

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

Claimants

v.

THE REPUBLIC OF PERU

Respondent

CLAIMANTS' MEMORIAL

ICSID CASE NO. ARB/19/28

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GLOSSARY AND ABBREVIATIONS

AAA	<u>Autoridad Administrativa del Agua I Caplina - Ocoña</u> : Branch of ANA with jurisdiction over water-related matters in the Arequipa region, where the Mamacocha Project was located.
AEP	<u>Fiscalía Especializada en Materia Ambiental de Arequipa</u> : The office of the Arequipa prosecutor who specializes in enforcing Arequipa's environmental criminal laws.
ANA	<u>Autoridad Nacional del Agua</u> : Governing body of Peru's water resource management that is tasked with the oversight of the different water authority administrative offices in Peru (<i>e.g.</i> , AAA).
ARMA	<u>Autoridad Regional del Medio Ambiente</u> : Regional environmental authority with jurisdiction over environmental matters in the Arequipa region, where the Mamacocha Project was located.
CHM	<u>CH Mamacocha S.R.L.</u>
COS	<u>Commercial Operation Start-Up</u> : The date on which CHM planned to achieve commercial operation under the RER Contract.
DCF	<u>Discounted Cash Flow</u>
DEG	<u>Deutsche Investitions-und Entwicklungsgesellschaft</u> : German development bank that was in negotiations with Claimants to provide a non-recourse project finance loan to the Mamacocha Project
DIA	<u>Declaración de Impacto Ambiental</u> : Environmental impact declaration
EIA	<u>Estudio de Impacto Ambiental</u> : Environmental impact study
EPC	<u>Engineering, Procurement and Construction</u>
FET	<u>Fair and Equitable Treatment</u>
FMV	<u>Fair Market Value</u>
GCZ	<u>GCZ Ingenieros S.A.C.</u>
GLAP	<u>General Law of Administrative Procedure</u>
ILC Articles	<u>International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts</u>
Innergex	<u>Innergex Renewable Energy Inc.</u> : Canadian hydropower company that was in negotiations with Claimants to acquire a 70% equity share in the Mamacocha Project

IRR	<u>Internal Rate of Return</u>
Latam Hydro	<u>Latam Hydro LLC</u>
Legislative Decree No. 1002	<u>Legislative Decree for the Promotion of Investment for the Generation of Electricity from Renewable Energies</u>
MFN	<u>Most-Favored Nation</u>
MINEM	<u>Ministerio de Energía y Minas del Perú:</u> Entity of the Peruvian government responsible for managing the energy and mining sectors and overseeing the distribution of energy throughout Peru.
OSINERGMIN	<u>Organismo Supervisor de la Inversión en Energía y Minería:</u> Entity of the Peruvian government responsible for regulating Peru's energy and mining industries, including renewable energy resources projects like the Mamacocha Project.
Peru	<u>The Republic of Peru</u>
PPA	<u>Power Purchase Agreement</u>
RER	<u>Renewable Energy Resources</u>
RER Contract	<u>Contrato de Concesión para el Suministro de Energía Renovable al Sistema Eléctrico Interconectado Nacional:</u> February 18, 2014 contract between CHM and Peru.
RGA	<u>Gobierno Regional de Arequipa:</u> Regional government responsible for the department of Arequipa, where the Mamacocha Project was located.
SEIN	<u>Sistema Eléctrico Interconectado Nacional:</u> Peru's electrical grid, consisting of the set of transmission lines and electrical substations connected to each other.
Special Commission	<u>Comisión Especial Que Representa a la República del Perú en Controversias Internacionales de Inversión:</u> Agency within Peru's Ministerio de Economía y Finanzas that is responsible for resolving international investment disputes in which Peru is a party.
TPA	<u>U.S.-Peru Trade Promotion Agreement:</u> Free trade agreement between the U.S. and Peru, entered into force on February 1, 2009.
TUPA	<u>Texto Único de Procedimientos Administrativos:</u> Document that contains all regulations and procedures governing the acts of Peru's administrative agencies, including the length of time within which an agency can review a permit or concession application.

I. EXECUTIVE SUMMARY

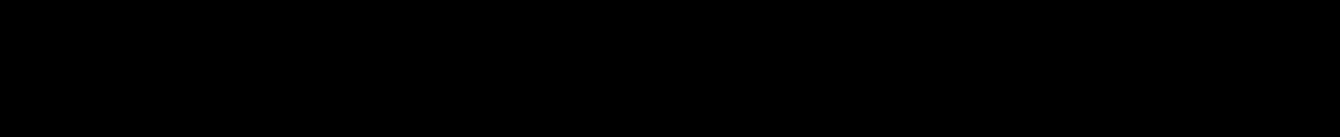
1. Claimants, Latam Hydro LLC (“**Latam Hydro**”) and CH Mamacocha S.R.L. (“**CHM**”), bring claims under the U.S.-Peru Trade Promotion Agreement (“**TPA**” or “**Treaty**”) and the Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System (“**RER Contract**”) against Respondent, the Republic of Peru (“**Peru**”), arising from Peru’s financial destruction of a 20-megawatt hydroelectric project near the Mamacocha Lagoon in Arequipa, Peru (the “**Mamacocha Project**” or “**Project**”) as well as five (5) related hydroelectric projects upstream of the Lagoon (the “**Upstream Projects**”).

2. This case involves the government’s deliberate interference and ultimate destruction of the Mamacocha and Upstream Projects, which were backed by diligent U.S. investors and designed by world-class engineers and scientists to be environmentally sustainable. CHM was the concessionaire and Peru’s counterparty under the RER Contract. Latam Hydro was the U.S. investor that owned and controlled CHM. Together, they poured nearly US \$24 million into these Projects and expected to get sizable returns on their investments. But in a short period—between March 2017 and December 2018—Peru adopted a series of arbitrary, discriminatory, and bad-faith measures that wiped out their investments.

3. The RER Contract was the product of a years-long promotional campaign by Peru to attract foreign investment in its renewable energy sector. Those who were awarded this contract were promised key incentives, including a 20-year “Guaranteed Revenue” concession. But there was a catch. The concessionaire had to achieve commercial operation in approximately (34) months to maximize the concession. And if the concessionaire took longer than fifty-eight (58) months to achieve commercial operation, the contract would automatically terminate. Time was literally of the essence.

4. The project encountered unexpected and, ultimately, fatal roadblocks. Approximately thirty-eight (38) months of the total time of fifty-eight (58) months were lost to permitting delays caused by regional government agencies. Peru admitted it was responsible for these delays and that these delays prevented reaching “Financial Closing,” a critical milestone before shovels could hit the ground on the Mamacocha Project. Peru partially cured these delays by extending the commercial operation start-up (“COS”) date and reaffirming that it had a duty under the RER Contract, Peruvian law, and the TPA to protect concessionaires from delays and interferences caused by government negligence, misconduct or inaction.

5. But in March 2017, the Regional Government of Arequipa (“RGA”) commenced a groundless strike-suit (the “RGA Lawsuit”) to block further development by invalidating the Mamacocha Project’s essential environmental permits that had been approved three years earlier.



The viability of the Mamacocha Project was immediately threatened.

6. Claimants’ ongoing negotiations with a majority investor, a lead bank, and a contractor—all of which were within weeks of closing—ground to an immediate halt, due to the unexpected and unpredictable political risks created by the RGA’s political opposition to the Project. Nonetheless, Claimants appeared to overcome this hurdle when a central governmental agency hired a distinguished outside law firm to assess the legality of the RGA Lawsuit. The resulting opinion confirmed what Claimants already knew: the RGA Lawsuit was meritless and had little likelihood of success. By filing its Lawsuit, the RGA had acted in bad faith to block the Project. The central government threatened the Regional Governor and RGA officials with potential civil and criminal liability, apparently causing panic inside the RGA and leading to

public “finger pointing.” The resulting public documents confirm that the Project was a victim of a clandestine “investigation” and trumped up charges that government officials knew would not prevail in a court of law.

7. The RGA Lawsuit was eventually withdrawn, but the whole ordeal had taken a year of precious time away from the Project. And because time was of the essence, the Mamacocha Project had no reasonable viability unless Peru restored the time the regional government had taken away. In December 2018, however, Peru implemented coordinated measures that sealed the fate of the Project. **First**, the government denied the concessionaire’s request for an extension of the COS deadline to make up for the lengthy interruption caused by the RGA Lawsuit. By that point, only fifteen (15) months remained to undertake construction of a project which, at a minimum, required between twenty-six (26) and thirty (30) months to complete. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] But they succeeded in destroying the Mamacocha Project and, with it, the Upstream Projects, in one fell swoop.

8. This ICSID arbitration will evaluate Peru’s wrongdoing in turning its back on the commitments made to Claimants, despite their diligence, persistence, and commitment to Peru. Latam Hydro was a model foreign investor for Peru. It is owned and controlled by Messrs. Michael Jacobson and Gary Bengier, former eBay, Inc. senior executives who have the business acumen, financial resources, and business relationships to oversee environmentally responsible

projects that would improve the country's electricity supply and, in the process, reduce global warming. They chose the Mamacocha and Upstream Projects not only based on their profitability, but also with an eye to improving the living standards in the remote communities in which they were investing. And they hired approximately thirty (30) businesspeople, economists, engineers, environmental experts, social workers and others to ensure these projects were developed, constructed, and operated in accordance with the highest environmental standards, best industry practices, and with the interests of the neighboring communities in mind.

9. Claimants answered Peru's call for private foreign investors in Peru's renewable energy sector. In 2008, Peru promulgated a new regulatory framework to encourage private investments, including foreign investment, in its renewable energy sector by offering significant financial incentives, guarantees, and legal protections designed to attract long-term investment in its renewable energy sector (the "**RER Promotion**"). The RER Promotion was established to further Peru's national goal of increasing the generation of electricity using renewable energy resources ("**RER**"), including "small hydroelectric" projects of twenty (20) megawatts or less of installed capacity. Peru also created the RER Promotion to "facilitate the implementation" of Peru's recent accession to the TPA by, *inter alia*, "eliminating barriers" for U.S. investment in Peru through key "incentives" under its energy laws.

10. Peru embodied these "incentives" and the TPA protections in the RER contracts that it awarded in public auctions under the RER Promotion. As noted above, the *sine qua non* of these incentives was Peru's sovereign guarantee that it would pay "Guaranteed Revenue" over a period of up to twenty (20) years, which significantly reduced the economic risks and uncertainties that had historically impeded development of RER projects. The RER contracts also offered concessionaires a unique risk-allocation scheme whereby Peru, through MINEM,

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committed to assist concessionaires cut through government “red tape” during the permitting phase. This incentive was just one example of the “public-private” nature of the RER Contract, in which Peru and the concessionaire were supposed to be “partners” with the shared goal of ensuring the success and viability of RER projects.

11. The RER Contract also promised foreign investors that any significant dispute under the RER Contracts would be resolved by an impartial and independent ICSID tribunal seated outside Peru, due to the involvement of a foreign investor on the one side and a State counterparty on the other. Combined, these incentives and protections were designed to make the RER Contracts “bankable” investment agreements—*i.e.*, acceptable to institutional lenders—thereby, providing the concessionaire with commercially competitive non-recourse financing to construct and operate a generation plant and transmission line and supply electricity to the national energy grid.

12. The RER Contracts also incorporated by reference numerous other protections under Peruvian law and the TPA on which Claimants reasonably relied. Peru, for example, promised to adhere to the administrative procedural laws and regulations, including those that imposed on Peru fixed review periods for Peruvian authorities at all levels of government to grant permits, concessions, and applications related to the RER and other projects. Peru also committed to treat concessionaires fairly, consistently, in good faith, and without discrimination. Accordingly, Peru committed to protect Claimants’ legitimate, investment-backed expectations and honor prior interpretations and positions taken by Peru under these contracts.

13. Because every day *literally* mattered under the RER Contract, it was incumbent on the concessionaire to manage diligently everything under its control, such as compliance with the applicable laws and regulations. It was then up to Peruvian government authorities to grant

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all necessary permits, property rights and legal authorizations “in due time” so the project could achieve COS on time. That was the bargain that Peru offered foreign investors under the RER Contracts.

