy in Peru, leading eventually to the company’s collapse in 2018 for the following three principal reasons.

148. ***Peru’s actions occasioned a sharp decline in KML’s supply of gold.*** Peru’s series of gold seizures in 2012 and 2013 were reported in both the domestic and international press.²²³ Because of Peru, these reports painted KML—as well as [REDACTED] himself—in sensationalistic terms, recklessly tying Claimant to alleged money-laundering activity, even though the Peruvian authorities had never questioned, much less indicted or put KML on trial for such conduct.

149. Because of the ubiquitous nature of these press reports, many of Claimant’s suppliers became aware of them and began decreasing the volume of business they did with Claimant. Colloquially put, these press reports “put a chill” on KML’s ability to purchase large quantities of gold, severely dampening supply. As [REDACTED] has explained:

²²² Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶ 5.15, C-0106-ENG.

²²³ See *supra*, at ¶ 58; and KML transaction summary of all purchases between 2012 and 2018, C-0030-ENG.

54. Many local companies and providers would not deal with KML because the company was allegedly involved in corruption in Peru (Exhibit C-0050-ENG). Because of the arbitrary actions of Peru, many press articles connected KML to unfounded allegations of money-laundering and corruption, while the case of [REDACTED] (which is unrelated to KML) attracted particular attention in Peru and the United States (Exhibit C-0051-ENG/SPA). Many banks and suppliers (sellers of gold) became concerned and reluctant to deal, or be in business, with KML, (Exhibit C-

0027-ENG) which in practice made it impossible for KML to reach its target of buying 45 tons of gold per year in Peru. The main driver of KML's very safe profits was based on volume of gold and quick resale, mainly to [REDACTED].

Evidence:

C-0103-ENG (Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 54).

150. This reaction was logical from the standpoint of the sellers (supplier of gold to KML): they did not want to risk selling large volumes of gold, and having payments delayed—or thwarted completely—in the event that the gold was seized by SUNAT, and KML could not re-sell the gold and pay the suppliers. As Mr. Smajlovic has showed, the volume of KML's gold purchased in Peru declined precipitously after the five seizures by SUNAT, dropping to 1.64% of Peru's gold market from 9.25% of Peru's gold market during the years 2013-15.²²⁴

151. Moreover, SUNAT's widely publicized seizures of KML's gold also began to affect KML's ability to maintain and use bank accounts, further handicapping KML's ability to do business.²²⁵

²²⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at Figure 3, **C-0106-ENG**.

²²⁵ Witness Statement-[REDACTED]-Claimant's Memorial-ENG, at ¶ 55, **C-0103-ENG** ("With banks closing KML's account, it became impossible to continue paying suppliers promptly (faster than our (continued...))

152. *Peru's actions created an overwhelming debt burden for KML.* Consistent with its general practice, KML financed its purchase of the five gold shipments that SUNAT seized. To purchase the gold, Claimant borrowed US\$ 11.9 million at interest rates that ranged from 4.75% to 7.5%, depending on the amount of the loan,²²⁶ to [REDACTED]. When SUNAT seized Claimants' five gold shipments, it put Claimant in a financial bind: since KML could not sell the seized gold, it could not repay the loan that it had secured to purchase the gold from its suppliers in the first place. Moreover, as a company with only US\$ 800,000 initial capitalization, Claimant did not have other cash-on-hand to pay off the loan independently. As a result, KML had to keep accruing interest on the loan—and is still continuing to accrue debt to this day. These interest amounts are considerable. As Mr. Smajlovic has showed, they amounted to maintaining a loan balance that exceeded \$8 million per month.²²⁷ The interest accrual ate into a very considerable portion of the Claimant's profits, significantly weakening the long-term viability of its commercial success.

153. As [REDACTED] explains:

competitors, as we did in 2013). Banks would not lend money to KML if KML's accounts were being closed. Without U.S. bank accounts, and a global media scandal which Peru unfairly connected to KML, many suppliers (sellers of gold) all over the world did not want to deal with KML."); *see also*, notice of closure of bank accounts of KML, **C-0027-ENG**.

²²⁶ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶¶ 10.8, 10.17, **C-0106-ENG**.

²²⁷ *Id.* Annex 1, at pp. 70, ¶ 10.8- 10.9.

55. With banks closing KML's account, it became impossible to continue paying suppliers promptly (faster than our competitors, as we did in 2013). Banks would not lend money to KML if KML's accounts were being closed. Without U.S. bank accounts, and a global media scandal which Peru unfairly connected to KML, many suppliers (sellers of gold) all over the world did not want to deal with KML. The cash-flow of KML was also adversely affected by the impossibility of selling (and turning into cash) the gold unfairly seized by Peru in 2013 and 2014. The worldwide operations of KML were crippled by the actions of Peru. KML could not effectively operate in other markets due to Peru's adverse marketing efforts (attacking KML's reputation) and misinformation against KML.

Evidence:

C-0103-ENG (Witness Statement-██████████-Claimant's Memorial-ENG, at ¶ 55).

154. Peru's measures also forced KML to suffer adverse effects on working capital and higher cost per unit.²²⁸

155. This particular breach by Peru of the TPA caused damages to KML of US\$ 47,296,862, without pre or post award interest, as explained below in Section V.

V. COMPENSATION

A. Overview and summary

156. KML is making three separate main heads of damages in this arbitration against Peru, which require compensation: (i) lost profits (breach of Articles 10.3 and 10.5 of the TPA); (ii) indirect expropriation of gold inventory (breach of Article 10.7 of the TPA); and

²²⁸ *Id.* Annex 1, at pp. 60-71, ¶ 10.3, 10.6.

(iii) indirect expropriation of KML’s enterprise as a going concern business (breach of Article 10.7 of the TPA). Damages can be summarized as follows (as of March 2022):

Head of Damage	Substantive breach by Peru	Relation	Quantum Methodology	Amount in US\$
Lost Profits	Arts. 10.3 and 10.5 of the TPA	Incremental cash flow lost <u>until</u> November 30, 2018	Cash flow analysis	13,793,135
Expropriation of gold inventory	Art. 10.7 of the TPA	Physical, tangible assets (gold)	Price of gold	17,674,623 (plus pre-award interest) <i>or</i> 26,099,826 (as of February 2022)
Expropriation of enterprise as a going concern business	Art. 10.7 of the TPA	Cash flow projected <u>after</u> November 30, 2018	Discounted Cash Flow	47,296,862
Pre-award interest			Article 10.7(3) of the TPA	14,234,049 (March 2022)
Tax indemnity (gross-up)	Art. 10.7 of the TPA		Article 10.7(2)(d) of the TPA	25,562,481

157. KML commenced its operations in 2011 and within two years of operating in Peru KML increased its gold purchases by a multiple of 54 (*i.e.*, 54 times) and positioned itself as a major market player in Peru with strong profitability by 2013.²²⁹ This was attributable to the increased demand of its customer base for precious metals and to its competitive

²²⁹ *Id.* at ¶ 2.2; and Witness Statement- [REDACTED]-Claimant’s Memorial-ENG, at ¶¶ 33-35, 8, C-0103-ENG.
(continued...)

business strategy.²³⁰ Additionally, the demand for gold sales were projected to continue to rise and KML was well situated to continue taking advantage of its strong position in the purchases of Peruvian gold.²³¹ In fact, as shown below, the value of KML's enterprise as a going concern would have increased further if it had not been expropriated by Peru.²³²

158. In November 2013, Peru seized one of KML's shipments of gold, followed by four additional seizures in January 2014, for a total of five gold seizures worth more than US\$ 26 million dollars (at today's current market prices).²³³ This was followed by a campaign against KML (traceable to Peru), tarnishing its reputation in Peru and other Latin American countries.²³⁴ This further affected KML's and ██████████'s relationship with their suppliers, lowering the amount of gold they were able to purchase, and ultimately resulted in a complete loss of the KML business on November 30, 2018.²³⁵ Due to the loss of its established vendor base and its ruined reputation, KML was never able to return to a position in which it was able to purchase similar quantities of gold as it had acquired in 2013.²³⁶ Despite ██████████'s fervent efforts, KML was unable to engage with enough new suppliers that could replenish similar previous quantities.²³⁷

159. Further, because of Peru unduly prolonged interim seizures of gold, a drawn-out loss of access to the significant gold quantities resulted in a greater cost of operating KML's business, carrying greater financing costs, and lower profits.²³⁸ Additionally, the lengthened inability to sell the inventory of those five shipments—that are still to this date in Peru's possession—caused KML to be unable to access liquid funds; and subsequently, after

²³⁰ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, ¶ 6.19, C-0106-ENG; and Witness Statement-██████████-Claimant's Memorial-ENG, at ¶¶ 33-35, 8, C-0103-ENG.

²³¹ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.25 and at ¶ 5.16, C-0106-ENG; *also see*, ██████████ letter to KML dated September 10, 2013, C-0047-ENG.

²³² Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.34, Figure 15, C-0106-ENG.

²³³ *Id.* at ¶ 2.3.

²³⁴ Witness Statement-██████████-Claimant's Memorial-ENG, ¶¶ 54, 13, C-0103-ENG.

²³⁵ *Id.* at ¶ 57.

²³⁶ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 2.4, C-0106-ENG.

²³⁷ *Id.*

²³⁸ *Id.* at ¶ 2.5.

(continued...)

exhausting all of its options, KML was forced to shut down its operation due to insolvency in November 2018.²³⁹

160. As explained above in Section IV of this Memorial, the expropriatory measures taken by Peru are in breach of its obligations under the Treaty.²⁴⁰ Peru's wrongful protracted measures have permanently deprived KML of the value of its investments, without compensation.²⁴¹ Consequently, KML is entitled to reparation in accordance with the standards prescribed by international law for internationally wrongful acts. Under those standards, KML is in principle entitled to *restitutio in integrum*, *i.e.*, to be restored to the position KML would have occupied if Peru's wrongful conduct had not occurred.

161. KML is not opposed to receiving back its entire inventory of gold seized (unfairly kept by Peru for far too long), as partial restitution for its second main head of damages (indirect expropriation of gold inventory). However, restitution of lost profits (first main head of damages) and expropriation of enterprise (third main head of damages) is in practice impossible; for these two claims, restoration of the *status quo ante* in kind is not feasible. In any event, KML has the right to receive from Peru monetary compensation that financially puts KML in the same position it would have been, absent Peru's wrongful acts.²⁴²

162. To calculate the *quantum* of damages in accordance with applicable legal standards, KML engaged Mr. Almir Smajlovic and the consulting firm Secretariat Advisors, LLC (the Quantum Expert).²⁴³ Secretariat is a very prestigious, global economic consulting firm. Mr. Smajlovic manages Secretariat's Disputes Forensics & Investigations practice, where he focuses on damages quantum in international commercial and investment treaty arbitration matters.²⁴⁴ He has over ten years of experience in the areas of damages quantum and other

²³⁹ *Id.*

²⁴⁰ TPA, at Art. 10.5 and 10.7, **CL-0001-ENG**.

²⁴¹ *Id.* at Art. 10.7(1) and Annex 10-B; see also, *Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18; ARB/07/15, Award (28 February 2010), IIC 458 (2010), at ¶ 390 (noting that absence of due process is sufficient to support a finding that the expropriation was wrongful), **CL-0026-ENG**.

²⁴² TPA at Art. 10.7(1) and Annex 10-B, **CL-0001-ENG**.

²⁴³ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 1.1, **C-0106-ENG**.

²⁴⁴ *Id.* at ¶ 1.6.

(continued...)

financial, economic, forensic, and accounting-related analysis.²⁴⁵ Further, Mr. Smajlovic has served as an expert in over 100 substantive valuations in noncontentious and contentious matters in Europe, Asia, Middle East, Africa, North America, and South America.²⁴⁶ The Quantum Expert was engaged to perform an independent assessment of the value of the Claimant’s losses caused by the Peru’s wrongful measures.²⁴⁷ The Quantum Expert’s valuation analyses, set forth in detail in their report, are summarized below.

163. Based on the Quantum Expert’s analysis, by November 30, 2018, all of the prolonged measures taken by Peru resulted in permanent and irreversible economic losses for KML.²⁴⁸ KML’s equity turned to negative US\$ 13,649,821 on that date, and KML became *de facto* bankrupt after having to write off its inventory.²⁴⁹ November 30, 2018, represents the date that Peru’s expropriation of KML’s investments became permanent and fully irreversible. For that reason, November 30, 2018, is both the date of breach by Peru of the TPA, and the appropriate valuation date (Valuation Date) for the Quantum Expert’s analysis throughout his report.²⁵⁰

164. As of 2013, KML purchased approximately 9.25% of the total gold produced in Peru.²⁵¹ Based on ██████████’s witness statement, he had the expectation that purchases from Peru would at the very least double by the end of 2014; his goal was to purchase 45,000 kilograms of gold from Peru’s market on an annual basis.²⁵² The Quantum Expert believes this to be a “reasonable and well grounded” expectation based on his analyses.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at ¶ 1.9.

²⁴⁷ *Id.* at ¶¶ 1.3-1.4.

²⁴⁸ *Id.* at ¶ 6.10.

²⁴⁹ *Id.* at ¶ 6.12.

²⁵⁰ *Id.* at ¶ 2.16. Also, for issues relating to valuation specifically in indirect expropriations, including the setting of an appropriate valuation date (*vis-à-vis* treaty breach date), *see generally: Indirect Expropriation and its valuation in the BIT Generation*, W. Michael Reisman & Robert D. Sloane, Boston University School of Law (2004), **CL-0071-ENG**.

²⁵¹ Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶ 2.2, **C-0106-ENG**.