14. After careful due diligence, Claimants decided to invest in the Mamacocha and Upstream Projects in reliance on the legitimate expectations they formed from the promises and commitments offered under the RER Promotion, RER Contract, the TPA, and Peruvian law. Claimants assembled a team with more than 150 years of experience in bringing renewable energy projects to fruition. They relied on leading energy lawyers who had personally been involved in the creation of the RER Promotion and had shepherded dozens of other projects through this legal framework. They commissioned voluminous studies to ensure the Project’s feasibility and minimal environmental impact. They opened a central office in Lima and several satellite offices in the region where the Project would be located. They worked closely with these communities to educate them about the myriad economic and social benefits that the Project would bring. They completed many social development programs as a sign of goodwill. And they began the permitting process *a full year* in advance of the public auction under which they were awarded the RER Contract.

15. Through no fault of its own, the Mamacocha Project encountered strong opposition from regional government officials. As explained earlier, the regional opposition came to a head in March 2017 when the RGA filed its Lawsuit. But there is more to this story. In May 2017, the regional water authority denied the Mamacocha Project’s last-remaining permit on its critical path—the “civil works authorization”—purely to appease political allies on the Regional Council that wanted to block the Project, as the regional branch of the national water authority (“AAA”) later admitted. This measure alone was back-breaking because without this

permit the banks would not finance and the Project could not get built. When the RGA folded its Lawsuit, the AAA followed suit shortly thereafter by issuing CHM's long-delayed permit.

16. The Regional Governor's order to dismiss the Lawsuit had the opposite effect on the AEP's criminal investigation. Because it was based entirely on the RGA Lawsuit's allegations, it was reasonable to expect that it would have ended as soon as the Regional Governor disclosed that the RGA's Lawsuit was wholly without merit. [REDACTED]

[REDACTED]

17. Peru's combined assault on the Mamacocha Project had its intended effect. Without the requested extensions to compensate for the RGA Lawsuit interferences and facing a new unauthorized arbitration brought by Peru to nullify extensions previously granted, it became impossible to attract financing, commence construction, or achieve commercial operation in the short time remaining before the COS deadline was to elapse. The Mamacocha and Upstream Projects were rendered impossible to complete and the RGA Contract was terminated as a matter of law. [REDACTED]

[REDACTED]

18. As described more fully below, these measures against the Projects are wholly attributable to Peru and, separately and cumulatively, violated the protections set forth under the TPA, including the Fair and Equitable Treatment standard under Article 10.5, the Expropriation protections under Article 10.7, and the prohibitions against discriminatory treatment under

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Article 10.4. Additionally, these measures breached Peru's obligations under the RER Contract as well as the Peruvian law principles of good faith, *actos propios*, and *confianza legitima*.

19. This case is unique because Claimants intend to prove their claims principally through public admissions by Peruvian government officials. These admissions include, but are not limited to, the following:

- a. Peru's admissions in Addenda 1-2 of the RER Contract that government entities exclusively delayed the Project by three years and these delays made it impossible for the Mamacocho Project to advance;
- b. Peru's admission in the Sosa Report discussed below that Peru has a duty under the Peruvian and international law to hold CHM harmless from interferences by government entities;
- c. Peru's admission in Addenda 3-6 of the RER Contract that CHM's obligations and work schedule were suspended to allow the Peruvian government to convince the RGA to dismiss its lawsuit and then to permit negotiations with MINEM to approve a third extension to the RER Contract;
- d. Peru's admission from public disclosures by RGA officials that: (i) the RGA always knew the RGA Lawsuit was meritless; (ii) it was "highly likely" that the RGA Lawsuit would result in the RGA paying millions of dollars to Claimants in an ensuing arbitration; and (iii) the RGA officials who recommended the RGA Lawsuit acted in bad faith and could be criminally prosecuted for their actions; and

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- e. Peru's admissions in November 2018 that Peru had failed in its domestic and international legal duties to protect the RER Projects from government delays and interferences.

20. Claimants seek the following relief: (i) damages in a quantum required to fully compensate Latam Hydro and CHM for their lost investments and costs proximately caused by Peru's breaches under the TPA and RER Contract; (ii) return of the US \$5 million performance bond deposited under the RER Contract and the bond for the transmission line; (iii) a declaration that the RER Contract is terminated and CHM has no further obligations arising from the RER Contract; (iv) a recommendation for Peru to terminate the criminal investigation against CHM's legal representative; and (v) such other relief as the Tribunal determines is just and proper.

21. With this Memorial, Claimants present witness statements from: (i) Claimants' founder, co-owner, and co-Sponsor, Mr. Michael Jacobson ("**Jacobson I**"); (ii) Latam Hydro's former CEO and President, Mr. Stefan Sillen ("**Sillen I**"); (iii) Latam Hydro's former Project Manager and Technical Consultant, Mr. Andrés Bartrina ("**Bartrina I**"); (iv) CHM's former Manager, Mr. Carlos Diez Canseco ("**Canseco I**"); (v) Claimants' lead energy lawyer, Dr. Roberto Santiváñez ("**Santiváñez I**"); and (vi) CHM's legal representative, Dr. Licy Benzaquén ("**Benzaquén I**").

22. Claimants also rely upon independent expert opinions by:

- a. Dr. Maria Teresa Quiñones, a prominent Peruvian administrative law expert, who opines that Peru has breached its obligations under Peruvian administrative law ("**Quiñones Report I**");

- b. Dr. Eduardo Benavides, a pre-eminent Peruvian civil law expert, who opines on Peru's numerous breaches of the RER Contract and Peruvian civil law ("**Benavides Report I**");
- c. Mr. John McTyre, Partner at HKA Global Ltd., an internationally respected construction and delay claim consultancy firm, who opines after independent review that Peru was responsible for 1742 days of delays to the Project ("**HKA Report I**"); and
- d. Messrs. Santiago Dellepiane and Andrea Cardani, Managing Director and Director, respectively, at Berkeley Research Group, who conclude after independent review that Claimants suffered damages exceeding US \$47 million, inclusive of pre-award interest calculated to the date of this submission ("**BRG Report I**").

23. This Memorial is structured as follows: Section II describes the factual background of this dispute; Section III establishes the jurisdictional bases for Latam Hydro and CHM's claims; Section IV demonstrates that Peru is liable for violations of the TPA and international law; Section V proves Peru's breaches of its obligations under the RER Contract and Peruvian Law; Section VI explains the quantification of damages that Latam Hydro and CHM have suffered as a direct result of Peru's wrongful conduct; and Section VII sets out Claimants' Request for Relief.

II. STATEMENT OF FACTS

February 22, 2012	• The Mamacocha and Upstream Projects begin with the commissioning of a pre-feasibility report
February 18, 2014	• CHM and Peru execute the RER Contract
July 17, 2015	• CHM and Peru execute Addendum 1 to the RER Contract to account for 705-day delays attributable to Peru
January 3, 2017	• CHM and Peru execute Addendum 2 to the RER Contract to account for 462-day delays attributable to Peru
March 14, 2017	• The RGA files the RGA Lawsuit to revoke the Mamacocha Project's environmental permits for the hydroelectric plant
March 24, 2017	[REDACTED]
May 16, 2017	• AAA denies civil works authorization for arbitrary and unlawful reasons
July 5, 2017	• AAA issues a materially defective civil works authorization, causing significant delays
July 20, 2017	• Claimants initiate "Trato Directo" negotiations with the Special Commission due to unlawful nature of the RGA Lawsuit
August 29, 2017	• CHM and Peru execute Addendum 3 to the RER Contract, which suspends the contract from April 21, 2017 to December 31, 2017
December 27, 2017	• The Regional Governor of Arequipa issues a resolution that orders dismissal of the RGA Lawsuit after Peru concluded it lacked merit and was commenced in bad faith
January 12, 2018	• CHM and Peru execute Addendum 4 to the RER Contract, which suspends the contract from January 1, 2018 to February 28, 2018
February 2, 2018	[REDACTED]
March 6, 2018	• CHM and Peru execute Addendum 5 to the RER Contract, which suspends the contract from March 1, 2018 to June 30, 2018
March 7, 2018	• Claimants serve Peru with a second notice of intent under Article 10.15
July 6, 2018	• CHM and Peru execute Addendum 6 to the RER Contract, which suspends the contract from July 1, 2018 to September 30, 2018
December 27, 2018	[REDACTED]
December 31, 2018	• MINEM denies CHM's February 5, 2018 extension request, destroying the Mamacocha and Upstream Projects

A. The Co-Founders of Latam Hydro

24. Michael Jacobson is a U.S. citizen, co-founder and member of Latam Hydro, and co-Sponsor and co-owner of the Mamacocha and Upstream Projects.¹ Mr. Jacobson is an experienced businessman who served as Senior Vice President, General Counsel, and Secretary of eBay, Inc. for almost seventeen (17) years.² eBay, Inc. is one of Silicon Valley's success stories, as it created the ecommerce platform for consumer-to-consumer and small business-to-consumer sales through its website. During his long tenure, he advised eBay, Inc. through a wide range of high-profile transactions including its successful initial public offering in 1998, its US \$1.5 billion acquisition of PayPal in 2002, its US \$2.6 billion acquisition and later profitable sale of Skype, and its spinoff of PayPal in 2015.³

25. The other co-founder and member of Latam Hydro is Gary Bengier, a U.S. citizen.⁴ Mr. Bengier also served as co-Sponsor and co-owner of the Mamacocha and Upstream Projects.⁵ Mr. Bengier is Mr. Jacobson's former colleague at eBay, Inc., having served as the company's Chief Financial Officer from 1997 to 2001, building its early financial team, and leading the company's initial public offering in 1998.⁶ Since leaving eBay, Inc., Mr. Bengier has been an active investor in energy and other projects.⁷ Earlier in his career, Mr. Bengier had been an analyst at the international engineering firm Bechtel, analyzing, among other things, energy projects including hydro projects.⁸

¹ Jacobson I, ¶ 1.

² Jacobson I, ¶ 3.

³ Jacobson I, ¶ 3.

⁴ Jacobson I, ¶¶ 23-24.

⁵ Jacobson I, ¶¶ 23-24.

⁶ Jacobson I, ¶¶ 23-24.

⁷ Jacobson I, ¶ 24.

⁸ Jacobson I, ¶ 24.

26. The co-founders of Latam Hydro are experienced, diligent investors who were attracted to making a long-term renewable energy investment in Peru because of its stable legal regime, relatively low political volatility, thriving economy and concomitant increasing demand for electricity.⁹ Peru also had abundant untapped hydrological resources and had expressed a desire to develop these resources.¹⁰ In addition, both investors were interested in energy sustainability and reducing global warming.¹¹ And they were committed to helping underserved populations, like the remote, farming village of Ayo.¹²

27. Most significantly, these investors were attracted to Peru because of the incentives and protections offered by the TPA,¹³ the ensuing RER Promotion program established to attract a flow of new domestic and foreign investment into Peru's renewable energy sector,¹⁴ and the extremely favorable financial returns provided by the long-term sovereign-guaranteed electricity concession contracts on offer.¹⁵

B. Peru and the U.S. Entered Into a Trade Promotion Agreement

28. The TPA was signed on April 12, 2006 and entered into force on February 1, 2009.¹⁶ It ushered in a new era for U.S.-Peru trade and investment.¹⁷ As reported by the Office of the U.S. Trade Representative, “[t]he Agreement established a secure, predictable legal framework for U.S. investors operating in Peru. All forms of investment are protected under the

⁹ Jacobson I, ¶ 8.

¹⁰ Jacobson I, ¶ 13; Sillen I, ¶ 20; .

¹¹ Jacobson I, ¶ 3.

¹² Jacobson I, ¶¶ 52, 60, 62-63.

¹³ TPA, February 1, 2009, Ch. 10 (C-0001); Jacobson I, ¶ 8.

¹⁴ Jacobson I, ¶¶ 9-12.

¹⁵ Jacobson I, ¶¶ 9-12.

¹⁶ See TPA, February 1, 2009, Ch. 23 (C-0001); Office of the U.S. Trade Representative, “Peru Trade Promotion Agreement,” <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> (accessed on September 6, 2020).

¹⁷ Office of the U.S. Trade Representative, “Peru Trade Promotion Agreement,” <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> (accessed on September 6, 2020).

Agreement.”¹⁸ The TPA embodies robust investor protections, including guarantees of fair and equitable treatment, compensation for expropriation, most-favored nation treatment, and investor state dispute resolution at ICSID.¹⁹ The TPA provided the foundation to attract U.S. investors to Peru’s renewable energy sector.²⁰

C. Peru Promoted Investments by U.S. Investors in Renewable Energy Projects

29. On May 1, 2008, Peru enacted the “Legislative Decree for the Promotion of Investment for the Generation of Electricity from Renewable Energies” (“**Legislative Decree No. 1002**”).²¹ Legislative Decree No. 1002’s stated objective is “to promote the use of Renewable Energy Resources (RER) in order to improve the quality of life of the population and to protect the environment by promoting investment in electricity production.”²² Importantly, this Decree also expressly states that it strives “to facilitate the implementation of the United States – Peru Trade Promotion Agreement” and “promot[e] . . . private investment” by, *inter alia*, “eliminating barriers” for U.S. investors to develop projects in Peru’s renewable energy sector.²³ The Decree further states this investment promotion will be effected through “incentives” provided through a “legal framework”²⁴ to develop renewable energy resources—*i.e.*, biomass, wind, solar, geothermal, tidal, and small-scale hydroelectric projects with an installed capacity that does not exceed twenty (20) megawatts.²⁵ This legal framework to incentivize private investment for RER projects is hereafter referred to as the RER Promotion.

¹⁸ Office of the U.S. Trade Representative, “Peru Trade Promotion Agreement,” <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> (accessed on September 6, 2020).

¹⁹ TPA, February 1, 2009, Arts. 10.4, 10.5, 10.7, 10.16(3) (C-0001).

²⁰ See Office of the U.S. Trade Representative, Advisory Group Reports, “ITAC 6 – Energy and Energy Services,” (accessed on September 8, 2020); Jacobson I, ¶¶ 6-13.

²¹ Legislative Decree No. 1002, May 1, 2008 (C-0007).

²² Legislative Decree No. 1002, May 1, 2008, Art. 1 (C-0007).

²³ Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).

²⁴ Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).

²⁵ Legislative Decree No. 1002, May 1, 2008, Art. 3 (C-0007).

30. To implement the RER Promotion, Peru, through MINEM, devised an auction process to award contracts to investors, including U.S. investors, that contained the incentives contemplated by Legislative Decree No. 1002.²⁶ The auctions would be conducted by Peru's regulator of the electricity sector, Organismo Supervisor de la Inversión en Energía y Minería (“OSINERGMIN”), at MINEM's direction.²⁷ OSINERGMIN would select the lowest electrical prices offered that, in the aggregate, would produce an annual supply of electricity publicized by MINEM before the auction.²⁸ Successful bidders would then enter into a standard-form, non-negotiable, long-term electricity generation, supply, and revenue agreement with Peru, *i.e.*, the RER Contract.²⁹

31. The chief incentive in the RER Contract is Peru's sovereign guarantee that it will pay the concessionaire a fixed price per megawatt hour, for a fixed amount of megawatt hours per year, over a 20-year period.³⁰ This means that if the price paid to the concessionaire for electricity injected into the spot market at a specific moment in time is lower than the fixed price under the RER Contract, Peru will pay the concessionaire a premium to make up for this deficiency.³¹ Thus, as long as the concessionaire supplies the required levels of electricity to the grid, Peru guarantees an annual revenue flow from the project's commencement of operations through the termination date of the RER Contract (the “**Guaranteed Revenue Concession**”).³²

²⁶ Legislative Decree No. 1002, May 1, 2008, Art. 7.1 (C-0007).

²⁷ Legislative Decree No. 1002, May 1, 2008, Art. 7.1 (C-0007); Santiváñez I, ¶ 24.

²⁸ Santiváñez I, ¶ 25.

²⁹ Legislative Decree No. 1002, May 1, 2008, Arts. 5 and 7 (C-0007); Santiváñez I, ¶ 26.

³⁰ RER Contract, February 18, 2014, Clauses 1.4.26, 1.4.37, 6.3 (C-0002). Claimants have replaced the English-language translation of the RER Contract that was originally included in C-0002 with a new English-language translation that Claimants believe to be more accurate.

³¹ RER Contract, February 18, 2014, Clauses 1.4.8, 1.4.39, 6.3.3 (C-0002); Santiváñez I, ¶ 27.

³² RER Contract, Clauses 1.4.22, 1.4.26, 1.4.37, 6.3 (C-0002).

This incentive guaranteed a minimum income for a long-term project, making it eligible for competitive non-recourse project financing.³³

32. The Guaranteed Revenue Concession eliminates the price volatility of Peru's spot market, where prices vary hourly, and gives the concessionaire a minimum guaranteed income for the term of the project, thereby lowering the risk profile of the project, making it eligible for competitive non-recourse project financing at commercially reasonable terms including lower interest rates and for longer terms.³⁴ These features, coupled with the fact that Peru committed to pay in U.S. dollars, and tie the inflation adjustment to a U.S. inflation index, ensured the RER Contract would be a "bankable contract," *i.e.*, a contract that minimizes the exposure to local inflation and exchange rate risk and "gives a project sufficient future cashflow and probability of success that, combined with the project assets as collateral, are acceptable to institutional lenders for non-recourse financing."³⁵

33. Michael Jacobson, who at all relevant times served as the co-Sponsor, co-owner, and chief financier of the Mamacocha and Upstream Projects, cites the Guarantee Revenue Concession as one of the "principal factor[s]" that convinced him to invest in Peru.³⁶ The 20-year term for the concession was particularly attractive to him because it "permits the borrower to debt finance a larger amount of the project or to amortize its loan payments at smaller levels, in each case yielding a higher IRR [internal rate of return]."³⁷ He adds:

[We] also knew that the longer the term of the guaranteed-revenue stream the more favorable the commercial terms we could expect from banks. Guaranteeing revenue streams for up to twenty (20) years would lower our risk profile and, in turn, make us attractive to both commercial and development banks that typically finance

³³ Santivandez I, ¶ 33; Jacobson, ¶ 11; Sillen, ¶ 12.

³⁴ Quiones Report I, ¶ 11; Sillen I, ¶ 12.

³⁵ Santivandez I, ¶¶ 32-33; Sillen I, ¶ 46.

³⁶ Jacobson I, ¶ 9.

³⁷ Jacobson I, ¶ 10.

renewable energy projects. This fact was not lost on Peru given that it had structured the RER Promotion program to guarantee payment of the revenues over a 20-year concession term. The RER Promotion also priced and paid these concessions in US dollars to eliminate exchange risk and thereby bolster the appeal of these concessions to international financial institutions as bankable investment contracts.³⁸

34. Another critical incentive incorporated in the RER Contract is that Peru, through MINEM, “coadyuvará” or will ensure that the concessionaire would receive all necessary permits, authorizations, and concessions in a timely manner.³⁹ Mr. Stefan Sillen, the former Chief Executive Officer of Latam Hydro who managed the Mamacocha and Upstream Projects,⁴⁰ explains this commitment “was essential to would-be concessionaires because the obligations of the concessionaire [under the RER Contract] were to develop and construct a project within certain milestone.”⁴¹

35. Hence, this sovereign guarantee of cooperation mitigated for the concessionaire the political and administrative risks typically associated with local, regional or national permitting and approvals. The concessionaire needed only to act diligently and comply with the legal and procedural requirements with the understanding that MINEM would step in if a government authority delayed or interfered with the process.⁴² This affirmative obligation for MINEM is results-oriented, meaning that MINEM is ensuring the permits will be obtained.⁴³ As Dr. Santiváñez explains, this obligation is unique to the RER Contracts and signifies Peru’s intent to protect concessionaires from governmental delays and interference.⁴⁴ This obligation

³⁸ Jacobson I, ¶ 11.

³⁹ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

⁴⁰ Before serving as President and Chief Executive Officer of Latam Hydro, Mr. Sillen had decades of experience serving as an investor, developer, manager, and financial analyst of energy projects in Europe, including for Vattenfall (UK) and KPMG.

⁴¹ Sillen I, ¶ 14.

⁴² Benavides Report I, ¶¶ 13, 182-184; Quiñones Report I, ¶¶ 108-125.

⁴³ Benavides Report I, ¶¶ 13, 123-46.

⁴⁴ Santiváñez I, ¶¶ 37-38.

was particularly important in the context of the RER Contract which contained strict milestone deadlines for operational readiness.⁴⁵

36. The dispute resolution clause offered in the RER Contract was another critical protection and incentive for foreign investors.⁴⁶ The clause embodied Peru's consent to resolve all disputes valued at more than US \$20 million exclusively through an ICSID arbitration seated in Washington D.C.⁴⁷ Given that hydroelectric projects the size of the Mamacocha Project are typically valued well in excess of this monetary threshold, this sovereign guarantee gave U.S. investors the reasonable expectation that any contractual disputes involving the viability of the project would be decided by an international arbitration panel sited outside of Peru, the home of the State counterparty.⁴⁸ Dr. Santiviáñez explains that Peru included this dispute resolution clause "to make the RER contracts bankable and attractive to international financiers and investors" in accordance with the objectives and goals of the RER Promotion.⁴⁹

37. The governing law of the RER Contract was another critical incentive.⁵⁰ The RER Contract expressly provides that the protections contained in Legislative Decree No. 1002, which include the investment-related protections of the TPA,⁵¹ apply to the RER Contract.⁵² Further, the RER Contract incorporates by reference the "domestic" and "Internal Laws" of Peru,⁵³ which include Peru's civil code ("**Civil Code**") and Peru's General Law on Administrative Procedure ("**GLAP**"). As explained in Section V, *infra*, these Peruvian laws, as incorporated under the RER Contract, impose myriad obligations on Peru to refrain from

⁴⁵ RER Contract, February 18, 2014, Clauses 1.4.22, 1.4.23, 8.4 (C-0002).

⁴⁶ RER Contract, February 18, 2014, Clause 11.3 (C-0002).

⁴⁷ RER Contract, February 18, 2014, Clause 11.3(a) (C-0002).

⁴⁸ Sillen I, ¶ 18.

⁴⁹ Santiviáñez I, ¶ 41.

⁵⁰ RER Contract, February 18, 2014, Clauses 1.2, 1.4.30 (C-0002).

⁵¹ Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).

⁵² RER Contract, February 18, 2014, Clause 1.4.28 (C-0002).

⁵³ RER Contract, February 18, 2014, Clause 1.2, 1.4.30 (C-0002).

interfering with the concessionaire's performance or taking inconsistent or contradictory positions in its fulfillment of the contract.

38. In addition to the RER Promotion incentives, Peru offered sound macroeconomic fundamentals. As of 2012, Peru had one of the world's fastest growing economies (approximately 6.5% growth per year), a low inflation rate (approximately 2.8%), and an investment-grade rating of BBB+.⁵⁴ Also, at the time, project developers typically expected a return rate of 15-18% on their investments.

39. Another key attraction was Peru's plentiful and sustainable hydrological resources.⁵⁵ The team reviewed hydrological studies of many Peruvian waterways.⁵⁶ They discovered and assessed more than one hundred sites to build highly efficient hydroelectric plants with minimum upkeep and maintenance required.⁵⁷ Based on these studies, they believed they could build several hydroelectric plant projects and maintain a long-term presence in Peru.⁵⁸

D. The Mamacocha and Upstream Projects Were Established in Reliance on the Incentives and Protections Guaranteed by the RER Promotion

40. In reliance on Peru's sovereign guarantees and incentives under the RER Promotion, Mr. Jacobson commissioned a world-class team of professionals to scout potential sites in Peru for a profitable hydroelectric project.⁵⁹ Collectively, this team of professionals had extensive experience with developing, financing, and constructing renewable energy projects around the world, including in Peru, for well-known multinational power, electric utilities and energy services companies, like Vattenfall A.B., Iberdrola S.A., and GDF-Suez S.A.⁶⁰

⁵⁴ Sillen I, ¶ 19.

⁵⁵ Sillen I, ¶ 20; Jacobson I, ¶ 13; Bartrina I, ¶ 6.

⁵⁶ Sillen I, ¶ 10.

⁵⁷ Sillen I, ¶ 20.

⁵⁸ Sillen I, ¶ 20, Jacobson I, ¶ 13.

⁵⁹ Jacobson I, ¶ 6; Sillen I, ¶ 10.

⁶⁰ Sillen I, ¶ 6; Bartrina I, ¶ 3.