²⁵² *Id.* at ¶ 6.25; Witness Statement-██████████-Claimant’s Memorial-ENG, at ¶23, **C-0103-ENG**; and ██████████ letter to KML dated September 10, 2013, **C-0047-ENG**.

6.25 Based on total demand from Dubai, [REDACTED] s expectations were to employ his pragmatic market strategy and obtain, on an annual basis, 45,000 kilograms of gold from Peru's gold market (being conservative, however, my model assumes much less than 45,000 kilograms of gold purchased by KML in Peru).¹⁶⁹ In my opinion, and based on the actual performance of KML, such expectation was reasonable and well

grounded. The remaining portion of the gold would have been primarily acquired from other Latin America's countries, Caribbean and the United States.¹⁷⁰

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.25).

165. In accordance with Article 10.16 of the TPA, KML is entitled to claim damages for historical lost profits; Fair Market Value (FMV) of Claimant's inventory (gold assets); and FMV of its expropriated enterprise, as of November 30, 2018.²⁵³

166. The Quantum Expert states that Fair Market Value (FMV) is in accordance with Article 10.7 of the Treaty, and is the appropriate standard of value and valuation approach in this case.²⁵⁴ His "but-for" KML's premise of value is calculated under the assumption of a going concern.²⁵⁵ It was also determined that, for the expropriation of the enterprise (third head of damage), discounted cash flow (DCF) is the appropriate method to calculate FMV in this case.²⁵⁶ No weight was placed on KML's (higher) enterprise value determined using a single comparable company data.²⁵⁷ It was only used to check for reasonableness of revenue estimates, cost estimates, overall profitability of the enterprise, and discount rate used.²⁵⁸

²⁵³ TPA, at Art. 10.16., **CL-0001-ENG**.

²⁵⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 2.7, **C-0106-ENG**.

²⁵⁵ *Id.* at ¶ 4.5.

²⁵⁶ *Id.* at ¶ 4.12.

²⁵⁷ *Id.* at ¶ 7.1.

²⁵⁸ *Id.*

(continued...)

167. For the diminution in FMV under the income approach, the Quantum Expert discounted the projected future cash flows from KML's Investments under two scenarios.²⁵⁹ The first scenario is modeled as cash flows as they would have occurred absent Peru's measures and discounted them to the Valuation Date also assuming a level of risk appropriate based on the absence of such wrongful measures.²⁶⁰ The discount rate used is 5.19%.²⁶¹ The second scenario was based on actual figures reported in KML's financial statements.²⁶²

168. For both the *historical lost profits claim* (first main head of damage) and the *expropriation of the enterprise claim* (third main head of damage), but-for cash flows were used to calculate a hypothetical scenario absent the wrongful measures.²⁶³ The Quantum Expert also used reasonable hypothetical costs/expenses to subtract from his but-for revenue scenarios.²⁶⁴

169. For the third main head of damages (expropriation of enterprise), the damage sustained by KML consists of the loss of the fair market value of the KML enterprise as a going concern. There, *at a minimum*, KML is entitled to compensation equal to the fair market value of the KML enterprise before the expropriation measure became irreversible. The Quantum Expert has estimated this minimum amount of compensation owed to the Claimant and he refer to this valuation as the "*Ex Ante Approach*."²⁶⁵

170. The compensation to which KML is entitled should be equal to (i) the lost profits related to the operation of the KML enterprise that KML would have received between the date of initial physical dispossession (2103-14) and the Valuation Date, brought forward to the date of the Award; *plus* (ii) the fair market value of the seized inventory (gold); *plus* the (iii) fair market value of the KML enterprise as of the Valuation Date, brought forward to

²⁵⁹ *Id.* at ¶ 2.9.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at ¶ 6.1.

²⁶⁴ *Id.* at ¶ 6.48.

²⁶⁵ "*Ex ante*" refers to the fact that this analysis is based only on information available before or at the time of the unlawful act.

(continued...)

the date of the Award. The Quantum Expert has provisionally calculated pre-award interest and seized inventory value as of March 04, 2022, as a placeholder for the date of the Award, in the expectation that he would update his calculations as of a date as close as possible to the date of the hearing or the date of the Award.²⁶⁶

171. The Quantum Expert first calculated the foregone cash flows up to the Valuation Date, demonstrating KML's lost profits (breach of Articles 10.3 and 10.5 of the TPA), and separated this head of damages to avoid double counting.²⁶⁷ Second, he calculated the indirect expropriation of the inventory (gold) in two scenarios: (1) as of the date of his report (March 04, 2022),²⁶⁸ and (2) as of the Valuation Date,²⁶⁹ and also separated this head of damages to avoid double counting. Third, he calculated the foregone cash flows up to 2048, demonstrating through a thorough and reasonable hypothetical, the value of the indirectly expropriated enterprise.²⁷⁰ Fourth, he added pre-award interest through March 2022 to the present value of lost profits and the value of expropriated business.²⁷¹ Fifth, to avoid double or unfair taxation, he grossed up the after-tax damages' figures to the to the present value of lost profits and the value of expropriated business.²⁷²

172. As explained in detail below, the *quantum* of compensation is approximately **US\$ 118.6 million** (assessed as of March 04, 2022, and subject to updating to the date of the Award).²⁷³ By comparison, the Quantum Expert calculated that, if the seized inventory of gold were valued as of the Valuation Date (November 30, 2018), the *quantum* of total

²⁶⁶ KML asked Quantum Expert to provide an alternative calculation in which he valued the seized gold using market prices close to the report date. In this scenario no pre-award interest is applied as the value of inventory is based on a recent price.

²⁶⁷ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.36, C-0106-ENG.

²⁶⁸ *Id.* at ¶ 6.7, Table 5.

²⁶⁹ *Id.* at ¶ 6.8, Table 6.

²⁷⁰ *Id.* at ¶ 6.23.

²⁷¹ *Id.* at ¶ 8.7, Tables 15, 16.

²⁷² *Id.*

²⁷³ *Id.* at ¶ 8.8, Table 17. This figure is calculated using London Interbank Offered Rate (LIBOR) plus four percent as the appropriate award interest rate. *See Id.* at ¶ 8.4.

(continued...)

compensation, inclusive of pre-award interest through March 04, 2022, would be approximately **US\$ 123.8 million**.²⁷⁴

173. The Tribunal’s Award should also address other aspects of the full reparation required by international law. Because the Quantum Expert has calculated compensation on an after-tax basis, KML is entitled to protection against any: (1) attempt on the part of Peru to itself levy a tax on the compensation to be awarded; or (2) tax incurred as a direct consequence of Peru’s measures²⁷⁵ KML is also entitled to pre-and post-Award compound interest for the relevant periods,²⁷⁶ and to its costs and attorneys’ fees associated with this proceeding.

B. The applicable standard of compensation

174. Under Article 10.16 of the Treaty, the Award to be rendered in this case must determine whether there is a breach by Peru of its obligations under section A of the Treaty, whether “the enterprise [KML] has incurred loss or damages by reason of, or arising out of that breach,” and that the claim for breach is “directly related to the covered investment that was established.”²⁷⁷

175. In summary, first Peru’s prolonged conduct relating to the seizure of the five gold shipments constitutes an indirect expropriation of certain KML assets; namely, 449,282.54 (net) grams of gold. Second, the expropriation led KML’s Peruvian business operations into a downward spiral. This contributed to also causing:

²⁷⁴ *Id.* at Table 16.

²⁷⁵ *Id.* at ¶ 6.65 (“In an ordinary course of business, Claimant (i.e., its investors) would have received annual proceeds and would not have been subject to any taxation since cash flows are not net of income tax”).

²⁷⁶ *Id.* at ¶ 8.1.

²⁷⁷ TPA, at Art. 10.16(1)(b) (“In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: . . . (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A . . . and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach . . . 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.”), **CL-0001-ENG**.

- The loss of profits (2014-18); and
- The indirect expropriation of the entire KML enterprise as a going concern.

176. Article 10.7 prohibits expropriation of investments, except by satisfying certain specified conditions, including a specified standard of compensation through which Peru could have lawfully expropriated:

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*.
2. The *compensation* referred to in paragraph 1(c) shall:
 - (a) be paid without delay;
 - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
 - (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
 - (d) be fully realizable and freely transferable.
3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be *no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.*
4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:
 - (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
 - (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.²⁷⁸

²⁷⁸ *Id.* at Art. 10.7.

177. Under Article 10.7 of the TPA, the prescribed standard of compensation is a necessary (but insufficient) condition for the lawfulness of the expropriation under the Treaty. In other words, it is the standard of compensation for a lawful expropriation, *i.e.*, an expropriation that complies with the Treaty. The Treaty does not prescribe a standard of compensation for an unlawful or wrongful expropriation, that is, an expropriation that fails to meet one or more of the requirements of Article 10.7.²⁷⁹

178. As the Treaty does not lay down any special rule to assess the quantum of compensation in the event of *wrongful* expropriation, the matter is governed by customary international law.²⁸⁰ Under customary international law, the standard of reparation for internationally wrongful acts is restoration of the *status quo ante*. As the Permanent Court of International Justice held in the *Chorzów Factory* case, the reparation must “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed.”²⁸¹ This principle was codified by the International Law Commission in Article 31 of the Articles on State Responsibility for Internationally Wrongful Acts: “The responsible State is under an obligation to make

²⁷⁹ See *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012), IIC 568 (2012), at ¶¶ 543-45 (noting that “[m]any tribunals have held that the lack of payment is sufficient for the expropriation to be deemed unlawful,” and concluding that an expropriation was unlawful because Ecuador made no “prompt, adequate and effective payment” to compensate for the expropriation of the claimant’s investment), **CL-0023-ENG**.

²⁸⁰ See *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/97/3, Award (20 August 2007), at ¶¶ 8.2.3-8.2.5, **CL-0027-ENG**; *Siemens v. Argentina*, at ¶ 349, **CL-0018-ENG**; *ADC Affiliate Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Final Award on Jurisdiction, Merits, and Damages (2 October 2006), at ¶ 483 (in this case, for example, the Tribunal noted the absence of any provision in the Cyprus-Hungary BIT, which is substantially similar to the Treaty in this proceeding, creating *lex specialis* to govern damages in the case of unlawful expropriation, and accordingly awarded damages according to the customary international law standard), **CL-0032-ENG**.

²⁸¹ *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, Judgment on the Merits (13 September 1928), Collection of Judgments, 1928 P.C.I.J. (ser. A) No. 16, at pp. 47, **CL-0057-ENG**. This principle has been reaffirmed by international tribunals on many occasions since 1928. See, e.g., *ADC v. Hungary*, at ¶ 493 (“Thus there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.”), **CL-0032-ENG**; *Amoco International Finance Corporation v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Partial Award (14 July 1987), 15 Iran-U.S. C.T.R. 189, at ¶ 191 (“In spite of the fact that it is nearly sixty years old, this [*Chorzów Factory*] judgment is widely regarded as the most authoritative exposition of the principles applicable in this field, and is still valid today”), **CL-0058-ENG**.

(continued...)

full reparation for the injury caused by the internationally wrongful act.”²⁸² This principle is applicable to internationally wrongful acts in general, whether they are in breach of treaty obligations or in breach of customary international law.²⁸³

179. To put KML economically in the same position it would be in if the wrongful acts had not occurred, compensation in this case must consist of (i) a sum equivalent to the loss of the net cash flows that the KML enterprise would have generated between the date of dispossession and the Valuation Date to compensate for lost profits; (ii) the fair value of KML’s seized gold inventory; (iii) the fair market value of the KML enterprise as of Valuation Date to compensate for the indirect expropriation of the enterprise; (iv) pre- and post-award interest sufficient to provide full reparation on both lost profits and two expropriation claims; (v) gross up for taxes on both lost profits and expropriations; and (vi) costs and attorneys’ fees.²⁸⁴

180. Fair market value is generally understood as:

[T]he price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, where neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.²⁸⁵

181. Similarly, the World Bank Guidelines define fair market value as the “amount that a willing buyer would normally pay to a willing seller after taking into account the nature

²⁸² ILC Articles, at Art. 31, **CL-0040-ENG**.

²⁸³ See, e.g. (under various different treaties), *Saipem SpA v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (20 June 2009), IIC 378 (2009), at ¶ 201, **CL-0033-ENG** (applying the *Chorzów Factory* principle under the Italy-Bangladesh BIT); *Vivendi v. Argentina (Resub.)*, at ¶¶ 8.2.4–8.2.8, **CL-0027-ENG**; *Siemens v. Argentina* at ¶¶ 386–389, **CL-0018-ENG**; *MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), 12 ICSID Reports 6 (2007), at ¶ 238, **CL-0034-ENG**; *S.D. Myers, Inc. v. Canada*, Ad hoc—UNCITRAL, First Partial Award and Separate Opinion (13 November 2000), IIC 249 (2000), at ¶¶ 311-13, **CL-0035-ENG**; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (25 August 2000), at ¶ 122, **CL-0059-ENG**.

²⁸⁴ Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at ¶ 6.8, Table 16, **C-0106-ENG**.

²⁸⁵ International Glossary of Business Valuation Terms, American Society of Appraisers, **CL-0060-ENG**; endorsed in *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, at ¶ 402, **CL-0061-ENG**.

(continued...)

of the investment, the circumstances in which it would operate in the future and its specific characteristics.”²⁸⁶

182. When a series of wrongful acts causes the loss of property (whether tangible or intangible) that has increased in value since the time of the loss, putting the victim in the same position it would now occupy, but for the act, requires giving the victim the benefit of the increase in value.²⁸⁷ Conversely, if the property has decreased in value, the injured party is entitled to compensation equal to the value of the property at the time of dispossession, because from then on the risks of loss or diminution of value falls on the wrongdoer; otherwise the wrongdoer would benefit from his unlawful conduct.²⁸⁸

183. Under the international-law principle of full reparation, the victim of a wrongful expropriation is therefore entitled to compensation equal to the *greater* of either (i) the value that the lost property would have had at the time of dispossession (which acts as a *floor*) or (ii) the value that the lost property would have had at the time of the Award.²⁸⁹ As the tribunal recognized in *Siemens v. Argentine Republic*, “the value of the investment to be compensated is the value it has now, as of the date of this Award, unless such value is lower than at the date of expropriation, in which event the earlier value would be awarded.”²⁹⁰ In this case, the KML enterprise would have been more valuable at the present

²⁸⁶ World Bank Guidelines on the Treatment of Foreign Direct Investment, at § IV, ¶ 5, **CL-0062-ENG**.

²⁸⁷ The PCIJ tribunal in *Chorzów Factory* endorsed this principle by providing instructions for an expert enquiry that would compare the current value of the interests at issue with their value at the date of dispossession. See *Chorzów Factory*, at pp. 51-52, **CL-0057-ENG**; see also *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 27 October 2011, at ¶¶ 706, 710, **CL-0063-ENG**; *Bernardus Henricus Funnekotter et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009), IIC 370 (2009), at ¶ 111, **CL-0024-ENG**; *Siemens v. Argentina*, at ¶ 352, **CL-0018-ENG**; *ADC v. Hungary*, at ¶ 497, **CL-0032-ENG**; *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran*, Award (29 June 1989), 21 Iran-U.S. C.T.R. 79, ¶ 110 (1989), **CL-0036-ENG**; *Amoco v. Iran*, at ¶¶ 196, 200, **CL-0058-ENG**; and R.Y. Jennings, *State Contracts in International Law*, 37 BRITISH YEARBOOK INT’L L. 156, 171 (1961) (observing that reparation as a remedy for unlawful dispossession would include “any increase in value between the time of seizure and the time of the indemnification”), **CL-0079-ENG**.

²⁸⁸ See *Siemens v. Argentina*, at ¶ 360, **CL-0018-ENG**; Irmgard Marboe, *Compensation and Damages in International Law—The Limits of “Fair Market Value”*, 7 J. WORLD INV’T & TRADE 723, 752 (2006) (reprinted in TRANSNAT’L DISPUTE MGMT., Vol. 4, Issue no. 6 (2007)), **CL-0075-ENG**.

²⁸⁹ See *Amoco v. Iran*, at ¶ 18, **CL-0058-ENG**.

²⁹⁰ *Siemens v. Argentina*, at ¶ 360, **CL-0018-ENG**; see also Marboe at ¶ 752 (“The amount of compensation after a legal expropriation [measured on the date of dispossession] should represent the lower limit of the Award”), **CL-0075-ENG**.

(continued...)

time than in 2018, and hence KML is entitled to compensation that captures that higher value.

184. In *ADC v. Hungary*, the tribunal held that Hungary had wrongfully expropriated the Claimant’s interests in the operating concession for the Budapest Ferihegy International Airport.²⁹¹ The tribunal found that the value of the lost investment had increased in the intervening years and calculated the compensation as of the date of the award, rather than the date of the expropriation five years earlier.²⁹² The tribunal reasoned that an award that included the significant increase in value of the airport concession came the closest to respecting the *Chorzów Factory* principle of putting the Claimant in the same position as if the expropriation had not taken place.²⁹³ Here, the value of the indirectly expropriated inventory (*i.e.*, gold) should be valued at the price of gold today, rather than the value of the gold at the Valuation Date. Alternatively, it could be brought to present date (using 2018 prices, then adding pre-award compound interest).²⁹⁴

185. Something similar should occur with the expropriation of KML’s enterprise. In *Siemens v. Argentine Republic*, the tribunal applied the same principle after finding that the expropriation of the claimant’s investment was wrongful.²⁹⁵ The tribunal there concluded that, “[u]nder customary international law, Siemens is entitled not just to the value of its enterprise as of [...] the date of expropriation, but also to any greater value that enterprise has gained up to the date of this award, plus any consequential damages.”²⁹⁶ The tribunal added: “It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award [must] be compensated in full.”²⁹⁷

²⁹¹ *ADC v. Hungary*, at ¶¶ 11, 426, 429, 434, 444, 476(d), **CL-0032-ENG**.

²⁹² *Id.* at ¶ 496.

²⁹³ *Id.* at ¶ 497.

²⁹⁴ This approach is very conservative, as it results in lower damages: the commercial rate of interest used by the Quantum Expert is lower than the change in market price.

²⁹⁵ *Siemens v. Argentina*, at ¶¶ 273, 352-53, **CL-0018-ENG**.

²⁹⁶ *Id.* at ¶ 352.

²⁹⁷ *Id.* at ¶ 353.

(continued...)

186. The standard of full reparation is equally applicable to all measures that violate the TPA, whether or not they are characterized as wrongful expropriation.²⁹⁸ The Articles on State Responsibility do not differentiate between types of wrongful acts.²⁹⁹ In this case, KML has made three main separately cognizable claims (avoiding double counting). The lost profits have been quantified pursuant to, and based on, a breach of the national treatment and fair and equitable standards of the TPA; and the expropriation breaches have been quantified segregated in: seized inventory, and going concern enterprise. KML and the Quantum Expert have been extremely careful in avoiding double counting when presenting three main separate heads of damage.

6.9 In order to prevent double-counting of the KML's inventory I modified my lost profits calculation. I specifically deducted the corresponding value of the KML's inventory

(asset) and accounts payable (liability) as reported in KML's financial statements.¹⁴¹ Making these adjustments and separately accounting for the value of inventory does not result in double counting.¹⁴²

Evidence:

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

C. Three main heads of damage

a. Lost profits caused by Peru

187. The lost profits of KML were caused by Peru's breach of Articles 10.3 and 10.5 of the TPA. This is an individualized, and separately quantified claim, for breach by Peru of

²⁹⁸ See, e.g., *MTD v. Chile*, at ¶ 238 (applying *Chorzów Factory* principle to measure reparation in a case finding state responsibility for breach of fair and equitable treatment standard), **CL-0034-ENG**.

²⁹⁹ See ILC Articles, at Articles 28-31, 34-36(referring generically to an "internationally wrongful act"), **CL-0040-ENG**.

the national treatment and fair and equitable standards contained in the TPA. This claim is distinct from KML's expropriation claims, both qualitatively and quantitatively.

188. Although lost profits relate to the 2013-18 period, for purposes of the TPA this particular loss was incurred and became actionable (*i.e.*, cognizable in arbitration) on November 30, 2018. This is because the treaty breach by Peru was a series of actions or omissions which only as defined in the aggregate are sufficient to constitute an international wrongful act.³⁰⁰

189. The lost profits became financially irreversible in 2018 when KML collapsed, not merely because Peru initiated investigations about the origin of the seized gold, but rather because Peru arbitrarily extended and prolonged its holding of the gold for too long, and caused reputational harm and other adverse consequences against KML.

190. The compensation for lost profits encompasses the lost net cash flows from the KML enterprise from January 1, 2014, to November 30, 2018 (the Valuation Date), brought forward to their present value as of the Valuation date using an appropriate interest rate. The Quantum Expert has provisionally used March 04, 2022, as the pre-award interest date for the purposes of his analysis (discussed further below).³⁰¹

191. Lost profits have been calculated on the basis of actual (now historical) information since January 01, 2014, through November 30, 2018.³⁰² Actual cash flows received by Claimant, including cash flows resulting from mitigation efforts, were subtracted from the but-for cash flows during the relevant period (as if the enterprise had continued to operate unaffected by Peru's wrongful measures). Lost profits were accounted starting on January 1, 2014, through November 2018.³⁰³ In sum, the Quantum Expert analyzed the but-for

³⁰⁰ *Each one isolated*, the initial temporary immobilizations of gold by Peru in 2013 and 2014, and some other subsequent measures—each one alone—, did not, in and of themselves, breach the TPA.

³⁰¹ KML expects to produce an updated report from the Quantum Expert at a time closer to the date of the Hearing, and would be prepared to produce a further update at a time approximating that of the Award.

³⁰² Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 2.15, C-0106-ENG.

³⁰³ *Id.* at ¶ 6.1.

(continued...)

revenue based on the estimation of what KML's market share of the gold market would have been, absent Peru's wrongful measures.³⁰⁴

192. Furthermore, the Quantum Expert considered actual economic developments such as annual gold production, gold price, taxes, working capital, and other actual economic developments which occurred during this historical period. This was his chosen approach to be able to forecast without inherent errors, and approximate restitution as closely as possible.³⁰⁵

193. Accordingly, to calculate the free net cash flows that the KML enterprise would have generated from January 1, 2014, through November 30, 2018, the Quantum Expert projected the (i) revenues, (ii) costs (including taxes), and (iii) changes in net working capital, that the KML enterprise would have experienced each year over that period.

194. *Revenues.* The Quantum Expert's revenue projections are driven by four variables: (i) Claimant's market share in Peru's gold market, (ii) Claimant's gold quantities purchased from other countries, (iii) the actual and forecasted prices of gold and gold turnover, and (iv) the nature of KML's sales revenue.³⁰⁶ First, to project KML's market share of the gold market in Peru, the Quantum Expert took a top-down approach and relied on total quantity of gold sold as a percentage of the country's total gold produced in a given year.³⁰⁷ He used Peru's actual yearly gold production from 2010 to 2018 as published by the Peruvian Ministry of Energy Mines (MINEM), to forecast total yearly purchases of gold.³⁰⁸ Further, he used historical information provided by KML to determine the average of gold purchases prior to the wrongful measures in the last three months of 2013.³⁰⁹ On average KML purchased over 2,517 kilograms of gold per month in Peru, which would have led to over 36,000 kilograms per annum.³¹⁰ However, the Quantum Expert conservative model never

³⁰⁴ *Id.* at ¶ 6.17.

³⁰⁵ *Id.* at ¶ 5.3.

³⁰⁶ *Id.* at ¶ 6.16.

³⁰⁷ *Id.* at ¶ 6.19.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at ¶ 6.21.

³¹⁰ *Id.*

(continued...)

reached 36,000 kilograms, it peaked at 32,291 kilograms in 2017. Further, the Quantum Expert conservatively found in their but-for scenario that starting on January 1, 2014, KML would have been able to grow its business and reach approximately 21.25% share of the total Peruvian gold market.³¹¹

195. Second, he looked at the amount of gold purchased from other countries--KML purchased approximately 53% of all purchases from at least nine other countries and extrapolated these into his model.³¹²

196. Third, the Quantum Expert looked at KML's cost of goods sold (COGS) as gold "turnover," applying the average annual gold price paid by KML in each respective year to its but-for gold volumes purchased from the first and second steps above.³¹³

197. Fourth, the Quantum Expert reviewed the nature of Claimant's sales revenue, which are closely correlated to its total gold turnover and were broken down into the following: i) refinery income, ii) profit on fixing, and iii) other income.³¹⁴ Based on KML's market share in Peru's gold markets, gold quantities purchased from other countries, actual and forecasted prices of gold and gold turnover, and the nature of KML's sales revenue, the Quantum Expert calculated the annual revenues of the KML enterprise through 2018.

198. To prevent double-counting, the Quantum Expert deducted the corresponding value of KML's expropriated inventory (five gold shipments) from KML's inventory (assets) and accounts payable (liability) as had been reported in KML's financial statements.³¹⁵

199. *Expenses.* The Quantum Expert then projected the expenses for purposes of calculating damages. Claimant's expenses to be forecasted fall into primary categories: i) refinery/shipping expense, ii) operating expenses (OPEX), and iii) interest (financing) expense.³¹⁶ Like the but-for revenues, the expenses were reasonably estimated based on

³¹¹ *Id.* at ¶ 6.5.

³¹² *Id.* at ¶ 6.31.

³¹³ *Id.* at ¶¶ 6.36-6.37.

³¹⁴ *Id.* at ¶ 6.40.

³¹⁵ *Id.* at ¶ 6.9.

³¹⁶ *Id.* at ¶ 6.48.

(continued...)

total gold turnover.³¹⁷ KML's refinery/shipping expenses were 0.268% of its total gold turnover.³¹⁸ This was the basis of the Quantum Expert's estimated expenses.

200. *Net Working Capital.* As the Quantum Expert explains, "[n]et working capital is the difference between a company's current assets and its current liabilities."³¹⁹ It is a measure of the cash that a company requires to operate on a day-to-day basis.³²⁰ The increase of assets and liabilities affects the amount of cash available to the business.³²¹ The Quantum Expert calculated damages including damages associated with changes in the but-for and actual working capital accounts.³²²

201. *Interest Rate.* The cash flows of which KML was deprived from January 1, 2014, through November 30, 2018, must be brought forward to their present value at an appropriate rate of interest to compensate KML for the loss of the use of those funds.

202. In summary, the Quantum Expert created hypothetical but-for revenues, but-for expenses, but-for interest/financing expenses, but-for net working capital accounts, but-for capital expenditures, and so forth, to arrive at the but-for cash flows for November 2013 through November 2018, that is then subtracted by KML's actual cash flow values from November 2013 through November 2018 to determine KML's lost profits.³²³ The lost profits are then brought forward to the date of the TPA breach and Valuation Date at an appropriate commercial rate of interest.³²⁴

203. After assessing all information necessary to determine the *quantum* of compensation for KML's *historical lost profits claim*, the Quantum Expert determined that the present value of KML's lost profits is **US\$13,793,135** (this amount does not include pre-award interest nor tax gross-up).³²⁵

³¹⁷ *Id.* at ¶ 6.50.