41. In or around December 2011, the team found what appeared to be a perfect location for a hydroelectric project near the “Valley of Volcanoes” in a mountainous Arequipa region in Southern Peru (pictured below).⁶¹ This location prominently features the Mamacocha Lagoon, a body of water that is filled by underground springs from the upstream lagoons and rivers that seep through the permeable, volcanic rock at the top and bottom of the Lagoon.⁶² The runoff from the Lagoon feeds into the Mamacocha River, which flows downhill a few kilometers through a canyon until it joins with the Colca River at the base of the valley.⁶³ Based on these features, the team came away from a scouting site visit with a plan to build a run-of-the-river hydroelectric plant⁶⁴ that used part of the runoff from the Mamacocha Lagoon and took advantage of the steep elevation drop-offs to generate electricity.⁶⁵



42. After the December 2011 site visit, the team contacted MINEM to learn more about the substance and timing of the permitting process for the Project.⁶⁶ On January 12, 2012,

⁶¹ Jacobson I, ¶ 6; Sillen I, ¶ 21; Bartrina I, ¶ 11.

⁶² Sillen I, ¶ 21.

⁶³ Sillen I, ¶ 21; Bartrina I, ¶ 11.

⁶⁴ Unlike a conventional hydroelectric dam project which uses water from a dammed reservoir, a “run-of-the-river” facility relies upon overflow waters from a natural source, such as a river, lake or lagoon.

⁶⁵ Sillen I, ¶ 21.

⁶⁶ Bartrina I, ¶ 29.

a consultant (and former legal advisor at MINEM) sent the team a written report that explained that the Project would require environmental, water, and archaeological permits as well as power-generation and transmission concessions.⁶⁷ The report also stated that these permits and concessions would be issued in accordance with the review periods under the GLAP and administrative regulations known as the Texto Único de Procedimientos Administrativos (“**TUPA**”).⁶⁸ Finally, the report included a chronology that makes clear that the length of the permitting process would largely depend upon whether the project was classified, environmentally speaking, as a Category I, II or III project.⁶⁹ If classified under Category I, the Project would only need to submit a sworn environmental impact statement (or “**DIA**”) to secure the critical environmental permit.⁷⁰ But if the Project was classified under Categories II or III – typically reserved for projects that displace residents, deforest standing groves, need to build reservoirs or dams, or exhaust toxic materials into the environment – it would need to submit a detailed environmental impact study (or “**EIA**”) and go through various bureaucratic processes.⁷¹ The consultant’s report further states that the DIA process would take thirty (30) business days or, approximately, forty-five (45) calendar days, while the EIA process could take up to 345 calendar days.⁷²

43. Given the significant time difference between the DIA and EIA processes, the team requested more guidance from MINEM as to which process would correspond to the contemplated Mamacochoa Project. On January 31, 2012, MINEM published Report No. 0026-2012-MEM-AAE-NAE/MEM, which contains the official guidance from MINEM’s legal

⁶⁷ Email from C. Diez Canseco to U. Tisell et al., January 12, 2012 (C-0180).

⁶⁸ Email from C. Diez Canseco to U. Tisell et al., January 12, 2012 (C-0180).

⁶⁹ Email from C. Diez Canseco to U. Tisell et al., January 12, 2012 (C-0180).

⁷⁰ Email from C. Diez Canseco to U. Tisell et al., January 12, 2012 (C-0180).

⁷¹ Email from C. Diez Canseco to U. Tisell et al., January 12, 2012 (C-0180).

⁷² Email from C. Diez Canseco to U. Tisell et al., January 12, 2012 (C-0180).

department as to which projects should expect to submit a DIA, as opposed to an EIA, to secure the environmental permits.⁷³ As depicted below, the report provides, *inter alia*, that run-of-the-river hydroelectric projects located in the mountains (*i.e.*, “Sierra”) in areas that are not specifically protected by Peru’s environmental laws (*i.e.*, “Sin ANP”) *require only a DIA*.⁷⁴

2.3 Centrales Hidroeléctricas:

A. Central de Agua Fluyente: Categorización de acuerdo a la siguiente matriz:

Escenario	Costa	Sierra	Selva
CH. Sin ANP	DIA	DIA	EIA-sd
CH. Con ANP	DIA	EIA-sd	EIA-sd

B. Central de pie de Presa: Le correspondería un Estudio de Impacto Ambiental Detallado.

44. The team relied upon this report to design and plan the Mamacocha Project in a way that would require only a DIA to secure its environmental permits given that the Project would be located in the mountains in an area that was not protected by environmental laws.⁷⁵

45. On February 22, 2012, the team commissioned a nine-month pre-feasibility study conducted by CESEL Ingenieros, a world-renowned engineering firm based in Peru, to better assess the environmental impact of the Project and the hydrological, geological, archaeological, topographical, and social conditions of the areas surrounding the Mamacocha Lagoon.⁷⁶ The study was also needed to assess the possible locations where the anticipated 20-megawatt

⁷³ MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).

⁷⁴ MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).

⁷⁵ Bartrina I, ¶ 33.

⁷⁶ CESEL Ingenieros Pre-Feasibility Study - Vol I Executive Summary, October 26, 2012 (C-0100(a)); CESEL Ingenieros Pre-Feasibility Study - Vol II Basic Studies, October 26, 2012 (C-0100(b)); CESEL Ingenieros Pre-Feasibility Study - Vol III Hydraulic Project Draft, October 26, 2012 (C-0100(c)); CESEL Ingenieros Pre-Feasibility Study - Vol IV Electric Project Draft, October 26, 2012 (C-0100(d)); CESEL Ingenieros Pre-Feasibility Study - Vol V Preliminary Environmental Evaluation, October 26, 2012 (C-0100(e)).

hydroelectric plant could be built, as well as how the electricity generated by the plant could be connected to Peru's electricity grid.⁷⁷

46. On October 2012, the Project received the final version of the five-volume pre-feasibility study.⁷⁸ This study was the result of several separate visits by CESEL Ingenieros to the project site and hundreds of hours of scientific and engineering analysis.⁷⁹ With respect to the hydrological conditions of the site, the pre-feasibility report assessed nearly sixty (60) years of recorded hydrological data (direct flow measurements at the discharge and data derived from nearby meteorological and hydrological stations) and concluded that the water runoff from the Mamacocha Lagoon had an average flow of just over 9 m³/s, which was more than the 7 m³/s that was needed for the plant to have a capacity of twenty (20) megawatts of electricity.⁸⁰ The report further provided that, unlike typical hydroelectric projects west of the Andes mountains that experience significant seasonal fluctuations in hydrology, the Mamacocha Project would have less fluctuation year-round because the water flow into the Lagoon did not directly originate from melting glaciers or rainfall in the immediate vicinity but, rather, from underground springs that fed into the Mamacocha Lagoon at a fairly consistent yearly rate.⁸¹

47. With respect to the environmental conditions, the pre-feasibility report favorably noted that the extremely arid conditions of the region meant there were very few species of flora or fauna that would be affected by construction in and around that site.⁸² The report also noted there were no neighboring towns or communities that would be directly affected by the anticipated on-site construction – with the nearest village of Ayo being approximately seven (7)

⁷⁷ CESEL Ingenieros Pre-Feasibility Study - Vol I Executive Summary, October 26, 2012 (C-0100(a)).

⁷⁸ Bartrina I, ¶ 6; Jacobson I, ¶ 14; Sillen I, ¶ 24.

⁷⁹ Bartrina I, ¶ 9.

⁸⁰ CESEL Ingenieros Pre-Feasibility Study - Vol I Executive Summary, October 26, 2012, Section 1.2. (C-0100(a)).

⁸¹ CESEL Ingenieros Pre-Feasibility Study - Vol I Executive Summary, October 26, 2012 Sections 1.1, 1.2 (C-0100(a)).

⁸² CESEL Ingenieros Pre-Feasibility Study - Vol I Executive Summary, October 26, 2012, Section 1.2. (C-0100(a)).

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kilometers away – and there were no archaeological factors that would inhibit civil works in that area.⁸³ Below is a picture of the Mamacocha Lagoon showing the desolate conditions and dearth of flora and fauna in the region.⁸⁴



48. The pre-feasibility report also concluded that the electricity generated by the Mamacocha Project could be connected to the nearby Chipmo substation.⁸⁵ This would require the erection of an approximately 65-kilometer transmission line from the project site to the substation.⁸⁶ This line would run through the district of Ayo and across the nearby communities of Chilcaymarca and Andagua.⁸⁷

49. The pre-feasibility report's positive conclusions solidified the team's plans to develop the Mamacocha Project and participate in the next public auction under the RER Promotion.⁸⁸ In November 2012, Mr. Jacobson and his team created Hidroeléctrica Laguna Azul

⁸³ CESEL Ingenieros Pre-Feasibility Study - Vol I Executive Summary, October 26, 2012, Section 1.2 (C-0100(a)).

⁸⁴ Bartrina I, ¶ 12.

⁸⁵ CESEL Ingenieros Pre-Feasibility Study - Vol I Executive Summary, October 26, 2012, Section 1.2 (C-0100(a)).

⁸⁶ Bartrina I, ¶ 13; Sillen I, ¶ 27.

⁸⁷ Bartrina I, ¶ 13.

⁸⁸ Bartrina I, ¶ 14; Sillen I, ¶ 30.

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S.R.L. to serve as the Project's local operations company and prospective concessionaire, as required by the RER Promotion.⁸⁹ On February 22, 2017, this company formally changed its name to CH Mamacocha S.R.L., *i.e.*, CHM.⁹⁰

50. The first order of business for CHM was to commission a feasibility report.⁹¹ A feasibility study is a crucial undertaking in every project.⁹² Its purpose is to account for each of the project's relevant factors – including economic, technical, legal, and scheduling considerations – to ascertain the likelihood of completing the project successfully.⁹³ This analysis would help generate relevant data and information that would be used for CHM's proposal in the upcoming RER Promotion auction.⁹⁴ CHM selected Pöyry, the internationally renowned Finnish engineering firm, to conduct this study due to its extensive experience with similar hydroelectric projects in Southern Peru.⁹⁵

51. In July 2013, Pöyry finalized the first phase of its feasibility report.⁹⁶ The report confirmed the most feasible design for the Mamacocha Project (depicted below).⁹⁷ According to this design, the overspill from the Lagoon would run through a 1.4 km covered surface canal and a 2.24 km tunnel inside an adjacent mountain, before dropping approximately 337 meters in elevation and being directed through two 10-megawatt turbines, which were also to be located inside the mountain.⁹⁸ Then, the water would be discharged into the Mamacocha River, near its

⁸⁹ Registration of Hidroeléctrica Laguna Azul S.R.L.'s (today CH Mamacocha S.R.L.) Articles of Incorporation, November 23, 2012 (C-021); Jacobson I, ¶ 16; Sillen I, ¶ 30.

⁹⁰ Registration of Hidroeléctrica Laguna Azul S.R.L.'s name changed to CH Mamacocha S.R.L., February 22, 2017 (C-0020).

⁹¹ Sillen I, ¶ 31; Bartrina I, ¶ 15.

⁹² Bartrina I, ¶ 15.

⁹³ Bartrina I, ¶ 15.

⁹⁴ Bartrina I, ¶ 15.

⁹⁵ Bartrina I, ¶ 15; Sillen I, ¶ 31.

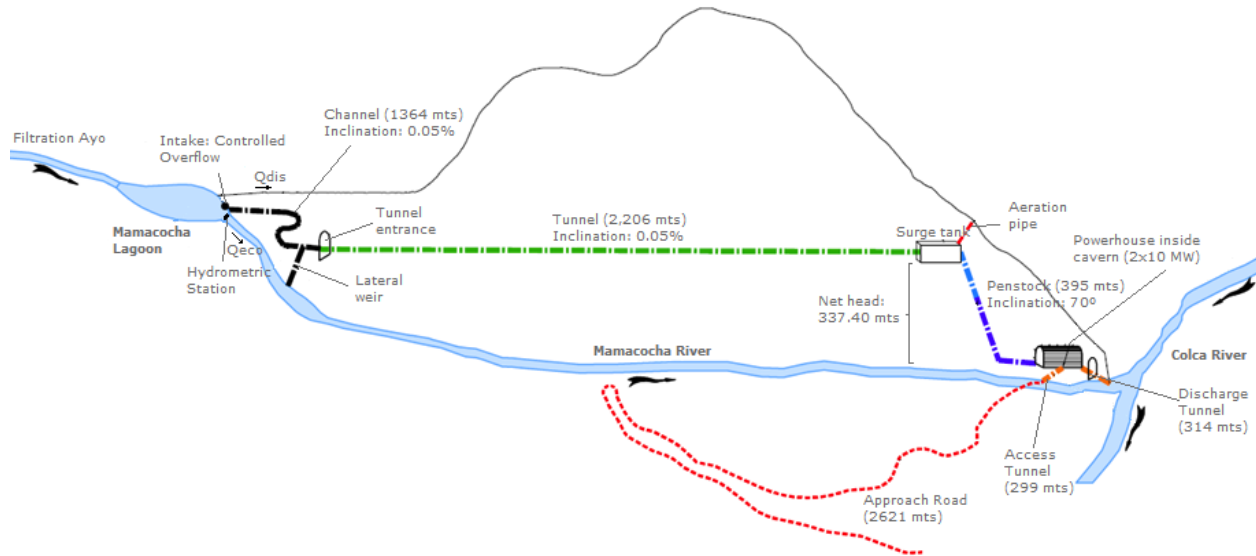
⁹⁶ Laguna Azul Feasibility Report Phase I (C-0101). In August 2014, Pöyry finalized its Phase II Report. Pöyry Laguna Azul Feasibility Report Phase II (C-0181).