³¹⁸ *Id.*

³¹⁹ *Id.* at ¶ 6.55.

³²⁰ *Id.*

³²¹ *Id.* at ¶ 6.56.

³²² *Id.* at ¶ 6.57.

³²³ *Id.* at ¶ 6.1.

³²⁴ *Id.*

³²⁵ *Id.* at ¶ 7.2, Table 10.

b. Gold inventory indirectly expropriated by Peru

204. This separate and additional claim (head of damage) also became legally cognizable on November 30, 2018. It is based on the breach by Peru of Article 10.7(1) of the TPA, which was consummated on such date. Because of its particular characteristics, and method of quantification, this claim has been separated from the lost profit claim (above), and the second expropriation claim made (below) by KML (again, carefully avoiding double counting).

205. In 2013 and 2014, SUNAT temporarily immobilized 449,282.54 grams of gold from KML. This indirectly (and progressively) expropriated gold would be valued at **US\$26,099,826** (at February 2022 prices).³²⁶ This is the most accurate value to compensate KML for the indirect expropriation of the gold by Peru, since the gold is still in Peru's possession, and Peru did not compensate KML for such gold.

Table 5 – Five of the Seized and Immobilized Shipments¹³⁵

Purchase No.	Purchase Date	Seller	Status	Payment Status	Est. Net Weight Declared (Grams)	Current Value @ \$58.09 per gram
Purchase No.1	27-Nov-2013	██████████	Seized	Paid	104,353.78	\$ 6,062,144
Purchase No.2	7-Jan-2014	██████████	Seized	Paid	91,972.06	\$ 5,342,862
Purchase No.3	7-Jan-2014	██████████	Seized	Liability	36,393.96	\$ 2,114,206
Purchase No.4	7-Jan-2014	██████████	Seized	Paid	118,737.74	\$ 6,897,740
Purchase No.5	8-Jan-2014	██████████	Immobilized	Liability	97,825.00	\$ 5,682,873
Total					449,282.54	\$ 26,099,826

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at Table 5).

206. The inventory that was progressively expropriated could also be valued at US\$ 17,674,623 on the Valuation Date (prices on November 30, 2018).³²⁷ This is an alternative scenario that requires adding pre-award interests to ensure that the damages of time value of money are properly accounted.

³²⁶ *Id.* at ¶ 6.7, Table 5.

³²⁷ *Id.* at ¶ 6.8, Table 6.

Table 6 - Value of Seized Gold (Five Purchases) as of 30 November 2018¹⁴⁰

Purchase No.	Purchase Date	Seller	Status	Payment Status	Est. Net Weight Declared (Grams)	Value @ 30 Nov 2018
Purchase No.1	27-Nov-2013	██████████	Seized	Paid	104,353.78	\$ 4,105,242
Purchase No.2	7-Jan-2014	██████████	Seized	Paid	91,972.06	\$ 3,618,150
Purchase No.3	7-Jan-2014	██████████	Seized	Liability	36,393.96	\$ 1,431,726
Purchase No.4	7-Jan-2014	██████████	Seized	Paid	118,737.74	\$ 4,671,103
Purchase No.5	8-Jan-2014	██████████	Immobilized	Liability	97,825.00	\$ 3,848,402
Total					449,282.54	\$ 17,674,623

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at Table 6).

d. Expropriation of KML as a going concern enterprise

207. This third claim (third main head of damages) also became legally cognizable on November 30, 2018. It is based on the breach by Peru of Article 10.7(1) of the TPA consummated on such date. It requires a different valuation approach *vis-a-vis* the expropriation of the gold (inventory) of KML.

208. For expropriation of the enterprise claim, the Quantum Expert considered a period from the Valuation Date into the future.³²⁸ He used an *ex-ante* approach, where the valuator only considers information that is known or knowable as of the valuation date.³²⁹ Using this approach, that is in accordance with Article 10.7 of the TPA, the Quantum Expert calculated KML’s enterprise as of the Valuation Date, assuming a thirty-year period after.³³⁰

209. The Quantum Expert assumed that KML would remain in Peru and other markets for another thirty years until the current Peruvian proven reserves were depleted.³³¹ This period corresponds to the assumed annual Peruvian gold mining capacity and the amount

³²⁸ *Id.* at ¶ 5.3.

³²⁹ *Id.* at ¶ 5.4.

³³⁰ *Id.*

³³¹ *Id.* at ¶ 6.5.

(continued...)

of Peru’s gold reserves in mines which existed as of November 30, 2018.³³² As such, being conservative, their calculations do not consider future developments or discoveries of new gold reserves in Peru past the Valuation Date.³³³ Further, the Quantum Expert excluded any diminution in value attributable to Peru’s wrongful acts; therefore, the valuation of KML as November 30, 2018, was calculated as if the wrongful acts prior to such date had not occurred.³³⁴ Additionally, being extremely conservative, the Quantum Expert assumed zero growth in market share from 2018-48.³³⁵

210. *Determining the Free Cash Flows of the KML Enterprise.* To calculate the free cash flows of the KML Enterprise from November 2018 through November 2048, the Quantum Expert applied the same general methodology used to determine the cash flows foregone between January 1, 2014, through November 30, 2018. Accordingly, he projected KML’s annual (i) revenues, (ii) costs, and (iii) changes in net working capital.

211. The Quantum Expert first determined the fair market value of the KML enterprise using a discounted cash flow (DCF) analysis. The DCF method is the most widely used and accepted method for valuing income-producing business enterprises with a track record of profits, and is routinely endorsed and applied by tribunals valuing expropriated investments in investor-State disputes.³³⁶ A DCF valuation calculates the future cash flows that a business is expected to generate over its lifetime, and discounts those cash flows to their

³³² *Id.* at ¶ 2.19.

³³³ *Id.*

³³⁴ *Id.* at ¶ 5.7.

³³⁵ *Id.* at ¶ 6.20.

³³⁶ *Phillips v. Iran*, at ¶ 112 (“a prospective buyer of the asset would almost certainly undertake such DCF analysis to help it determine the price it would be willing to pay”), **CL-0036-ENG**; *CMS v. Argentina*, at ¶ 416 (“DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets.”), **CL-0061-ENG**; *see also* World Bank Guidelines on the Treatment of Foreign Direct Investment, at § IV, ¶ 6 (“Without implying the exclusive validity of a single standard [...] such determination will be deemed reasonable if conducted as follows: (a) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value [...]”), **CL-0062-ENG**; *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award and Separate Opinion (18 July 2008), IIC 330 (2008), at ¶ 793 (DCF is the “method used in most BIT cases” and is “the appropriate method in the present case”), **CL-0020-ENG**.

(continued...)

present value using an appropriate discount rate. The Quantum Expert projected future cash flows from November 2018 through November 2048.

212. *Revenues.* As explained in the revenues subsection for lost profits, the Quantum Expert' revenue projections are driven by four variables: (i) KML's market share in Peru's gold market, (ii) KML's gold quantities purchased from other countries, (iii) the actual and forecasted prices of gold and gold turnover, and (iv) the nature of KML's sales revenue.³³⁷ Because of KML's strong and proven competitive advantage, the Quantum Expert assumed that KML's but-for market share from 2013 grows and then remains flat from 2015 through 2048.³³⁸ Based on the Quantum Expert's analysis, he estimated gold purchases for the period of 2019-48 would have reached their highest point in 2019.

213. *Expenses.* The Quantum Expert then projected the expenses for purposes of calculating damages. The expenses were segregated in the categories of shipping, operating, and financing (interest).³³⁹ In all cases, expenses were tied or connected to total gold turnover. The projection methodology used is hence simple and very conservative.

214. *Determining the Appropriate Risking of Cash Flows v. Discount Rate.* Having determined the net cash flows that the KML enterprise would have generated after the Valuation Date in the absence of the Peru's wrongful measures, the Quantum Expert then analyzed how those cash flows should be discounted to their present value. For the expropriation of the enterprise claim, KML's lost future cash flows require adjustments to the Valuation Date to account for both the time value of money and the riskiness of achieving the cash flows.³⁴⁰ As such, all future cash flows are discounted back using the appropriate discount rate to account for the time value of money and the risk associated with the cash flows.³⁴¹ The Quantum Expert used risk-free or appropriately risked discount

³³⁷ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.16, C-0106-ENG.

³³⁸ *Id.* at ¶ 6.19.

³³⁹ *Id.* at ¶ 6.48 to 6.53.

³⁴⁰ *Id.* at ¶ 6.74.

³⁴¹ *Id.*

(continued...)

rate and estimated the appropriate discount rate as of November 30, 2018, to be 5.19, which includes a risk premium of 200 basis point.³⁴²

215. *Overall Estimate of the Fair Market Value of the KML Enterprise.* After assessing the information necessary to determine the value of the enterprise as a hypothetical continuous going concern as of the Valuation Date, the Quantum Expert concluded KML's enterprise value to be **US\$ 47,296,862** (this amount does not take into account pre-award interest and tax gross-up).³⁴³ The Quantum Expert used the FMV method calculated under the DCF method to arrive at the enterprise value.³⁴⁴ Furthermore, the Quantum Expert corroborated his conclusion by using the market approach, and analyzing the numbers against a company similar to KML: [REDACTED], which showed that the enterprise value conclusion for KML is lower than the implied and average values for [REDACTED].³⁴⁵

216. Naturally, the calculation of the fair market value of the KML enterprise as of the Valuation Date should not take into account any measures taken by Peru that diminished the value of KML's investment.³⁴⁶ The foregoing methodology comports with the directions that the PCIJ gave to the Quantum Expert in the *Chorzów Factory* case. In that case, the Court asked the experts to calculate the value of the enterprise as of the date of

³⁴² *Id.*

³⁴³ *Id.* at ¶ 7.2, Table 10.

³⁴⁴ *Id.* at ¶ 7.1, Table 10.

³⁴⁵ *Id.* at ¶ 7.6, Table 10.

³⁴⁶ Therefore, if, *arguendo*, the Arbitral Tribunal determines that Peru did not breach articles 10.3 or 10.5 of the TPA, and denies KML's lost profit claim thereunder, the valuation of the KML enterprise would need to add or reconsider cash-flows as adversely affected *before* the Valuation Date, as part of the expropriation claim. *See, e.g., Starrett Housing Corp. v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Final Award (14 August 1987), Concurring Opinion of Judge Holtzmann, at ¶15 ("International law teaches that the value of expropriated property must be determined without regard to the effects of taking or threats of taking."), **CL-0037-ENG**; *American Int'l Group, Inc. v. Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 107 (1983), at ¶ 60 ("In ascertaining the going concern value of an enterprise at a previous point in time for purposes of establishing the appropriate quantum of compensation for nationalization, it is [...] necessary to exclude the effects of actions taken by the nationalizing State in relation to the enterprise which actions may have depressed its value."), **CL-0038-ENG**. This principle applies with equal or greater force to unlawful measures taken before or after the dispossession of the victim's property.
(continued...)

dispossession.³⁴⁷ In addition, the Court instructed the experts to answer the following two questions:

[I.]B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking [...] from July 3rd, 1922 [the date of dispossession], to the date of the present judgment, if it had been in the hands of the said [dispossessed] Companies [Bayerische and Oberschlesische Stickstoffwerke]?

II. What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking [...] had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionally on lines similar to those applied in the case of undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?³⁴⁸

217. The methodology adopted by the Quantum Expert to calculate the compensation due for the expropriation of the KML enterprise is also consistent with the decision of the second tribunal in *Amco Asia v. Indonesia* in 1990.³⁴⁹ There, having concluded that a series of events culminating in the revocation of the claimant's license constituted unlawful measures, the tribunal analyzed the issue of damages in three separate tranches: (i) the period from the commencement of unlawful measures until the revocation of the license in July 1980, for which data were known or available, (ii) the period from July 1980 through 1989, for which data were also known or available, and (iii) the period from 1990 (the year of the award) until the end of the license term in 1999, for which data could not be known or available.³⁵⁰ For the first and second periods, the tribunal calculated damages on the basis of known data; for the third period, the tribunal concluded that a DCF analysis would

³⁴⁷ *Chorzów Factory*, at pp. 51, **CL-0057-ENG**.

³⁴⁸ *Id.* at pp. 51-52; *see also id.* at pp. 53 (“If [...] the reply given by the experts to question I B should show that [...] after provision for the cost of upkeep and normal improvement during the following years [after dispossession], there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded [on the basis of the answer to question II].”).

³⁴⁹ *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Merits on Resubmission, 31 May 1990, 89 I.L.R. 580, **CL-0039-ENG**.

³⁵⁰ *Id.* at ¶¶ 163, 196, 89 I.L.R. at 627, 635.

(continued...)

provide the proper measure of damages.³⁵¹ That DCF analysis was informed by knowledge of events after the license was revoked.³⁵² A similar approach should be used by the Tribunal here in the case of KML.

D. Taxation and grossed-up damages

218. KML requests that the Tribunal order Peru to pay grossed up damages based on the tax implications of the award.

219. KML is a limited liability company registered in the State of Florida. While KML is not incorporated in Peru, it had a local office and operations there, which would be subject to 29.5% corporate income tax rate.³⁵³ Based on a report published by PwC:

Branches, agencies, and permanent establishments (PE) of non-resident companies or entities incorporated in Peru are subject to income tax on their Peruvian-source income, while subsidiaries are subject to income tax on their global-source income.³⁵⁴

220. After-tax damages figures, which could then be subject to taxation in the United States, would not place Claimant members in the equitable position compared to the scenario in which they ran their business (or sold it to a third-party, as of the Valuation Date).³⁵⁵ But KML's enterprise was not for sale, and it was not sold, when it was expropriated by Peru. Here, any and all applicable taxes (wherever arising) would be caused exclusively by, and be attributable to, Peru's measures.

221. The Quantum Expert explains that without the tax adjustment, KML would not be in the same situation absent the prolonged wrongful measures.³⁵⁶ The Quantum Expert also explains that if the tax issues are not properly calculated in the damages, this could result

³⁵¹ *Id.* at ¶¶ 163-166, 196, 89 I.L.R. at 635.

³⁵² *Id.* at ¶ 186, 89 I.L.R. at 633 (“[I]f Amco is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique.”).

³⁵³ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.60, **C-0106-ENG**.

³⁵⁴ PwC – Doing Business in Peru – 2019, at pp. 23, **CL-0081-ENG**.

³⁵⁵ Expert Report-Almir Smajlovic (Secretariat)-Claimant's Memorial-ENG, at ¶ 6.61, **C-0106-ENG**.

³⁵⁶ *Id.* at ¶ 6.65.

(continued...)

in double-taxation of the award.³⁵⁷ As such, present value of lost profits and value of expropriated business were therefore grossed-up in this matter to avoid a double count of taxation in the event of an award.³⁵⁸

Table 17 - Summary of Damages to KML (Grossed-Up) With Current Value of Inventory²⁷¹

Summary of (Grossed-Up) Damages to KML	
Present Value of Lost Profits	\$ 19,558,011
Value of Expropriated Business (Enterprise Value (EV))	\$ 67,087,747
Damages Before Pre-Award Interest and Seized Inventory	\$ 86,645,758
Pre-Award Interest Through March 2022	11,039,101
Total Damages With Pre-Award Interest, Before Inventory	\$ 97,684,859
Value of Seized Inventory Close to the Report Date	\$ 26,099,826
Total Damages Including Pre-Award Interest	\$ 123,784,685

Evidence:

C-0106-ENG (Expert Report-Almir Smajlovic (Secretariat)-Claimant’s Memorial-ENG, at Table 17).

222. The principle of full reparation also dictates that the Award should protect the Claimant against events of taxation that would prevent it from being placed in a position that is economically equivalent to the one it would have occupied if the unlawful measures had not occurred. Consequently, the Claimant is also entitled to be protected from any attempt by Peru to levy a tax on the compensation to be awarded in this proceeding, which has been calculated on an after-tax basis.

223. The compensation to be awarded should not give rise to any income-tax liability under Peruvian law for which the KML is not kept whole. International tribunals have consistently held that the value of the expropriated asset must not be influenced by the

³⁵⁷ *Id.* at ¶ 6.62.

³⁵⁸ *Id.*

expropriation itself. For instance, in *Birnbaum v. Iran*, the respondent argued that “the taking of [the company’s] fixed assets and investments created a tax liability related to them,” and requested that the tax be deducted from the fair market value of the expropriated asset to determine compensation. The tribunal rejected the argument and noted: “The Tribunal has never reduced the value of assets or the compensation due a Claimant for an expropriation of such assets on the ground that it caused the Claimant to realize taxable income.”³⁵⁹

224. Accordingly, the compensation determined in the Award should be calculated, and should be payable, in an amount net of *any* taxes.³⁶⁰ KML requests that, in establishing the *quantum* of compensation, the Tribunal specify:

- That the compensation is calculated on an after-tax basis; and
- That the *quantum* of compensation shall be grossed up to the extent necessary to negate the effect of any tax that may be levied by Peru or any of its political subdivisions, or caused (anywhere, including in the United States) by Peru’s measures, that would otherwise have the practical effect of diminishing the compensation determined in the Award.

³⁵⁹ *Birnbaum v. Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Award No. 549-967-2(6 July 1993) (*Birnbaum v. Islamic Republic of Iran*), at ¶ 128, **CL-0064-ENG**; *Ebrahimi v. Islamic Republic of Iran*, Iran-U.S. Cl. Trib. Award No. 560-44-3, at ¶ 164 (12 Oct. 1994), **CL-0078-ENG**. The tribunal further explained its rationale as follows: “For purposes of determining the gross value of a taken enterprise the Tribunal has frequently assumed a hypothetical sale to the government at estimated market price. Such an analogy, while illustrative of valuation theory, should not be overextended to create a tax liability arising from a taking. In a sale, an owner voluntarily disposes of his property. By definition, however, a taking removes from the owner any willful participation in the transfer. For this reason, the Tribunal has consistently held that the taking itself may not influence the value of the taken property.” *Birnbaum v. Islamic Republic of Iran*, at ¶ 129, **CL-0064-ENG**.

³⁶⁰ *See Siemens v. Argentina*, at ¶ 403(11) (declaring “that any funds to be paid pursuant to this decision shall be paid in dollars and into an account outside Argentina indicated by the Claimant and *net of any taxes and costs*”), **CL-0018-ENG**.

(continued...)

E. Interest on the compensation awarded

a. Pre-award compound interest

225. The Treaty requires that compensation for lawful expropriation include interest at a commercially reasonable rate until the date of payment.³⁶¹ Article 10.7(3) of the Treaty provides in relevant part that “compensation [...] shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.”³⁶² This provision refers to the interest that should have been paid to the Claimant for a lawful expropriation. As the tribunal in *Vivendi v. Argentine Republic* noted, “it is just as, if not more appropriate for interest to be paid on compensation for a wrongful expropriation.”³⁶³

226. It is customary in international investment disputes for tribunals to grant pre-award interest.³⁶⁴ There are several reasons for requiring a respondent to pay interest to a successful claimant.

The first and primary reason for interest is that its payment furthers the principle of full compensation, because it helps restore the claimant to the position it would have enjoyed if the breach had not occurred. [...] The second justification for interest is that its award prevents unjust enrichment of the respondent by requiring it to pay compensation for the benefit that it received by using the money it wrongfully withheld. In other words, since the respondent has received the earning capacity of the borrowed money without compensating the claimant for the loss of its use, the respondent should pay the opportunity cost of the money that it withheld from the claimant. The third function of interest is that its payment

³⁶¹ See, TPA, at Art.10.7 (3), **CL-0001-ENG**.

³⁶² *Id.* at Art. 10.7(3).

³⁶³ *Vivendi v. Argentina (Resub.)*, at ¶ 9.2.2 (emphasis added), **CL-0027-ENG**; see also *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (11 May 2009), IIC 374 (2009), at ¶ 597 (holding that, if the LIBOR rate specified in the Italy-Egypt BIT for interest on lawful compensation were *deemed* to be adequate, “there is no reason not to hold that they are similarly adequate to compensate in case of delayed payment of compensation for an unlawful expropriation”), **CL-0028-ENG**.

³⁶⁴ See *Vivendi v. Argentina (Resub.)*, at ¶¶ 9.2.1, 9.2.8 (stating that “the liability to pay interest is now an accepted legal principle” and awarding compound interest), **CL-0027-ENG**.
(continued...)

promotes efficiency. Without interest, respondents may be insufficiently deterred.³⁶⁵

227. Under the TPA and the applicable principles of customary international law, a “normal commercial rate” includes compounding of interest. As the tribunal in *Chevron v. Ecuador* observed in 2010, “the prevailing practice of international tribunals” today is to award compound interest.³⁶⁶ In *Siag v. Egypt*, the tribunal noted that “in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation.”³⁶⁷ Compound interest, rather than simple interest, is required to compensate a successful claimant for the time value of money and lost earnings opportunities.³⁶⁸

228. In *Wena Hotels Ltd. v. Egypt*, the tribunal applied compound interest to the award on an expropriation claim, despite Egyptian law to the contrary.³⁶⁹ The tribunal reasoned that “compounded interest will best ‘restore the Claimant to a reasonable approximation of

³⁶⁵ John Y. Gotanda, *The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration*, Transnational Dispute Management, Vol. 7, Issue, 1 (April 2010), at pp. 560, **CL-0074-ENG**.

³⁶⁶ *Chevron Corp. v. Republic of Ecuador*, Ad hoc—UNCITRAL Arb. Rules, Partial Award on the Merits (30 March 2010), IIC 421 (2010), at ¶ 555, (“Regarding the pre-award interest [...] the Tribunal determines that compound interest applies, in accordance with the prevailing practice of international tribunals.”), **CL-0065-ENG**; see also e.g., *El Paso v. Argentina*, at ¶ 746, **CL-0036-ENG**; *Funnekotter v. Zimbabwe*, at ¶ 146, **CL-0024-ENG**; *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008), IIC 336 (2008), at ¶¶ 310-313, **CL-0066-ENG**; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (21 July 2008), at ¶ 769, **CL-0029-ENG**; *PSEG Global Inc. and Ilgin Elektrik Uretim Ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 4 June 2004, at ¶ 348, **CL-0067-ENG**; *MTD v Chile*, at ¶¶ 215, 251, **CL-0034-ENG**; *Pope & Talbot Inc. v. Canada*, Ad hoc – UNCITRAL Arbitration Rules, Damages Award (31 May 2002), at ¶¶ 89-90, **CL-0068-ENG**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002), 7 ICSID Reports 178 (2005), at ¶ 175, **CL-0069-ENG**; *Metalclad Corporation v. United Mexican States*, at ¶ 128, **CL-0059-ENG**; *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (12 November 2000), 16 ICSID Rev-FILJ 1, 30-31, 5 ICSID Reports 419 (2002), at ¶ 96 (2001), **CL-0070-ENG**.

³⁶⁷ *Siag v. Egypt*, at ¶ 595, **CL-0028-ENG**.

³⁶⁸ See, e.g., John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int’l L. 40 (1996), at pp. 61 (“In the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest”), **CL-0072-ENG**; F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U.C. Davis L. Rev. 577, 586 (1988) (stating, “compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals”), **CL-0073-ENG**.

³⁶⁹ *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000), at ¶ 129, **CL-0030-ENG** (quoting *Metalclad Corporation v. United Mexican States*, at ¶ 128, **CL-0059-ENG**).

(continued...)

the position in which it would have been if the wrongful act had not taken place.” The tribunal added:

[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. As Professor Gotanda has observed “almost all financing and investment vehicles involve compound interest [...]. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.³⁷⁰

229. As explained above, the compensation owed by Peru includes (1) Claimant’s historical lost profits from 2014-18; (2) the indirect expropriation of Claimant’s gold; and, (3) fair market value of KML’s enterprise as a going concern (absent the wrongful measures) from 2018-48. Compound interest at a normal commercial rate must be added to those damages.

230. Calculated at a rate of LIBOR plus four percent, compounded annually, pre-award interest associated with their damages in this matter totals **US\$ 14,234,049** until March 2022. The Quantum Expert used LIBOR plus four percent because it approximates Claimant’s short-term commercial borrowing rate for its operations in Peru, which ranged from 4.75% to 7.50%, depending on the amount borrowed. Quantum Expert also selected annual compound rate of interest instead of simple interest.

b. Post-Award Compound Interest

231. KML requests that the Tribunal order Peru to pay post-award interest on the quantum of compensation determined in the Award, accruing from the date of the Award until payment of the compensation in full. For the same reasons stated in the case of pre-award interest, post-award interest should also be compounded in accordance with the prevailing practice of international tribunals.³⁷¹

³⁷⁰ *Id.*

³⁷¹ *See, e.g., Chevron v. Ecuador*, at ¶ 7 (awarding post-award compound interest), **CL-0065-ENG**.

F. Costs and expenses associated with this proceeding

232. KML requests that the Tribunal award it costs and expenses for the arbitration, including attorneys' fees, plus interest thereon.³⁷² In light of the principle of full reparation and Peru's breaches of its international obligations, such an award is fully warranted.³⁷³ The Claimant will submit its statement of costs and expenses at the close of this proceeding.

233. Peru made no effort whatsoever to negotiate or even communicate with KML after April 8, 2019 (when the notice of dispute—notice of intent—was delivered to Peru by KML). Peru instead chose to simply wait for KML to disappear and go away because of lack of resources to commence arbitration. Such egregious conduct by Peru constitutes, in and of itself, a violation of the TPA; and should also be considered for the qualitative and quantitative adjudications of all other treaty breaches alleged herein, especially cost and expenses associated with this proceeding.

VI. REQUEST FOR RELIEF

234. For the foregoing reasons, the Claimant respectfully requests that the Tribunal render an award in favor of Kaloti Metals & Logistics, LLC:

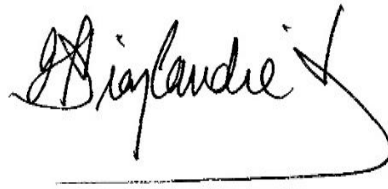
- a. Upholding the claims asserted by Claimant in this proceeding;
- b. Determining that Peru breached the TPA:
 - i. By failing to accord fair and equitable treatment to the Claimant's investments; by taking arbitrary or discriminatory measures that impaired the use and enjoyment of the Claimant's investments; by failing to accord to those investments the same treatment that it provided to nationals or companies of Peru, or third States;

³⁷² See ICSID Convention, at Art. 61(2) (authorizing the Tribunal to “assess the expenses incurred by the parties” in the proceedings and to “decide how and by whom” the costs of the arbitration are paid), **CL-0042-ENG**.