⁹⁷ Bartrina I, ¶¶ 16-17.

⁹⁸ Bartrina I, ¶ 17; Sillen I, ¶ 36.

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confluence with the Colca River.⁹⁹ This design minimized the Project’s visual footprint and ensured the construction would have a negligible environmental impact on the surrounding waterways, airways, and lands.¹⁰⁰



52. Because most of these structures were expected to be built inside a mountain, Pöyry devoted a significant portion of its analysis to the geology at the site and hired experienced subcontractors to perform geotechnical studies on-site.¹⁰¹ In its feasibility report, Pöyry concluded the geological considerations were “favourable and there are no major concerns regarding the construction of a surface channel, free flow tunnel and underground powerhouse.”¹⁰²

53. The feasibility report predicted that the Project easily could function for at least forty (40) years.¹⁰³ The feasibility report also concluded there was sufficient water flow to achieve a total installed capacity of twenty (20) megawatts with a mean annual energy output of

⁹⁹ Sillen I, ¶ 36.

¹⁰⁰ Bartrina I, ¶ 16.

¹⁰¹ Bartrina I, ¶ 18.

¹⁰² Laguna Azul Feasibility Report Phase I, p.9 (C-0101).

¹⁰³ Laguna Azul Feasibility Report Phase I, p.44 (C-0101); Bartrina I, ¶ 19.

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approximately 144,100 megawatt hours measured at the transformer terminals.¹⁰⁴ According to the report, this meant that the Project would be able to deliver approximately 138,300 megawatt hours per year to the electricity grid taking into account the expected losses in electricity during the transmission process, the plant availability and the diversion of a certain quantity of electricity to Ayo.¹⁰⁵

54. Although not legally required, it was important to the Project's sponsors to transmit electricity to Ayo.¹⁰⁶ Ayo frequently suffered blackouts and energy shortages, lacked infrastructure, access to markets, and sufficient educational institutions—all of which stunted its economic development and, therefore, drove many of its residents to migrate to Peru's cities.¹⁰⁷ Ayo's electricity principally was generated by an outdated and run-down micro-hydro plant located above ground and just off the shores of the Mamacocha Lagoon.¹⁰⁸ The Project's goal from the outset was to offer the Ayo Municipality a supply of electricity similar to what its plant provided, but from a reliable and stable source.¹⁰⁹

55. Based on its extensive analysis, Pöyry confirmed in its feasibility report that the estimated construction time for the Mamacocha Project would be approximately 770 days, *i.e.*, just over two years.¹¹⁰ Based on this schedule, the feasibility report estimated that it would cost between US \$47 million and US \$53 million to construct.¹¹¹ The team understood that the RGA had approved the construction of access roads near the project site for tourism purposes, which,

¹⁰⁴ Laguna Azul Feasibility Report Phase I, p. 144 (C-0101).

¹⁰⁵ Bartrina I, ¶ 20.

¹⁰⁶ Jacobson I, ¶ 60.

¹⁰⁷ Bartrina I, ¶ 21; Canseco I, ¶ 10.

¹⁰⁸ Bartrina I, ¶ 21.

¹⁰⁹ Bartrina I, ¶ 21.

¹¹⁰ Laguna Azul Feasibility Report Phase I, p. 7 (C-0101).

¹¹¹ Laguna Azul Feasibility Report Phase I, p. 7 (C-0101).

if completed in time, would significantly reduce the anticipated time and cost schedules for the Project and streamline the critical path involving excavation of the access tunnel.¹¹²

56. Pöyry's feasibility report also concluded that the waterways upstream of the Mamacocha Lagoon offered sufficient hydrology to power a cascade of small hydroelectric plants.¹¹³ These upstream plants were feasible due to their accessibility, ease of construction (no tunneling needed), and the steep drop-offs in elevation.¹¹⁴ Each individual plant could generate between 12-20 megawatts of installed capacity.¹¹⁵

57. Based on this assessment, CHM commissioned Pöyry to provide an initial conceptual design for the Upstream Projects.¹¹⁶ In October 2013, Pöyry submitted this report, which concluded that the hydrology and topography in these upstream waterways were favorable, the proposed schemes were simple, and the risks were minimal.¹¹⁷ Pöyry estimated that the total project costs for the Upstream Projects would be around US \$83 million and the final result would be four small hydroelectric plants with a combined installed capacity of 46 megawatts and an annual energy output of about 316,000 megawatt hours.¹¹⁸ Below is a graphic depicting the conceptual design for the Upstream Projects.¹¹⁹

¹¹² Bartrina I, ¶ 22.

¹¹³ Laguna Azul Feasibility Report Phase I, p. 14 (C-0101).

¹¹⁴ Bartrina I, ¶ 23.

¹¹⁵ Laguna Azul Feasibility Report Phase I, p. 14 (C-0101); Bartrina I, ¶ 23; Sillen I, ¶ 34.

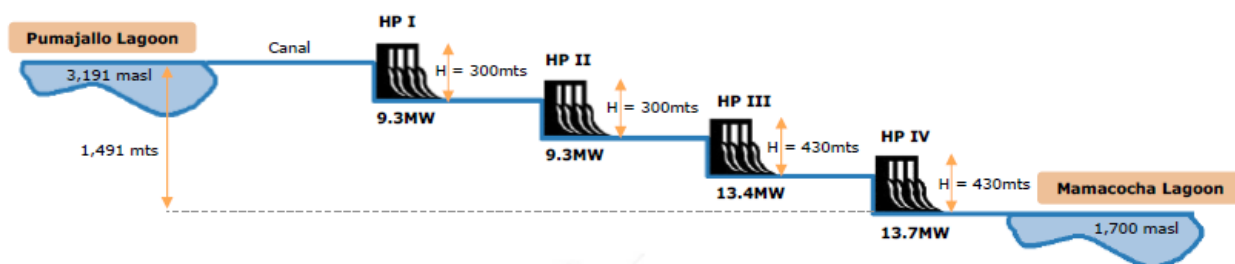
¹¹⁶ Bartrina I, ¶ 24.

¹¹⁷ Email from A. Bartrina to S. Sillen attaching Poyry's Memorandum titled "Upstream Addition Mamacocha II", October 3, 2013 (C-0102). In June 2016, Pöyry issued its final report, which confirmed that CHM could build between four and five hydroelectric plants—each with a capacity of ten to twenty megawatts for a total installed capacity of 40-100 megawatts—upstream of the Mamacocha Project. Email from A. Arch (Poyry) to A. Bartrina et al. attaching Poyry's Report of Participation in the Presentation of Technical Aspects of Mamacocha Hydropower Plant, June 17, 2017 (C-0116).

¹¹⁸ Email from A. Bartrina to S. Sillen attaching Poyry's Memorandum titled "Upstream Addition Mamacocha II," October 3, 2013 (C-0102).

¹¹⁹ Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014. (C-0032).

Upstream Projects conceptual design



58. Pöyry’s findings allowed CHM to market the Mamacocha Project and Upstream Projects as a combined product to prospective investors, since the latter was a natural extension of the former.¹²⁰ As noted in investor presentations,¹²¹ CHM’s plan was to develop the Mamacocha Project and partner with an experienced operator who could oversee its construction and operation while CHM remained a minority shareholder.¹²² The team would then shift its focus to develop the Upstream Projects.¹²³

E. Peru Modified the Rules for Projects in the Third Public Auction

59. By 2013, there had already been two public auctions under the RER Promotion.¹²⁴ The first public auction took place in 2010 and resulted in twenty-nine (29) winning bids for renewable energy projects—nineteen (19) “small-hydro,” *i.e.*, hydroelectric projects with an installed capacity of twenty (20) megawatts or less; three (3) biomass; three (3) wind; and (4) solar projects.¹²⁵ The second public auction took place in 2011 and resulted in ten (10) winning bids for renewable energy projects, seven of which were “small-hydro” projects.¹²⁶

¹²⁰ Jacobson I, ¶ 15;

¹²¹ Latam Hydro’s Investor Presentation prepared by Equitas Partners, August 2014 (C-0032).

¹²² Sillen I, ¶ 40; Jacobson I, ¶ 15; Bartrina I, ¶ 25.

¹²³ Sillen I, ¶ 40; Jacobson I, ¶ 15; Bartrina I, ¶ 15.

¹²⁴ Santiváñez I, ¶¶ 42-43.

¹²⁵ OSINERGMIN’s report titled “Classification of Environmental Studies for RER Generation Concessions” (C-0104).

¹²⁶ OSINERGMIN’s report titled “Classification of Environmental Studies for RER Generation Concessions” (C-0104).

60. The projects from the first two public auctions were plagued with significant pre-operational delays primarily arising from abuses of alleged “*force majeure*” conditions and outright negligence by the winning concessionaires.¹²⁷ Some winning bidders during these two auctions had limited experience with renewable energy projects and some were mere speculators who merely intended to flip the RER contracts to third parties to invest in and develop the projects.¹²⁸ Dr. Santiváñez, who has extensive experience with projects under the RER Promotion, states:

a total of 15 out of the 29 green-field RER projects awarded in the first two RER auctions had delays of between 1 and 7 years, requiring significant number of extensions to allow for these projects to go forward. MINEM agreed to grant these extensions under theories of *force majeure*, notwithstanding that most of the delays were not *force majeure* events but, rather, delays attributable to the concessionaires.¹²⁹

61. To mitigate against similar concessionaire delays in the third public auction, Peru narrowed the conditions under which a winning concessionaire could seek modifications to its approved works execution schedule for causes involving the concessionaire’s own delays or alleged *force majeure* events. On July 6, 2013, Peru issued Supreme Decree No. 024-2013-EM, which provided that the COS could not be delayed by more than two years, even if *force majeure* events occurred, or else the contract would terminate, and the performance bond would be forfeited.¹³⁰ This decree further provided that the contract termination date was not modifiable.¹³¹ Significantly, the Supreme Decree did not state that government-caused delays

¹²⁷ Santiváñez I, ¶ 43.

¹²⁸ Santiváñez I, ¶ 43.

¹²⁹ Santiváñez I, ¶ 43.

¹³⁰ Santiváñez I, ¶ 44.

¹³¹ Sillen I, ¶ 44; Jacobson I, ¶ 17.

could lead to termination of the RER Contract or diminution of the benefits promised to the concessionaires.¹³²

62. Claimants always understood that Supreme Decree No. 024-2013-EM's purpose was to protect the government from concessionaire-caused delays, including concessionaires relying upon purported *force majeure* events like those that served to delay the construction of projects authorized during the first two public auctions.¹³³

63. The "Statement of Motives" specifically linked the new time restrictions embodied in Supreme Decree No. 024-2013-EM to delays that had plagued the first and second auction projects.¹³⁴ Further, the bidding documents for the third public auction asked the concessionaires to confirm in writing that they understood that the termination date under the RER Contract could not be moved "even when there are *force majeure* events."¹³⁵

64. Nothing in Supreme Decree No. 024-2013-EM gave notice of Peru's current interpretation that the time restrictions applied to project delays exclusively attributable to Peru.¹³⁶ Such an interpretation would completely undermine the objectives of the RER Promotion because it would expose concessionaires to the unknowable and unquantifiable risk that Peru, itself, could hinder or interfere with the concessionaire's performance and thereby, unilaterally prevent a project from reaching operational completion by the commercial operation deadline.¹³⁷ That outcome would result in the unilateral reduction or termination of the Guaranteed Revenue Concession. Dr. Santiváñez explains:

Neither the language nor stated purpose of the changes introduced to the RER regulation by SD 024-2013 reflect a shift in the risk allocation structure of the RER Contract such that the

¹³² Santiváñez I, ¶¶45-46;

¹³³ Sillen I, ¶¶ 45-46; Jacobson I, ¶ 18.