³⁷³ See, e.g., *Siag v. Egypt*, at ¶¶ 621-22 (concluding that prevailing Claimant should recover reasonable legal fees and related expenses), **CL-0028-ENG**; *ADC v. Hungary*, at ¶ 533, **CL-0032-ENG**.

- ii. By wrongfully expropriating the Claimant's gold without complying with the requirements of the Treaty, including nondiscrimination and payment of prompt, adequate and effective compensation; and
 - iii. By wrongfully expropriating the Claimant's going concern enterprise business without complying with the requirements of the Treaty, including nondiscrimination and payment of prompt, adequate and effective compensation.
- c. Determining that such breaches have caused damages incurred by the Claimant;
- d. Ordering Peru to pay to the Claimant full reparation in accordance with the TPA and customary international law, including:
 - i. Compensation for damages sustained as a result of the discriminatory, unfair and unequitable treatment; the expropriation of gold; and the expropriation of the enterprise, in an amount to be established in the proceeding;
 - ii. Compound interest thereon (both pre-award and post-award) in accordance with applicable law;
 - iii. Determining that the Claimant shall be protected from taxation of such compensation, in the manner specified in this memorial;
 - iv. Ordering Peru to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the tribunal, and the cost of legal representation (counsel's fees), plus interest thereon in accordance with applicable law; and
 - v. Such other or additional relief as may be appropriate under the applicable law or may otherwise be just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Hernando Díaz-Candia". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Hernando Díaz-Candia
Ramón A. Azpúrua-Núñez
Gabriella Hormazabal
Mikel Del Valle

WDA LEGAL
848 Brickell Ave, suite 1000
Miami, FL 33131
305-988-8002 (telephone)

Counsel for the Claimant

Follows: Appendix A.

KALOTI METALS & LOGISTICS, LLC v. REPUBLIC OF PERU (ICSID CASE No. ARB/21/29)
Appendix A to Claimant's Memorial of March 16, 2022
Summarized (non-exhaustive) chronological table of some relevant events

Date	Purchase 1 111,545.37 grams (gross) of gold purchased by KML from ██████	Purchase 2 98,592.00 grams (gross) of gold purchased by KML from ██████	Purchase 3 38,600.90 grams (gross) of gold purchased by KML from ██████	Purchase 4 126,775.30 grams (gross) of gold purchased by KML from ██████	Purchase 5 99,843.22 grams (gross) of gold purchased by KML from ██████
<u>November 29, 2013</u>	<p>SUNAT temporarily immobilized 111,545.37 grams of gold purchased by KML from ██████, by means of Immobilization Orders Nos: 316-0300-2013-001479 (57.10 kg)¹ and 316-0300-2013-001497 (54.45 kg).²</p> <p>Report No. 316-0300-2013-001288 resulting in the immobilization by means of Report No. 316-0300-2013-001497 due to alleged incomplete waybill and documentation.³</p>				
<u>December 2, 2013</u>	<p>Notice N° 406-2013-SUNAT/3X3200 addressed to ██████ ██████ ██████ ██████ ██████ requesting information related to the Immobilization Act N° 316-0300-2013-001479</p>				

¹ C-0040-SPA: Immobilization orders No. 316-0300-2013-001479, 316-0300-2013-001497, 316-0300-2014-000110, 316-0300-2014-000111, 316-0300-2014-000020, 316-0300-2014-000021, 316-0300-2014-000022, 316-0300-2014-000002, at pp. 1.

² *Id.* at pp. 2.

³ C-0055-SPA: ██████. Report No. 316-0300-2013-001288, November 29, 2013.

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	<p>and granting 3 working days for its submission.⁴</p> <p>Petition to lift the immobilization declared by means of Act N° 316-0300-2013-001479 filed before SUNAT by ██████ ██████ ██████ ██████ ██████.⁵</p> <p>Communications from ██████ sent to SUNAT, in which ██████ submitted the transport waybills from the production site to ██████, and from ██████ to ██████, and explained the origin and metallurgical process of the gold.⁶</p>				
<u>December 4, 2013</u>	<p>Response from ██████ ██████ ██████ ██████ ██████ on behalf of ██████ to Notice No. 406-2013-SUNAT/3X3200, submitting the required documentation.⁷</p>				

⁴ C-0056-SPA: ██████. Notice N 406-2013-SUNAT/3X3200, December 2, 2013.

⁵ C-0057-SPA: ██████. Petition submitted to lift immobilization declared by immobilization order N 316-0300-2013-001479, December 2, 2013.

⁶ C-0058-SPA: ██████. Communication sent to SUNAT submitting transport waybills and support documents, December 2, 2013.

⁷ C-0059-SPA: ██████. Reply from ██████. submitted on behalf of ██████ to notice No. 406-2013-SUNAT/3X3200, December 4, 2013.

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<u>December 5, 2013</u>	Notice No. 424-2013-SUNAT/3X3200 addressed to ██████ ██████ ratifying the content of Notice No. 406-2013-SUNAT/3X3200 dated December 2, 2013. ⁸				
<u>December 9, 2013</u>	Communication from ██████ sent to SUNAT in response to notice No. 424-2013-SUNAT/3X200 and the reiteration of said notice. ⁹				
<u>December 13, 2013</u>	Notice No. 437-2013-SUNAT/3X3200 to ██████ regarding Immobilization Orders No. 316-0300-2013-001479 and 316-0300-2013-001497 informing that the observations made by the customs authority were not clarified, extending the immobilization measure for 10 days and requesting the submission of new documents. ¹⁰				

⁸ C-0060-SPA: ██████. Notice No. 424-2013-SUNAT/3X3200, December 5, 2013.

⁹ C-0061-SPA: ██████. Communication sent by ██████ to SUNAT in reference to notice No. 424-2013-SUNAT/3X3200, December 9, 2013.

¹⁰ C-0062-SPA: ██████. Notice No. 437-2013-SUNAT/3X3200, December 13, 2013.

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<u>December 19, 2013</u>	Brief submitted by ██████ requesting SUNAT an extension of 30 days to submit the documents required by Notice No. 437-2013-SUNAT/3X3200. ¹¹				
<u>December 27, 2013</u>	SUNAT’s ruling granting the extension of the immobilization period of the goods described in the Immobilization Order No. 316-0300-2013-001479 and 316-0300-2013-001497 until March 24, 2014. ¹² Proprietary Excluding Intervention Claim in favor of KML sent by ██████ to ██████ in which ██████ informed that the goods subject to seizure effected by Order No. 0230072504966 effectively belonged to KML; and ██████ requested the lifting of the				

¹¹ C-0063-SPA: ██████. Petition submitted by ██████ requesting SUNAT an extension of 30 days to submit the documents requested in Notice No. 437-2013-SUNAT/3X3200, December 19, 2013.

¹² C-0064-SPA: ██████. SUNAT’s ruling ordering the extension of the immobilization order No. 3016-0300-2013-001479 and 3016-0300-2013-001497, December 27, 2013.

KALOTI METALS & LOGISTICS, LLC v. REPUBLIC OF PERU (ICSID CASE NO. ARB/21/29)
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	measure because the goods belonged to a third party unrelated to the procedure initiated by the tax administration. ¹³				
<u>January 07, 2014</u>				<p>SUNAT temporarily immobilized 126,775.30 grams of gold purchased by KML from ██████. This immobilization was decreed by SUNAT on gold that was in the warehouses of ██████, in Callao.¹⁴</p> <p>The preliminary investigation was carried out by an Asset Laundering Investigation Division.¹⁵</p> <p>Reports N° 10-2014-DIRPOLFIS PNP-DIVILA-D3, dated December 14, 2014, sent to the 2nd</p>	

¹³ C-0065-SPA: ██████. Proprietary Excluding Intervention submitted by ██████ in favor of KML, December 27, 2013.

¹⁴ C-0101-SPA: Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes.

¹⁵ C-0067-SPA: ██████. Preliminary Investigation Extension Order notified to KML by the 1st supraprovincial Corporate Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain, Case No. 506015701-2014-1-0.

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				FISLAAPD who filed the complaint before the Sixth Criminal Court of Callao, where the investigation was initiated against ██████ ██████ for the alleged crime of asset laundering, allegedly related to illegal mining (File N° 365-2015). ¹⁶	
<u>January 08, 2014</u>		SUNAT temporarily immobilized 98,520.00 grams of gold purchased by KML from ██████ Gold, by means of Immobilization Order N° 316-0300-2014-000110. ¹⁷ There is also an immobilization act N° 316-0300-2014-000111. ¹⁸			
<u>January 08, 2014</u>	El Comercio publishes an article titled <i>Aduanas incautó media tonelada de oro ilegal por US\$ 18 millones</i> by Oscar Castilla C. ¹⁹				

¹⁶ **C-0101-SPA**: Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 163.

¹⁷ **C-0040-SPA**: Immobilization orders No. 316-0300-2013-001479, 316-0300-2013-001497, 316-0300-2014-000110, 316-0300-2014-000111, 316-0300-2014-000020, 316-0300-2014-000021, 316-0300-2014-000022, 316-0300-2014-000002, at pp. 3.

¹⁸ *Id.* at pp. 4.

¹⁹ **C-0051-ENG/SPA**: News articles and books that replicated negative facts unfairly linked to KML by Peru, at pp. 147 – 149.

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<u>January 09, 2014</u>			Export DAM N° 235-2014-40-002515-01-8-00. ²⁰ In accordance with the risk profile prepared by the intelligence and tactical operations division of the INPCFA, an electronic immobilization of 38.61 kg of gold was ordered by means of immobilization for inspection measure No. 316-0300-2014-14 dated January 9, 2014. ²¹	Temporarily immobilized by SUNAT through the following immobilization orders: N°316-0300-2014-000020 (50.50 kg); ²² N°316-0300-2014-000021 (26.61 kg); ²³ N°316-0300-2014-000022 (49.50 kg). ²⁴	
<u>January 10, 2014</u>		Report of Inspection N° 316-0300-2014-000038 dated 10-01-2014 (Illegible). ²⁵ There is another Inspection Record N° 316-0300-2014-000039 (illegible). ²⁶	SUNAT temporarily immobilized 38,600.90 grams of gold purchased by KML from ██████.	Notice N° 20-2014-SUNAT/3X3200 to ██████ ██████ ██████ ██████ ██████ requesting information related to the Immobilization	

²⁰ C-0068-SPA: ██████. Request for Preliminary Investigation for the crime of money laundering filed by the Public Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain Proceedings before the Ninth Provincial Criminal Prosecutor's Office of Callao, at pp. 2.

²¹ *Id.* at pp. 1.

²² C-0040-SPA: Immobilization orders No. 316-0300-2013-001479, 316-0300-2013-001497, 316-0300-2014-000110, 316-0300-2014-000111, 316-0300-2014-000020, 316-0300-2014-000021, 316-0300-2014-000022, 316-0300-2014-000002, at pp. 5 – 6.

²³ *Id.* at pp. 7 – 8.

²⁴ *Id.* at pp. 9 – 10.

²⁵ C-0069-SPA: ██████. Report of Inspection N 316-0300-2014-000038, January 10, 2014.

²⁶ C-0070-SPA: ██████. Report of Inspection N 316-0300-2014-000039, January 10, 2014.

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			Immobilization order No. 316-0300-2014-000002 of 38.61 kg of gold. ²⁷	Order N° 316-0300-2014-000020 granting 4 working days to send it. ²⁸ Notice N° 21-2014-SUNAT/3X3200 to ██████ ██████ ██████ ██████ requiring information related to the Immobilization Order N° 316-0300-2014-000021 granting 4 working days to send it. ²⁹ Notice N° 22-2014-SUNAT/3X3200 to ██████ ██████ ██████ ██████ requesting information related to the Immobilization Order N° 316-0300-2014-000022 granting	

²⁷ C-0040-SPA: Immobilization orders No. 316-0300-2013-001479, 316-0300-2013-001497, 316-0300-2014-000110, 316-0300-2014-000111, 316-0300-2014-000020, 316-0300-2014-000021, 316-0300-2014-000022, 316-0300-2014-000002, at pp. 11.

²⁸ C-0071-SPA: ██████. Notice N 20-2014-SUNAT/3X3200, January 10, 2014.

²⁹ C-0072-SPA: ██████. Notice N 21-2014-SUNAT/3X3200, January 10, 2014.

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				4 working days to send it. ³⁰	
January 13, 2014		<p>Notice N° 028-2014-SUNAT/3X3200 to ██████ ██████ ██████ requesting information related to the Immobilization Act N° 316-0300-2014-000111 granting 4 working days to send it.³¹</p> <p>Notice N° 029-2014-SUNAT/3X3200 to ██████ ██████ ██████ requesting information related to the Immobilization Act N° 316-0300-2014-000110 granting 4 working days to send it.³²</p>	<p>Notice No. 026-2014-SUNAT/3X3200 to ██████ ██████ ██████ requesting information related to the Immobilization Act No. 316-0300-2014-00002 granting 4 working days to send it.³³</p>	<p>Annex to the Statement of Facts: Inspection Record N° 0200620116980-03 issued by SUNAT evidencing an inspection visit to ██████'s domicile stating that it was verified that the company was engaged in the production and export of gold bars as declared by ██████ ██████.³⁴</p> <p>SUNAT Inspection Record N° 0200620088036-03 at the establishment or domicile of ██████ with its annex (KML is</p>	

³⁰ C-0073-SPA: ██████. Notice N 22-2014-SUNAT/3X3200, January 10, 2014.
³¹ C-0074-SPA: ██████. Notice N 28-2014-SUNAT/3X3200, January 13, 2014.
³² C-0075-SPA: ██████. Notice N 29-2014-SUNAT/3X3200, January 13, 2014.
³³ C-0080-SPA: ██████. Notice No. 026-2014-SUNAT/3X3200, January 14, 2014.
³⁴ C-0076-SPA: ██████. Inspection Record N 0200620116980-03, January 13, 2014.