¹³⁴ Statement of Reasons, Supreme Decree No. 24-2013-EM (C-0182); Santiváñez I, ¶ 44.

¹³⁵ RER Contract, February 18, 2014, Annex 6-9 (C-0002).

¹³⁶ Santiváñez I, ¶ 45.

¹³⁷ Santiváñez I, ¶¶ 44-45.

concessionaire would bear the risk of non-performance, obstruction, and delay by Peru. Certainly, there was no notice to investors or potential investors that they would be accepting the risk of Peru's default of its obligations under the RER Contracts.

To argue otherwise, is equivalent to argue the full cancellation of the RER Promotion. Based upon my extensive experience, it is my view that no investor would have agreed to assume the risk of nonperformance or default by the Peruvian government, and no financial institution would have offered financing to a project subject to such a risk of government interference or non-performance.¹³⁸

65. Messrs. Jacobson and Sillen explain in their witness statements that if Peru had disclosed to potential bidders that concessionaires would be required to bear the risk that Peru could unilaterally interfere with the contract for any reason, CHM would not have participated in the RER Promotion, nor would have any rational project developer.¹³⁹

F. Peru Awarded CHM an RER Contract During the Third Public Auction

66. In October 2013, CHM submitted its bid for the Mamacocha Project in the third public auction.¹⁴⁰ As shown in the graphic below, CHM's bid represented that the Mamacocha Project would include a hydroelectric plant with an installed capacity of twenty (20) megawatts.¹⁴¹ The bid further provided that the Project would deliver to the grid 130,000 megawatt hours of electricity per year at the set price of US \$62 per megawatt hour.¹⁴²

¹³⁸ Santiv  nez I, ¶¶ 45-46.

¹³⁹ Jacobson I, ¶ 18; Sillen I, ¶ 47.

¹⁴⁰ Email from S. Sillen to A. Bartrina et al., October 27, 2013 (C-0031).

¹⁴¹ RER Contract, February 18, 2014, Annex 1 (C-0002).

¹⁴² RER Contract, February 18, 2014, Annex 1 (C-0002).

Barra de Oferta (Nombre de la Barra y nivel de tensión)		CALLALLI 138 KV
Precio Monómico	En números (US\$/MWh)	62
	En letras	SESENTA Y DOS Dólares con ...00... centavos
Potencia de la Central (MW)		20
Energía Ofertada Anual (MWh)		130 000

67. CHM arrived at these numbers using the feasibility report and financial models that it had created with its investment bankers, using reasonable assumptions for its capital expenditures, financing costs, and other inputs.¹⁴³ The financial models indicated that the Mamacocha Project would yield an Internal Rate of Return (“IRR”), or profitability, of between 14-15% if the bid of US \$62 per megawatt hour were accepted.¹⁴⁴

68. In December 2013, OSINERGMIN notified CHM that it was one of nineteen (19) successful bidders in the third public auction.¹⁴⁵ The winning projects were all small-hydro projects, as provided in the below table created by OSINERGMIN (the Mamacocha Project, then called Laguna Azul, is the second to last on the list):¹⁴⁶

¹⁴³ Sillen I, ¶¶ 53-55; Jacobson I, ¶¶ 19-21.

¹⁴⁴ Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014 (C-0032).

¹⁴⁵ Jacobson I, ¶ 22; Sillen I, ¶ 56.

¹⁴⁶ Sillen I, ¶ 56. The table only indicates sixteen (16) bidders because OSINERGMIN disqualified three (3) successful bidders sometime after the third public auction concluded.

Table 1 Hydropower Winning Projects of the Third Public Auction

Project	Monomic Price Offered (USD per MWh)	Awarded Energy (GWh per year)
Yarucaya	50.50	115.00
Potrero	51.77	134.21
Hydr ka 5	53.90	57.93
Hydr ka 3	53.90	50.81
Hydr ka 2	54.50	20.02
Carhuac	54.80	97.00
Hydr ka 1	54.90	35.61
Hydr ka 4	55.50	44.79
Ronatulto II	55.59	80.00
Karpa	55.70	115.00
Colca	56.89	70.20
Zaña 1	57.50	80.94
Chilcay	57.53	69.96
Huasicancha	58.89	36.41
Laguna Azul	62.00	130.00
Santa Lorenza	64.80	140.00

Source: **Error! Reference source not found.**

69. On February 18, 2014, CHM executed the RER Contract with MINEM, which signed on behalf of the Republic of Peru.¹⁴⁷ There was no room for negotiation.¹⁴⁸ Every successful bidder was offered the same terms on a “take it or leave it” basis.¹⁴⁹

70. The RER Contract formalized the incentives contemplated by the RER Promotion, including the Guaranteed Revenue Concession.¹⁵⁰ The RER Contract further contained a “reference” COS of December 31, 2016 and allowed for a two-year float period in the event the project was delayed.¹⁵¹ If the project were not placed into commercial operation by

¹⁴⁷ RER Contract, February 18, 2014 (C-0002).

¹⁴⁸ Sillen I, ¶ 57.

¹⁴⁹ Sillen I, ¶ 57.

¹⁵⁰ RER Contract, February 18, 2014, Clause 1.4.26 (C-0002).

¹⁵¹ RER Contract, February 18, 2014, Clauses 1.4.23, 1.4.24 (C-0002).

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December 31, 2018, the RER Contract would, by its own terms, self-terminate and the performance bond under the contract would be forfeited.¹⁵² The RER Contract also contained a “Term of Validity” clause extending the Guaranteed Revenue Concession for twenty (20) years.¹⁵³ But this concession period could be reduced to as low as eighteen (18) years if the Project experienced delays.¹⁵⁴ Assuming a reference commercial date of operation of December 31, 2016, the Termination Date of the RER Contract was set for December 31, 2036.¹⁵⁵

71. On August 18, 2014, CHM submitted its works execution schedule for the RER Contract.¹⁵⁶ The works schedule contained a series of milestones that CHM had to satisfy before achieving commercial operation.¹⁵⁷ The “Financial Closing” milestone was the first such milestone.¹⁵⁸ To achieve Financial Closing, CHM had to secure equity capital and loans to finance construction and commissioning of the hydroelectric plant and transmission line.¹⁵⁹ The RER Contract included an entire section detailing the methods that a concessionaire could pursue to obtain financing for the project from third-party financial institutions.¹⁶⁰ Thus, from the outset, MINEM understood that the Mamacocha Project would be financed through conventional project finance mechanisms in which a non-recourse loan would be secured by the guaranteed revenue stream of the concession contract.¹⁶¹ Pursuant to the works schedule submitted by CHM (depicted below), CHM planned to complete these milestones and achieve commercial operation

¹⁵² RER Contract, February 18, 2014, Clauses 1.4.23, 8.4 (C-0002).

¹⁵³ RER Contract, February 18, 2014, Clause 1.4.37 (C-0002).

¹⁵⁴ RER Contract, February 18, 2014, Clause 1.4.23 (C-0002).

¹⁵⁵ RER Contract, February 18, 2014, Clause 1.4.22 (C-0002).

¹⁵⁶ August 14, 2014 letter containing Execution Works Schedule (C-0148).

¹⁵⁷ August 14, 2014 letter containing Execution Works Schedule (C-0148).

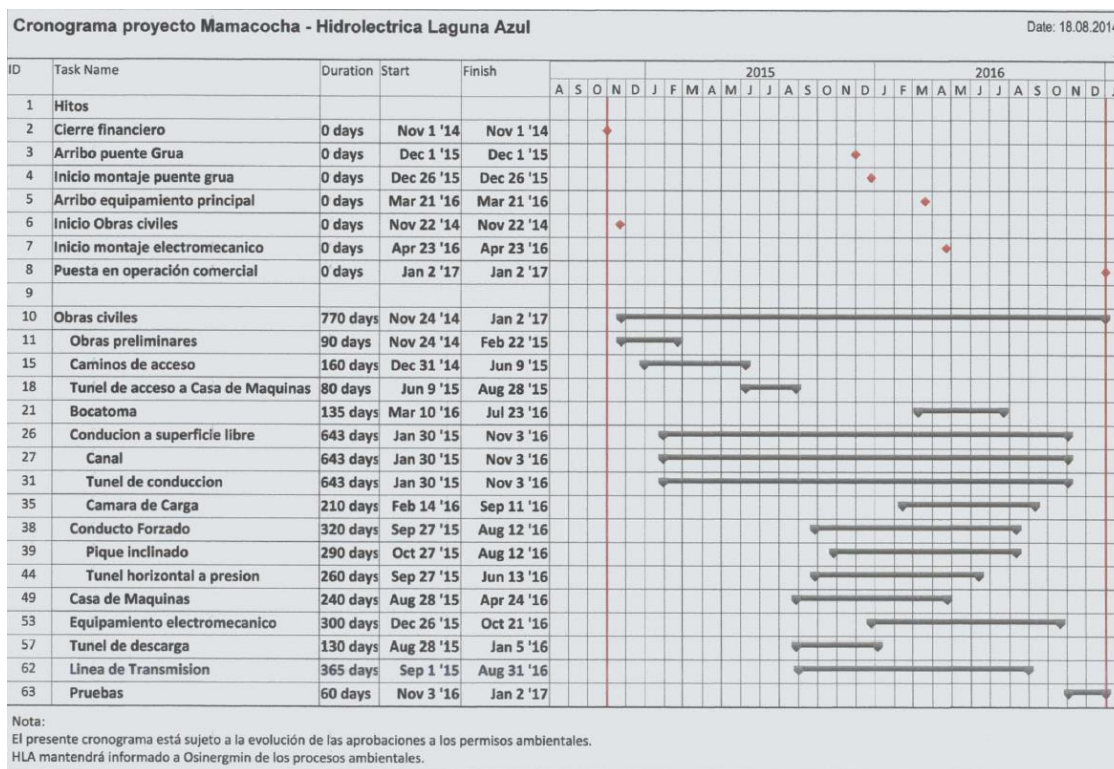
¹⁵⁸ August 14, 2014 letter containing Execution Works Schedule (C-0148).

¹⁵⁹ RER Contract, February 18, 2014, Clause 1.4.9 (C-0002).

¹⁶⁰ RER Contract, February 18, 2014, Clause 6.4 (C-0002).

¹⁶¹ Jacobson I, ¶ 10; Sillen I, ¶ 62.

on or by January 2, 2017.¹⁶² Hence, as long as the Project did not incur delays caused by Peru, Claimants expected to benefit from the full 20-year term of the Guaranteed Revenue Concession.



72. Upon execution of the RER Contract, CHM posted a performance bond issued by Banco de Crédito del Peru in Lima backed by a standby letter of credit from Wells Fargo Bank, which was in turn secured by cash deposits by Messrs. Jacobson and Bengier of more than \$5,000,000 as collateral.¹⁶³ The Sponsors have maintained this bond to this day, with Latam Hydro paying approximately US \$100,000 in annual bond/letter of credit fees to the banks.¹⁶⁴

G. Government Delays Before the Measures at Issue in the Instant Dispute

1. Delays Before Addendum 1 to the RER Contract

¹⁶² August 14, 2014 letter containing Execution Works Schedule (C-0148).

¹⁶³ Banco de Crédito Letter of Guarantee No. G706797, February 12, 2014. (C-0033)

¹⁶⁴ Jacobson I, ¶ 22.

73. Before CHM could achieve the Financial Closing milestone, it first needed to complete the permitting phase of the Project.¹⁶⁵ Banks and financial institutions required CHM to have its permits and concessions in hand before they would disburse funds for construction.¹⁶⁶ To get a head start on the permitting process, CHM began working diligently as early as 2012—nearly a year before the third public auction—to obtain certain permits that were prerequisites to applying for the critical power-generation and transmission line concessions.¹⁶⁷ CHM hoped to have these permits approved even before signing the RER Contract, thereby putting CHM in the position to receive the concessions in 2014, reach Financial Closing on or before November 1, 2014 and take full advantage of the 20-year Guaranteed Revenue Concession.¹⁶⁸

74. Based upon Peruvian law, prior administrative practice, and discussions with MINEM, Claimant understood the permitting process was supposed to be predictable and straightforward.¹⁶⁹ The Project needed permits from the relevant water and environmental authorities, archaeological approvals from the Ministry of Culture, and the approval of a grid impact study from the national grid operator.¹⁷⁰ TUPA regulations imposed fixed time deadlines for the permitting agencies to review an application and issue a permit, generally thirty (30) business days.¹⁷¹ The Project also needed power-generation and transmission concessions from MINEM.¹⁷² These could only be applied for and approved after most of the permits had been

¹⁶⁵ Sillen I, ¶ 77.

¹⁶⁶ Sillen I, ¶ 77.

¹⁶⁷ Bartrina I, ¶ 26; Sillen I, ¶ 80. These concessions are separate from the Guaranteed Revenue Concession under the RER Contract. They are separate agreements under CHM and MINEM under which CHM has permission to either generate electricity (power-generation concession) or transmit electricity to the grid (transmission concession). All three concessions are interrelated because without either of them the Mamacocha Project would not go forward.

¹⁶⁸ August 14, 2014 letter containing Execution Works Schedule (C-0148).

¹⁶⁹ Bartrina I, ¶ 27; Sillen I, ¶ 66.

¹⁷⁰ Bartrina I, ¶ 27.

¹⁷¹ Bartrina I, ¶ 28; Sillen I, ¶ 66.

¹⁷² Bartrina I, ¶ 27.

approved by the various regional agencies.¹⁷³ Based upon the comprehensive pre-feasibility and feasibility reports invested in by Latam Hydro, Claimants had every expectation that its applications would be complete and the permitting process would proceed as set forth in its original timelines.¹⁷⁴ CHM also commissioned a team of lawyers, engineers, and outside consultants to help submit its permit applications.¹⁷⁵

75. But the reviewing agencies never adhered to TUPA guidelines, causing years-long delays to the Mamacocha Project.¹⁷⁶ These delays appeared to be the result of the agencies' inexperience with RER projects.¹⁷⁷ In December 2012, Peru had decided to decentralize the permitting process by transferring from Lima-based officials to regional officials in Arequipa, and elsewhere in Peru, responsibility to review and approve permits.¹⁷⁸ This decentralization was intended to delegate authority to regional agencies that were closer to the relevant projects.¹⁷⁹ But these agencies proved ill-equipped, unprepared, and untrained to handle the permitting process for the Mamacocha Project.¹⁸⁰

76. To take one example, when CHM applied for its plant environmental permit from the Autoridad Regional del Medio Ambiente (“ARMA”), the regional authority initially classified the Mamacocha Project as a Category III project, reserved for projects that have the greatest impact on the environment, such as those that would displace residents, need to build a reservoir and dam, deforest standing groves, or exhaust toxic materials into the air and waterways.¹⁸¹ Upon classifying CHM's small hydro project in this category, ARMA explained

¹⁷³ Bartrina I, ¶ 68.

¹⁷⁴ Bartrina I, ¶ 27; Sillen I, ¶ 80.

¹⁷⁵ Bartrina I, ¶ 27.

¹⁷⁶ Bartrina I, ¶ 30; Sillen I, ¶ 67.

¹⁷⁷ Bartrina I, ¶ 30; Sillen I, ¶ 74.

¹⁷⁸ Ministerial Resolution 525-2012-MEM-DM, December 13, 2012 (C-0183)

¹⁷⁹ Benzaquén I, ¶ 11.

¹⁸⁰ Bartrina I, ¶ 30; Sillen I, ¶ 74.

¹⁸¹ Bartrina I, ¶ 31; Bartrina I, ¶ 71.

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that because it only had authority under the RER Promotion to classify hydroelectric projects up to twenty (20) megawatts, it presumed that the Mamacocha Project's 20-megawatt capacity would receive the highest possible environmental impact classification, notwithstanding that it was a clean, renewable energy project to be built in a remote area far from habitation and with little impact on flora or fauna.¹⁸²

77. CHM believes that the Mamacocha Project was the only RER Promotion project ever to receive this classification.¹⁸³ CHM appealed this decision.¹⁸⁴ After asking ARMA for reconsideration and visits by ARMA officials to the Project site, ARMA acknowledged it had made a mistake and re-classified the project in Category I, agreeing it would have a very limited environmental impact.¹⁸⁵

78. On November 24, 2014, CHM petitioned MINEM for a 705-day extension to the RER Contract works schedule to restore time lost due to the permitting delays caused by Peru.¹⁸⁶ This application emphasized that CHM could not achieve its Financial Closing milestone until it received all the necessary permits and, for that reason, the government delays to the permitting process had made it impossible for CHM to close on its financing obligations.¹⁸⁷

79. MINEM spent months undertaking a technical, legal, and policy review of CHM's request, including its own independent analysis of the delays experienced during the permitting phase of the Project.¹⁸⁸ On April 6, 2015, MINEM issued a legal report that recognized that *all the delays were wholly attributable to the government, not CHM* and that

¹⁸² Official Letter No. 748-2013-GRA/ARMA/SG, October 11, 2013 (C-0184).

¹⁸³ OSINERGMIN's report titled "Classification of Environmental Studies for RER Generation Concessions" (C-0104); Bartrina I, ¶ 35.

¹⁸⁴ Bartrina I, ¶ 36.

¹⁸⁵ Bartrina I, ¶ 37; Report No. 009-2014-GRA/ARMA-SG-EA-E, February 17, 2014 (C-0185).

¹⁸⁶ HLA Letter to General Directorate of Electricity, Ministry of Energy and Mines, November 24, 2014 (C-0149).

¹⁸⁷ HLA Letter to General Directorate of Electricity, Ministry of Energy and Mines, November 24, 2014 (C-0149).

¹⁸⁸ Oficio 504-2015-MEM-DGE - MINEM acepta nuevo cronograma 06.04.2015 (C-0186).

such delays had made it impossible for CHM to achieve Financial Closing.¹⁸⁹ Moreover, MINEM determined that the government agencies had actually caused delays of 763 calendar days, not merely the 705 days CHM had described in its application.¹⁹⁰ MINEM therefore granted CHM the 705-day extension it had sought.¹⁹¹ MINEM and CHM formalized this extension by mutually signing a modification to the RER Contract on July 17, 2015, which was formally registered on July 22, 2015 (“**Addendum 1**”).¹⁹²

2. Delays Before Addendum 2 to the RER Contract

80. From the beginning, the Project enjoyed strong, local support from the community in Ayo, who stood to benefit from a stable power source, enhanced employment opportunities, better economy, increased access to the tourism trade attracted to the nearby Valley of Volcanoes, and Latam Hydro’s commitment to social investment in the region.¹⁹³ But certain members of the RGA’s legislative body (the “**RGA Council**”) made their opposition to the Project features of their political campaigns, primarily by making unsubstantiated claims about the Mamacocha Project’s environmental impact.¹⁹⁴ None of these contentions were true, as the detailed permitting history and expert testimony gathered by Latam Hydro during its pre-feasibility and feasibility studies were to bear out.¹⁹⁵ As will be seen, this regional political opposition ultimately brought the Project to a complete stop in March 2017 when the RGA Council ordered the RGA to file a groundless legal challenge against the Project’s environmental permits. The decision to bring this strike lawsuit to obstruct the Project is the first measure challenged in this arbitration as described below.

¹⁸⁹ Oficio 504-2015-MEM-DGE - MINEM acepta nuevo cronograma 06.04.2015 (C-0186).

¹⁹⁰ Informe MINEM 005-2015-EM/DGE (C-0201).

¹⁹¹ Informe MINEM 005-2015-EM/DGE (C-0201).

¹⁹² Addendum 1 to the RER Contract, July 22, 2015 (C-008).

¹⁹³ Canseco I, ¶ 20.

¹⁹⁴ Canseco I, ¶ 32.

¹⁹⁵ Bartrina I, ¶ 57.

81. During MINEM's prolonged deliberations over the Project's concession applications, the RGA Council invited CHM to attend a series of public roundtable meetings, known as "Mesas de Trabajo," to discuss the Mamacocha Project.¹⁹⁶ CHM agreed to participate to explain the details of the Project and rebut the misinformation being circulated by the RGA official's political opposition.¹⁹⁷ But the "Mesas de Trabajo" did not prove to be an effective forum to exchange accurate information about the design, construction and benefits of the Project.¹⁹⁸ At the second of three scheduled roundtables, RGA Council officials refused to follow the pre-approved speaking format, shouted down CHM representatives (including its third-party design and engineering experts), and showed no interest in learning about the design, benefits and environmental sustainability of the Project.¹⁹⁹ Notably, the representative from Pöyry, who was one of several experts CHM invited to explain the benefits of the Project, later observed in his minutes that community members who favored the Project, such as the Mayor of Ayo, were never given the opportunity to speak:²⁰⁰

f.- It has to be underlined and mentioned as an important fact that the Mayor of Ayo, as representative of the main affected area who has a favourable position towards the project, was not given the opportunity to talk.

82. Notwithstanding the political opposition by certain regional officials, MINEM ultimately granted CHM the transmission and power-generation concessions in March 2016 and June 2016, respectively, albeit well past their legal deadlines.²⁰¹ Days later, the RGA Council

¹⁹⁶ Sillen I, ¶ 104; Bartrina I, ¶¶ 56-59; Canseco I, ¶¶ 36-43.

¹⁹⁷ Sillen I, ¶ 104; Bartrina I, ¶¶ 56-59; Canseco I, ¶¶ 36-43.

¹⁹⁸ Sillen I, ¶ 104; Bartrina I, ¶¶ 56-59; Canseco I, ¶¶ 36-43.

¹⁹⁹ Email from C. Diez Canseco to E. Corrales et al., July 27, 2016 (C-0131).

²⁰⁰ Email from A. Arch (Poyry) to A. Bartrina et al. attaching Poyry's Report of Participation in the Presentation of Technical Aspects of Mamacocha Hydropower Plant, June 17, 2017 (C-0116).

²⁰¹ Bartrina I, ¶ 59.

canceled the remaining scheduled roundtable meeting and appeared to end its interferences with the Project.²⁰²

83. On July 1, 2016, CHM applied for a further extension of the COS to March 14, 2020, to compensate for the unexpected and unlawful delays caused by MINEM's failure to grant the concessions in due time.²⁰³ If granted, *and if no further government interferences were to take place*, this extended COS was expected to provide CHM the breathing space necessary to complete the development, construction and operational start-up by the extended milestones under the RER Contract.²⁰⁴

84. On August 12, 2016, Gonzalo Tamayo, MINEM's Minister at the time, met with CHM representatives and told them he was "horrified" that the Project experienced more than 1,000-days of delays on account of the government.²⁰⁵ He also expressed his belief that the regional politicians opposing the Project only wanted money and attention and did not have a substantive basis to oppose the Project.²⁰⁶

85. On October 6, 2016, MINEM issued a report that MINEM's Director General of Electricity, Ms. Carla Paola Sosa Vela, endorsed on November 22, 2016 (the "**Sosa Report**").²⁰⁷ The Sosa Report found: (i) the interferences to the Mamacocha Project were "not attributable" to CHM, but rather fully and exclusively the fault of the government; (ii) the RER Contract is subject to the good-faith principle under the Civil Code; and (iii) it would be unfair for CHM to assume the risk of governmental interferences, especially since this assumption of risk was not made expressly clear in the RER Contract and is contrary to the Peruvian legal truism that no one

²⁰² Canseco I, ¶ 43; Bartrina I, ¶ 59.

²⁰³ Letter from Hidroeléctrica Laguna Azul to Minister of Energy and Mines, July 1, 2016 (C-0157).

²⁰⁴ C-0157; Bartrina I, ¶ 43.

²⁰⁵ Email from S. Sillen to M. Jacobson, August 12, 2016 (C-0039); Sillen I, ¶ 108.

²⁰⁶ C-0039; Sillen I, ¶ 108.