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				indicated as the main client). ³⁵ SUNAT Inspection Record N° 020062620116980-03 at the establishment or domicile of ██████ (without annex). ³⁶	
<u>January 14, 2014</u>	Motion submitted by ██████ requesting SUNAT an extension until March 24, 2014, to submit the additional documents requested in SUNAT Notification No. 437-2013-SUNAT/3X3200. ³⁷				
<u>January 16, 2014</u>		█████'s reply to the request of documents made by Notice No. 028-2014-SUNAT/3X3200 sent to ██████ ██████ ██████ ██████ in connection with Immobilization Order			

³⁵ C-0077-SPA: ██████. Inspection Record N 0200620088036-03, January 13, 2014.

³⁶ C-0078-SPA: ██████. Inspection Record N 0200620116980-03, January 13, 2014.

³⁷ C-0079-SPA: ██████. Petition submitted by ██████ before SUNAT requesting an extension to submit supporting documents, January 14, 2014.

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		No. 316-0300-2014-000111. ³⁸			
<u>January 20, 2014</u>		Written communication notarized by ██████, addressed to SUNAT requesting the lifting of the immobilization of the gold ordered by means of the Immobilization Order No. 316-0300-2014-000110 because it is property of KML. ³⁹			
<u>January 21, 2014</u>			Written communication sent by ██████ to SUNAT requesting the lifting of the immobilization of the gold ordered by means of the Immobilization Order No. 316-0300-2014-00002 because it is property of KML. ⁴⁰		
<u>January 24, 2014</u>			SUNAT reiterated the requirement to support the production, commercialization or possession of gold and sent it to ██████ through ██████		

³⁸ C-0081-SPA: ██████. ██████ reply to Notice N 028-2014-SUNAT/3X3200, January 16, 2014.

³⁹ C-0082-SPA: ██████. Notarized petition submitted by ██████ requesting the lift of immobilization order No. 316-0300-2014-000110, January 20, 2014.

⁴⁰ C-0083-SPA: ██████. Petition submitted by ██████ requesting the lift of immobilization order No. 316-0300-2014-000002, January 21, 2014.

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			Logistics, through Notice No. 52-2014-SUNAT/3X200. ⁴¹		
<u>January 27, 2014</u>			██████ requested the lifting of the immobilization measure N° 316-0300-2014-00002, submitting 16 supporting documents in administrative file N° 000-ADS0DT-2014-066010-6. ⁴²		
<u>January 30, 2014</u>			██████ reiterates its request to lift the immobilization measure by means of file No. 000-ADS0DT-2014-076548-6. ⁴³		
<u>January 31, 2014</u>			██████ reiterated its request to lift the immobilization measure by means of file No. 000-ADS0DT-2014-066010-6. ⁴⁴ On the same date, the Head of the Immediate and Mass Actions		

⁴¹ C-0084-SPA: ██████. Informe N° 303-2014-SUNAT-3X3200, April 09, 2014, at pp. 4.

⁴² *Id.* at pp. 4 – 5.

⁴³ *Id.*, at pp. 5.

⁴⁴ *Id.* at pp. 5.

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			<p>Division of the IPCFA requested the verification of the payment vouchers issued by ██████ to the subsequent inspection division - Memorandum N° 094-2014-SUNAT/3X200.⁴⁵</p> <p>On the same date, the Head of the Immediate and Mass Actions Division of the IPCFA requested the verification of the payment vouchers issued by ██████ to the Pisco Customs Office - Memorandum N° 096-2014-SUNAT/3X200.⁴⁶</p>		
<u>February 6, 2014</u>			<p>By resolution of the National Intendancy No. 000-3X0000/2014-000018 based on report No. 121-2014-SUNAT-3X200 dated February 3, 2014, an extension of immobilization No. 316-0300-2014-000002 (expired on May 6, 2014)</p>		

⁴⁵ *Id.* at pp. 5.

⁴⁶ *Id.* at pp. 5.

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			for up to 60 working days was granted. ⁴⁷		
<u>February 12, 2014</u>			█████ ██████ and KML requested the lifting of the immobilization act No. 316-0300-2014-000002 through file No. 000-ADS0DT-2014-109740-1. ⁴⁸		
<u>February 20, 2014</u>			Private communication from ██████ ██████ notifying the termination of mining operations in the Virgen del Carmen 2010 concession. ⁴⁹		
<u>February 24, 2014</u>			The Pisco Customs Office sends the result of the verification of payment vouchers to the Immediate Actions Division through file No. 000-ADS0DT-2014-109740-1. ⁵⁰		
<u>February 27, 2014</u>			The head of the IPCFA's Subsequent Control Division sends the result of the verification of payment vouchers to the		

⁴⁷ *Id.* at pp. 5.

⁴⁸ *Id.* at pp. 5.

⁴⁹ C-0085-SPA: ██████. Notice of termination of mining operations of ██████ at the Virgen del Carmen 2010 concession, February 20, 2014.

⁵⁰ C-0084-SPA: ██████. Informe N 303-2014-SUNAT-3X3200, April 09, 2014, at pp. 5.

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			Immediate Actions Division by means of memorandum No. 209- 2014-SUNAT-3X4100. ⁵¹		
<u>February 27, 2014</u>	Independent Review of Anti-Money Laundering & Compliance Program of KML performed by ██████ – concluding there are no reportable findings and/or deficiencies. ⁵²				
<u>March 13, 2014</u>		The Eleventh Prosecutor's Office of Callao, initiated a preliminary investigation against ██████ ██████ (legal representative of ██████), under the number 140-2014. ⁵³		Following the expiration of the preliminary investigation period, by means of Prosecutorial Resolution, dated March 13, 2014, the Superior National Coordinating Prosecutor's Office of the Prosecutor's Offices Specializing in Money Laundering and Loss of Domain, decided to assume jurisdiction in the present case, assigning the first supra- provincial prosecutor specialized in crimes of	By Prosecutorial Resolution dated March 13, 2014, the Superior National Coordinating Prosecutor's Office of the Prosecutor's Offices Specializing in Money Laundering and Loss of Domain, decided to assume jurisdiction in the present case, assigning the first supra- provincial prosecutor specialized in crimes of money laundering and loss of domain of lima - first office. ⁵⁵

⁵¹ *Id.* at pp. 5.

⁵² **C-0109-ENG**: Independent Review of KML Anti-Money Laundering & Compliance Program of ██████ (2013, 2014, 2015), at pp. 1 – 25.

⁵³ **C-0052-SPA**: Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 3 – 4.

⁵⁵ *Id.* at pp. 36.

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				money laundering and loss of domain of lima - first office. ⁵⁴	This temporary immobilization was initiated on March 13, 2014, based on an investigation by Peru against ██████ ██████ ██████ for the alleged commission of the crime of money laundering, in connection with illegal mining. ⁵⁶
<u>April 01, 2014</u>	██████████ notice informing KML of closure of account ending in 2129, letter sent by ██████████ (██████████) (pp.8). ⁵⁷				
<u>April 09, 2014</u>			SUNAT issues informe 303-2014-SUNAT-3X3200, signed by Customs Officer II ██████ ██████████ of the Division of Immediate and Massive Actions of the National Superintendence of Customs and Tax Administration (hereinafter referred to as "SUNAT"), by which:		

⁵⁴ C-0101-SPA: Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 36.
⁵⁶ *Id.* at pp. 36.
⁵⁷ C-0027-ENG: Notice of closure of bank accounts of KML's, at pp. 8.

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			<p>It establishes that the ██████ ██████ could not reliably support the legal origin, possession and/or purchase of the immobilized merchandise by means of Immobilization Act No. 316-0300-2014-000002, being susceptible of configuring, among other crimes, the crime of money laundering and other concurrent crimes.</p> <p>It recommends sending the report to the Public Prosecutor's Office and the Financial Intelligence Unit.⁵⁸</p>		
<u>April 16, 2014</u>			<p>KML's appeals in the money laundering complaint against ██████ ██████ ██████ ██████ - appeal made as the legitimate owner of the gold.⁵⁹</p>		

⁵⁸ C-0084-SPA: ██████. Informe N 303-2014-SUNAT-3X3200, April 09, 2014.

⁵⁹ C-0086-SPA: ██████. KML appeal as the legitimate owner of the gold in the money laundering investigation against ██████, April 16, 2014.

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<u>April 21, 2014</u>			Resolution No. 01, issued by the 9th Provincial Criminal Prosecutor's Office of Callao, of April 21, 2014. As a result of Report No. 303-2014-SUNAT-3X3200, a tax investigation is opened against ██████ █████ ██████ ██████ █████, representatives of ██████ █████ for the crime of money laundering from illegal mining. ⁶⁰		
<u>April 24, 2014</u>			Notice letter No. 140023440114-02-SUNAT regarding the audit carried out on the Virgen del Carmen 2010 Mining Concession against ██████. ⁶¹		
<u>April 28, 2014</u>			The public prosecutor specialized in money laundering crimes and loss of domain process files a criminal complaint against ██████		

⁶⁰ C-0087-SPA: ██████. Resolution No. 01, issued by the 9th Provincial Criminal Prosecutor’s Office of Callao, April 21, 2014, at pp. 21 – 24.

⁶¹ C-0088-SPA: Notice No. 140023440114-02-SUNAT regarding audit at the Virgen del Carmen 2010 concession, April 24, 2014.

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			██████ (legal representative of ██████) and other parties before the Prosecutor of the Ninth Provincial Criminal Prosecutor's Office of Callao. The alleged basis is an extraordinary tactical control action developed by the Intelligence and Tactical Operations Division of the National Intendancy for the Prevention of Smuggling and Customs Control of SUNAT in January 2014 on merchandise that the ██████ intended to export to the US. ⁶²		
<u>April 29, 2014</u>			KML files a request before the Ninth Provincial Prosecutor's Office of Callao, requesting dismissal of SUNAT's provisional seizure. ⁶³		

⁶² C-0068-SPA: ██████. Request for Preliminary Investigation for the crime of money laundering filed by the Public Prosecutor's Office Specializing in Money Laundering Crimes and Loss of Domain Proceedings before the Ninth Provincial Criminal Prosecutor's Office of Callao.

⁶³ C-0089-SPA: ██████. Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, April 29, 2014.

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<u>April 30, 2014</u>			<p>Ruling of the Superior Court of Justice of Callao - Permanent Criminal Court, in reference to the special procedure N° 80-2014-JPTP-CSJCL-ML, seizing 38.61 kg of gold bars, which were immobilized by means of the immobilization act N° 316-0300-2014-000002. The seizure period was set at 45 days from the execution of the measure.</p> <p>The preventive measure of immobilization provided for by SUNAT was lifted by imperative of the measure limiting seizure. The mineral was delivered in custody to CONABI (National Commission of Seized Goods, attached to the Presidency of the Council of Ministers of Peru) and its protection was arranged by the Bank of the Nation.⁶⁴</p>		

⁶⁴ C-0090-SPA: ██████. Ruling of the Superior Court of Justice of Callao – Permanent Criminal Court, April 30, 2014.

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<u>May 06, 2014</u>			Immobilization Release No. 316-0300-2014-000043, which lifts the preventive measure of immobilization according to immobilization record No. 316-0-300-2014-000002, to continue the special procedure No. 80-2014-JPTP-C5JCL-ML, issued by the Permanent Duty Criminal Court of the Superior Court of Justice of Callao, which ordered the seizure of the gold, designating CONABI as its custodian. ⁶⁵		
<u>May 20, 2014</u>				Prosecutorial Resolution No. 01, dated May 20, 2014 (in connection with File N° 01-2014, the first supra-provincial prosecutor specialized in crimes of money laundering and loss of domain of lima - first office) orders to broaden the	Prosecutorial Resolution No. 01, dated May 20, 2014 (in connection with File N° 01-2014, the first supra-provincial prosecutor specialized in crimes of money laundering and loss of domain of lima - first office) orders to broaden the

⁶⁵ C-0091-SPA: ██████. Immobilization release No. 316-0300-2014-000043.

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				preliminary investigation against ██████ ██████ ██████ ██████ and others. ⁶⁶	preliminary investigation against ██████ ██████ ██████ ██████ and others. ⁶⁷
<u>August 05, 2014</u>		Written communication dated August 4, 2014, sent to the 11th Provincial Criminal District Prosecutor's Office of Callao, Case No. 140-2014 signed by KML, regarding the investigation against ██████ for the alleged commission of money laundering, in which KML submits a legal opinion of ██████ ██████ showing that KML is the legitimate owner of the immobilized gold. KML also appointed lawyers to represent it. ⁶⁸	KML's written submission to the Ninth Provincial Criminal Prosecutor's Office of Callao regarding an analysis prepared by ██████ pertaining to the transfer of property title under Florida law, explaining when ownership of the gold acquired by KML was transferred from the suppliers to KML. ⁶⁹		
<u>September 09, 2014</u>			Resolution No. 1 - Initiation of preliminary		

⁶⁶ C-0101-SPA: Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 36.

⁶⁷ *Id.* at pp. 36.

⁶⁸ C-0092-SPA: ██████. Petition submitted by KML before the Eleventh Provincial Prosecutor's Office of Callao, August 05, 2014.

⁶⁹ C-0093-SPA: ██████. Petition submitted by KML before the Ninth Provincial Prosecutor's Office of Callao, August 05, 2014.

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		Laundering and Loss of Domain. The latter, by means of a Resolution issued, ██████ assumes jurisdiction and assigns the investigation to the Second Supraprovincial Prosecutor's Office Specializing in Money Laundering and Loss of Domain. ⁷¹			
<u>October 28, 2014</u>	██████████ notice informing KML of closure of account ending in 7480, letter sent by ██████████ (██████████) (pp.7). ⁷²				
<u>2014</u>	In 2014, the following companies stopped supplying (selling) gold to KML: ██████████ ██████████ ██████████ ██████████ ██████████ ██████████ ⁷³				
<u>2015</u>	In 2015, the following companies stopped supplying (selling) gold to KML: ██████████ ██████████ ⁷⁴				
<u>March 11, 2015</u>		The third office of the first supra-provincial prosecutor's office for money laundering and			

⁷¹ C-0052-SPA: Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 4.

⁷² C-0027-ENG: Notice of closure of bank accounts of KML's, at pp. 7.

⁷³ C-0050-ENG: KML's list of transactions and suppliers from 2011 to 2018.

⁷⁴ *Id.*

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		loss of domain assumes jurisdiction and generates the fiscal folder No. 66-2014, based on the preliminary investigation against ██████ (legal representative of ██████) allegedly for being this company a front to favor, facilitate and cover up illicit activities of money laundering from illegal mining. ⁷⁵			
<u>March 20, 2015</u>					Decision No. 1 of March 20, 2015, issued by the Second Specialized Criminal Court of San Juan de Miraflores, ordering the seizure of 99.84 kg of gold for the alleged commission of money laundering, from illegal Mining. ⁷⁶
<u>March 23, 2015</u>		The first supra-provincial corporate			

⁷⁵ **C-0052-SPA**: Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 4.

⁷⁶ **C-0101-SPA**: Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes, at pp. 163.

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		prosecutor's office specialized in money laundering and loss of domain initiated a preliminary investigation for the alleged commission of the crime of money laundering from illegal mining against █████, KML and others, based on reports 011-2014-DAO-UIF-SBS; 027-2014-DAO-UIF-SBS and 075-2014-DAO-UIF-SBS issued by the Peruvian Financial Intelligence Unit (<i>Unidad de Inteligencia Financiera del Perú</i>). ⁷⁷			
<u>March 27, 2015</u>					Members of the 2nd FISLAAPD and DIVILA FISCAL CRIMES PNP, pursuant to Resolution No. 1 of March 20, 2015, issued by the Second Specialized Criminal Court of San Juan de Miraflores,

⁷⁷ C-0052-SPA: Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 3 – 4.

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					seized a total of 99.84 kg of gold for the alleged commission of money laundering, from illegal mining, in the warehouses of ██████ Company, located in Chorrillos. Delivered to ██████. ⁷⁸
<u>April 20, 2015</u>	Independent Review of Anti-Money Laundering & Compliance Program of KML performed by ██████ – concluding there are no reportable findings and/or deficiencies. ⁷⁹				
<u>April 29, 2015</u>			Petition filed by KML for the return of gold bars before the Judge of the Sixth Criminal Court of Callao. ⁸⁰		
<u>May 14, 2015</u>		The sixth criminal court of Callao initiated judicial proceedings against ██████ (legal representative of ██████), as alleged perpetrator of the crime of aggravated money laundering. The actions under investigation in			

⁷⁸ C-0101-SPA: Prosecutorial Order No. 19, dated January 09, 2017, issued by the 1st supra-provincial corporate prosecutor’s office specializing in money laundering and loss of domain crimes, at pp. 163.

⁷⁹ C-0109-ENG: Independent Review of KML Anti-Money Laundering & Compliance Program of ██████ (2013, 2014, 2015), at pp. 26 – 49.

⁸⁰ C-0013-SPA: Petition before the *Sexto Juzgado Penal del Callao*.

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		process No. 01027-2015 derived from the immobilization by SUNAT of gold bars (98.61 kg) to be exported to Miami, FL, United States. ⁸¹			
	Ojo Público published an article titled <i>La pista detrás del London Bullion Market</i> by Oscar Castilla C., Nelly Luna Amancio and Fabiola Torres Lopez. ⁸²				
<u>June 24, 2015</u>	Ojo Público published an article titled <i>Compañías de Suiza y EE. UU. Niegan financiar minería ilegal, pero sin contestar interrogantes</i> . ⁸³				
<u>July 23, 2015</u>			Resolution of the Sixth Criminal Court of Callao dismissing KML petitions (non-recognized as good faith third party/ore owner). ⁸⁴		
<u>September 20, 2015</u>	General, supervening investigation mentioning KML: Prosecutorial Resolution No. 01, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of ownership crimes. ⁸⁵ Although the prosecutorial order identifies the specific actions that are the object of the investigation in relation to multiple persons and entities, with respect to KML there is no reference to a specific investigated action; nor is any individual linked to KML identified. ⁸⁶				
<u>October 16, 2015</u>		Communication No. 42- 2014-1°FISLAAPD- MP-EN-3D forwarding the prosecutor's			

⁸¹ **C-0052-SPA**: Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 5 – 6.

⁸² **C-0051-ENG/SPA**: News articles and books that replicated negative facts unfairly linked to KML by Peru, at pp. 176 – 196.

⁸³ *Id.* at pp. 164 – 175.

⁸⁴ **C-0100-SPA**: Resolution dated July 23, 2015, issued by the 6th Criminal Court of Callao, responding to KML’s petitions.

⁸⁵ **C-0052-SPA**: Prosecutorial Resolution No. 1, dated September 20, 2015, issued by the 1st supra-provincial corporate prosecutor's office specializing in money laundering and loss of domain crimes - Prosecution File No. 42-2014 Separation of allegations and further investigation, at pp. 1 – 18.

⁸⁶ *Id.* at pp. 1 – 18.

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		<p>resolution No. 1 dated, September 20, 2015, which orders to broaden the investigation against ██████ and others, for the alleged commission of the crime of money laundering arising from illegal mining. In this resolution, ██████ and KML, among others, are mentioned as investigated parties. By means of this resolution, these files are accumulated with the fiscal folders No. 58-2014, 66-2014 and 71-2014.⁸⁷</p>			
<u>December 18, 2015</u>	James Bargent publishes in In Sight Crime an article titled <i>Una incautación, una demanda y el oro ilegal de Perú</i> (Part 1 and 2). ⁸⁸				
<u>January 07, 2016</u>	Article from Yahoo Finance where KML announces further strengthening of compliance initiatives. ⁸⁹				
<u>February 03, 2016</u>			Order issued by the 4 th Criminal Chamber of Free Prisoners of Callao in Exp. 3306-2014, by which KML’s submission		

⁸⁷ C-0108-SPA: Communication No. 42-2014-1 FISLAAPD-MP-EN-3D forwarding the prosecutor's resolution No. 1 dated, September 20, 2015.

⁸⁸ C-0051-ENG/SPA: News articles and books that replicated negative facts unfairly linked to KML by Peru, at pp. 15 – 37.

⁸⁹ C-0031-ENG: *Kaloti Metals & Logistics announces further strengthening of compliance initiatives*. Yahoo Finance article.

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			brief is considered not to be presented because KML is not a party in the process. ⁹⁰		
<u>March 23, 2016</u>	██████ notice informing KML of closure of account ending in 0767, letter sent by ██████ (██████████) (pp.6). ⁹¹				
<u>April 2016</u>	The Global Initiative Against Transnational Organized Crime publishes a study regarding the Organized Crime and Illegally Mined Gold in Latin America, mentioning “The Kalotis” (sic) as its first case study (pp.72). ⁹²				
<u>April 25, 2016</u>	Independent Review of Anti-Money Laundering & Compliance Program of KML performed by ██████ – concluding there are no reportable findings and/or deficiencies. ⁹³				
<u>May 07, 2016</u>	██████ (██████████) notice informing KML of closure of account ending in 9066, letter sent by ██████ (██████████) (pp.5). ⁹⁴				
<u>May 25, 2016</u>			Petition filed by KML before the Judge of the Eighth Criminal Court of Callao requesting the lifting of the seizure measure. ⁹⁵		
<u>June 07, 2016</u>			Petition filed by KML before the Callao Transitory Criminal Court requesting the lifting of the seizure measure. ⁹⁶		

⁹⁰ C-0016-SPA: Decision from the *Cuarta Sala Penal Reos Libre*.

⁹¹ C-0027-ENG: Notice of closure of bank accounts of KML’s, at pp. 6.

⁹² C-0051-ENG/SPA: News articles and books that replicated negative facts unfairly linked to KML by Peru, at pp. 118.

⁹³ C-0109-ENG: Independent Review of KML Anti-Money Laundering & Compliance Program of ██████ (2013, 2014, 2015), at pp. 50 – 73.

⁹⁴ C-0027-ENG: Notice of closure of bank accounts of KML’s, at pp. 5.

⁹⁵ C-0014-SPA: Petition before the *Octavo Juzgado Penal del Callao*.

⁹⁶ C-0015-SPA: Petition before the *Juzgado Penal Transitorio del Callao*.

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<u>October 25, 2016</u>		<p>Attestation No. 002-2016-DIRILA/PNP-DIVINESP-D4 issued by the Direction of Money Laundering Investigations (Peruvian National Police) in which ██████ and KML are mentioned as alleged to be responsible for money laundering from illegal mining.</p> <p>Attestation No. 002-2016-DIRILA/PNP-DIVINESP-D4. The police authority states that the criminal process in charge of the 6th Criminal Court of Callao is related to criminal process 66-2014 and that the investigation originated in the immobilization of 98.61 kg. developed by the Intelligence and Tactical Operations Division of SUNAT on January 9, 2014, in an extraordinary control action for the purpose of inspection of gold that ██████ would</p>			

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			investigation against ██████ ████████████████████ ████████████████████, representatives of ██████ ████████████████████ for the crime of laundering assets from illegal mining. ¹⁰⁴		
<u>July 23, 2018</u>			Decision of the 1st Criminal Court of liquidation, submitting file No. 3306-2014-0- 0701-JR-PE-06 to the Superior Hierarchical Court. ¹⁰⁵		
<u>August 10, 2018</u>	████████████████████ notice informing KML of closure of ██████ deposit account ending in 4447 (pp.1). ¹⁰⁶				
<u>October 11, 2018</u>					Decision N° 04 of the Superior Court of Justice of Lima - Third Civil Chamber - regarding the contract between ██████ ████████████████████ ████████████████████ and KML in connection with the purchase of 99.84 kg of gold. ¹⁰⁷

¹⁰⁴ C-0096-SPA: ██████. Order of conclusion of preliminary investigation issued by the 1st Criminal Court of Callao, April 09, 2018.
¹⁰⁵ C-0097-SPA: ██████. Ruling of the 1st Criminal Liquidator Court, July 23, 2018.
¹⁰⁶ C-0027-ENG: Notice of closure of bank accounts of KML’s, at pp. 1.
¹⁰⁷ C-0110-SPA: Resolution No. 4, dated October 11, 2018, issued by the Third Civil Chamber of the Supreme Court of Peru.

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<u>2018</u>	In 2018, the following companies stopped supplying (selling) gold to KML: ██████ ¹⁰⁸				
<u>November 30, 2018</u>	The actions of Peru forced KML to terminate operations, KML’s investments were irreversibly deprived of all value, and damages were hence incurred. ¹⁰⁹				
<u>May 15, 2019</u>	Newsbeezzer.com publishes an article titled “ <i>Peter Ferrari</i> ” and one of the biggest cases of illegal gold trading in the last decade. ¹¹⁰				
	KML is mentioned in the book <i>Dirty Gold: the rise and fall of an international smuggling ring</i> ; by Jay Weaver, Nicholas Nehamas, Jim Wyss, and Kyra Gurney. ¹¹¹				
<u>March 11, 2020</u>	Netflix series “ <i>Dirty Money</i> ,” episode on “ <i>Dirty Gold</i> ” (season 2, episode 4) mainly about Peru. This documentary was directed by Stephen T. Maing and written by Nurkan Aydogan (KML was not mentioned). ¹¹²				
<u>September 22, 2020</u>	El Universo 100 publishes an article titled <i>Los pagos bajo sospecha de acopiadora de oro de EE. UU. a empresas peruanas investigadas por lavado y minería ilegal</i> , by Miguel Gutierrez R. ¹¹³				
<u>September 25, 2020</u>	970 Universal publishes an article titled <i>Archivos FinCen, lo que hay que saber: qué son, su alcance en Uruguay y Latinoamérica</i> , by Paula Ojeda. ¹¹⁴				
<u>May 5, 2021</u>	Katie Moore publishes an article titled Peru’s Gold War regarding the Human Rights Struggle Occurring in the Madre de Dios. ¹¹⁵				

¹⁰⁸ C-0050-ENG: KML’s list of transactions and suppliers from 2011 to 2018.

¹⁰⁹ C-0103-ENG: Witness Statement ██████-Claimant’s Memorial-ENG, at ¶ 57.

¹¹⁰ C-0051-ENG/SPA: News articles and books that replicated negative facts unfairly linked to KML by Peru, at pp. 40 – 42.

¹¹¹ *Id.* at pp. 1 – 14.

¹¹² C-0098-ENG: Netflix series *Dirty Money, Dirty gold episode*, season 2, episode 4. Documentary directed by Stephen T. Maing and written by Nurkan Aydogan.

¹¹³ C-0051-ENG/SPA: News articles and books that replicated negative facts unfairly linked to KML by Peru, at pp. 150 – 163.

¹¹⁴ *Id.* at pp. 197 – 201.

¹¹⁵ *Id.* at pp. 43 – 46.