²⁰⁷ MINEM's Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

can plead his own fault in his favor.²⁰⁸ The Sosa Report concluded that the interferences constituted breaches of Peru's obligations to CHM under the RER Contract and governing civil laws.²⁰⁹ The Sosa Report also concluded that Peru's inconsistent treatment of the Mamacocha Project, through contradictory positions about the project's classification and permitting review periods, could subject Peru to liability under the Treaty and customary international law.²¹⁰

86. As to Peru's liability under the Treaty and customary international law, the Sosa Report quoted the following passage from a final award in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, in which the ICSID tribunal held that Chile's inconsistent treatment of a construction project violated the doctrine of fair and equitable treatment under customary international law:

The foreign investor also expects that the receiving State will act in a non-contradictory manner; that is, among other things, without arbitrarily reversing previous or pre-existing decisions or approvals issued by the State on which the investor relied and based the assumption of his commitments and the planning and implementation of its economic and commercial activities. The investor also trusts that the State will use the legal instruments that govern the performance of the investor or the investment in accordance with the typically foreseeable function of such instruments, and in any case never to deprive the investor of his investment without compensation.²¹¹

87. The Sosa Report then concluded that if Peru refused CHM's request for an extension, it would be in violation of the fair and equitable treatment standard under international law:

²⁰⁸ MINEM's Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

²⁰⁹ MINEM's Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

²¹⁰ MINEM's Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

²¹¹ MINEM's Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

In this context, the delay (outside of what is foreseeable and expected) in obtaining the operating permit for the provision of the generation service, can be understood as unreasonable treatment afforded to the investor, subject to challenge, even more so when negative consequences of a financial nature for the Concessionaire can be extracted from an act attributable to the Administration.²¹²

88. In accordance with the Sosa Report's findings, MINEM, on December 29, 2016, granted CHM's request to extend the RER Contract's work schedule and push the COS to March 14, 2020. The parties thus entered into their second modification of the RER Contract ("Addendum 2"), which was formally registered on January 3, 2017.²¹³

H. After the Execution of Addenda 2, the Mamacocho Project Was Finally Ready to Proceed in Early 2017

89. In spite of the many early setbacks, the Mamacocho Project was finally ready to move forward in January 2017.²¹⁴ The amended works schedule under Addendum 2 gave the Project a new lifeline: a period of more than three (3) years to achieve Financial Closing, build and commission the plant and transmission line, and achieve commercial operation.²¹⁵ The Project successfully had obtained approvals of its concessions and all but one permit: the civil works authorization that was delayed by the government but was expected to be approved imminently.²¹⁶

90. With the great news about issuance of Addendum 2, Claimants immediately restarted financial negotiations that had long been shelved as a result of Peru's interference with the Mamacocho Project.²¹⁷ Back in 2016, Claimants had entered into exclusivity agreements with their preferred lender, Deutsche Investitions- und Entwicklungsgesellschaft ("DEG"), and

²¹² MINEM's Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (C-0012).

²¹³ Addendum 2 to the RER Contract, January 3, 2017 (C-0009).

²¹⁴ Sillen I, ¶ 113; Jacobson I, ¶ 36.

²¹⁵ Addendum 2 to the RER Contract, January 3, 2017 (C-0009); Bartrina I, ¶ 43.

²¹⁶ Bartrina I, ¶ 63; Sillen I, ¶ 115.

²¹⁷ Jacobson I, ¶¶ 37-38; Sillen I, ¶¶ 113-114, 116.

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Innergex Renewable Energy Inc. (“**Innergex**”), a Canadian hydropower company that was interested in acquiring a 70% share in the Mamacocha Project.²¹⁸ Both DEG and Innergex had refused to advance their negotiations until the Project received the necessary COS extensions.²¹⁹ After Addendum 2 was executed, negotiations with both institutions moved forward at a brisk pace.²²⁰

91. While Latam Hydro was fully committed to see the Mamacocha Project through to commercial operation and ultimately generation for the duration of its concession, Latam Hydro also held out the possibility of finding a respected majority equity partner with deep experience in the renewable energy sector to join the ownership group and supervise construction and operation of the Mamacocha Project.²²¹ This would then free Latam Hydro executives up to focus on development of the next-stage Upstream Projects, while permitting Latam Hydro to enjoy the rewards of being a minority equity partner in the overall venture.²²² Innergex was a perfect candidate for the majority equity role, given that it was a proven market leader in acquiring, owning and operating high-quality renewable energy facilities in North America, mostly hydro projects.²²³ The Mamacocha Project also fit Innergex’s strategic goal of expanding into Peru and Chile, using the Mamacocha Project as its beach-head.²²⁴ Among other considerations, Latam Hydro believed that having Innergex as part of its ownership team would give the Project even more leverage in its negotiations with their lender DEG, result in more favorable financial terms, and expedite the financial closing process.²²⁵

²¹⁸ Email from S. Sillen to R. De Batz, June 30, 2016 (C-0156); Sillen I, ¶ 105; Jacobson I, ¶¶ 37-38.

²¹⁹ Jacobson I, ¶¶ 37-38; Sillen I, ¶ 101; Email from S. Sillen to L. Benzaquen et al., March 26, 2016 (C-0153).

²²⁰ Sillen I, ¶¶ 114-115; Jacobson I, ¶¶ 40-41.

²²¹ Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014 (C-0032); Jacobson I, ¶ 26.

²²² Jacobson I, ¶ 26; Sillen I, ¶ 52.

²²³ Sillen I, ¶¶ 90-91; Jacobson I, ¶ 37.

²²⁴ Sillen I, ¶ 90.

²²⁵ Sillen I, ¶ 91; Jacobson I, ¶ 37.

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92. On January 5, 2017, Innergex told Latam Hydro that Innergex was “ready to sign the partnership agreements” with Latam Hydro as a result of the time extensions granted under Addendum 2.²²⁶ Consistent with this statement, on January 10, 2017, Innergex drafted an internal report titled “Peru Development Planning” that listed the Mamacocha Project as Innergex’s top priority in Peru and expressly stated that Innergex expected to sign its partnership agreements with Latam Hydro by the end of the month.²²⁷ This expectation was then incorporated in a “C.H. Mamacocha Timetable” that Claimants created on January 24, 2017²²⁸ and which Innergex and DEG both separately approved.²²⁹ Among other things, this timetable establishes that the parties expected: (i) the civil works authorization to be approved imminently; (ii) the negotiations between Latam Hydro and Innergex to close during the first week of February; (iii) the Project to receive credit approval from DEG in early March 2017; (iv) Financial Closing to occur in May 2017; and (v) CHM would work with MINEM to try to extend the Termination Date to restore the original 20-year Term of Validity for the Guaranteed Revenue Concession, although this goal was not a precondition for the parties to move forward with the equity infusion or the loan.²³⁰

93. But the negotiated agreements with Innergex and DEG could not be signed until CHM received the civil works authorization from AAA, a regional licensing body in Arequipa.²³¹ The civil works authorization was necessary to authorize the concessionaire to build structures near the waterways, including the Lagoon and rivers.²³² From the outset,

²²⁶ Email from S. Sillen to P. Gyergyay and J. Von Frowein (DEG), January 2, 2017 (C-0161); Email from S. Sillen to G. Bengier et al., January 5, 2017 (C-0041); Sillen I, ¶ 114.

²²⁷ Innergex Report titled “Peru Development Planning”, January 2017 (C-0205).

²²⁸ Email from S. Sillen to M. Jacobson et al. attaching C.H. Mamacocha Timeline v.1, January 24, 2017 (C-0163).

²²⁹ Sillen I, ¶ 117.

²³⁰ Email from S. Sillen to M. Jacobson et al. attaching C.H. Mamacocha Timeline v.1, January 24, 2017 (C-0163).

²³¹ Sillen I, ¶ 115.

²³² Bartrina I, ¶ 63.

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Innergex and DEG had made it clear they would not sign their respective agreements until the permitting process was complete. These entities were not willing to make an exception for the civil works authorization.²³³ CHM had applied for the civil works authorization in late 2016 and reasonably expected its approval in January 2017 because the AAA was provided all necessary information and had an obligation under the TUPA to issue its determination within twenty (20) business days.²³⁴ But AAA failed to adhere to this review time period.²³⁵

94. Nevertheless, the parties advanced their ongoing negotiations while awaiting AAA's imminent approval.²³⁶ In February 2017, at an in-person meeting in Germany between Latam Hydro and DEG representatives, DEG reported that its legal expert, Estudio Grau Abogados, had not identified any red flags with respect to the Project's authorizations and compliance with the relevant electricity laws and regulation.²³⁷ DEG similarly reported that its engineering expert, Hatch Engineering, had finished preliminary drafts of its technical due diligence that found no red flags with respect to the Project's engineering, feasibility, or design. These were important hurdles successfully overcome.²³⁸

95. On February 24, 2017, Latam Hydro and Innergex agreed in principle to the terms of their investment agreement.²³⁹ Innergex agreed to acquire a 70% stake in the Project by making a series of capital infusions over the ensuing months, including a US \$400,000 capital infusion upon closing to fund the first months of the construction phase. Latam Hydro would retain a 30% share of the Project in exchange for its investments to date. Latam Hydro would

²³³ Sillen I, ¶ 115.

²³⁴ Bartrina I, ¶ 63.

²³⁵ Bartrina I, ¶ 63.

²³⁶ Sillen I, ¶¶ 115-122.

²³⁷ Sillen I, ¶ 117.

²³⁸ Sillen I, ¶ 117.

²³⁹ Email from S. Sillen to M. Jacobson et al., February 25, 2017 (C-0046); Sillen I, ¶ 118.

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also receive a US \$1.5 million development premium from Innergex. The parties agreed to finalize and execute the investment agreement in late March 2017.²⁴⁰

96. Throughout February and the first half of March of 2017, Claimants worked assiduously to satisfy all of DEG's conditions precedent for credit approval and closing.²⁴¹ For example, Claimants negotiated and nearly finalized the Engineering, Procurement, and Construction ("EPC") contract with their preferred contractor, GCZ Ingenieros S.A.C. ("GCZ"). Claimants signed the inter-connection agreement with the owner of the Chipmo substation that the Project would use to connect the hydroelectric plant to Peru's electricity grid.²⁴² And Claimants moved forward with the cadastral work for the transmission line easements.²⁴³

97. On March 6, 2017, Claimants received DEG's Indicative Term Sheet for the Project.²⁴⁴ The term sheet provided that the Project would receive up to US \$60 million in non-recourse financing from DEG and other potential co-lenders that DEG would bring into the syndicate.²⁴⁵ Importantly, the tenor of the loan was long, allowing the Project to amortize the loan payments over 17.5 years with a three-year grace period.²⁴⁶ Based on these favorable terms, Latam Hydro, Innergex, and DEG agreed to meet in late March at DEG's lawyers' offices in New York to finalize the terms for credit approval.²⁴⁷ Once that happened, the parties would be in position to draft, negotiate, and close the loan documentation by May or June 2017.²⁴⁸

²⁴⁰ Email from S. Sillen to M. Jacobson et al., February 25, 2017 (C-0046); Sillen I, ¶ 118.

²⁴¹ Sillen I, ¶¶ 116-117.

²⁴² Sillen I, ¶ 120; Bartrina I, ¶ 49.

²⁴³ Sillen I, ¶ 120.

²⁴⁴ Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017 (C-0048); Sillen I, ¶ 121.

²⁴⁵ Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017 (C-0048); Sillen I, ¶ 121.

²⁴⁶ Email from S. Sillen to M. Jacobson et al. attaching DEG's Indicative Term Sheet, March 6, 2017 (C-0048); Sillen I, ¶ 121.

²⁴⁷ Sillen I, ¶ 122.

²⁴⁸ Sillen I, ¶ 122.

98. On March 13, 2017, Hatch Engineering circulated a “Final” 115-page diligence report on the Mamacocha Project titled “Independent Engineering Review of the Mamacocha Project.”²⁴⁹ This report concluded that, *inter alia*: (i) the Project’s design was “technically sound”; (ii) the contemplated hydroelectric plant was capable of operating for at least forty (40) years; and (iii) GCZ’s contemplated 26-month construction schedule was feasible, but unforeseen and unknown *force majeure* events may result in a 33-month construction schedule.²⁵⁰

99. The positive momentum in the negotiations with Innergex and DEG made Claimants confident they would achieve Financial Closing no later than June 2017.²⁵¹ Based on these developments, GCZ revised its proposal and updated its construction schedule on April 3, 2017.²⁵² The updated timeline anticipated beginning construction on July 1, 2017 and achieving commercial operation on August 29, 2019, more than seven (7) months ahead of the COS under Addendum 2.²⁵³ This date also allowed the Project to achieve commercial operation in time even under Hatch Engineering’s conservative 33-month construction schedule, which the parties viewed as a worst-case scenario.²⁵⁴ In mid-March 2017, GCZ sent Claimants a preview of this updated schedule, which Claimants immediately transmitted to DEG in handwritten form (see below).²⁵⁵

²⁴⁹ Independent Engineering Review of the Mamacocha Project by Hatch, March 13, 2017 (C-0187); Bartrina I, ¶ 52.

²⁵⁰ Independent Engineering Review of the Mamacocha Project by Hatch, March 13, 2017 (C-0187); Bartrina I, ¶ 52.

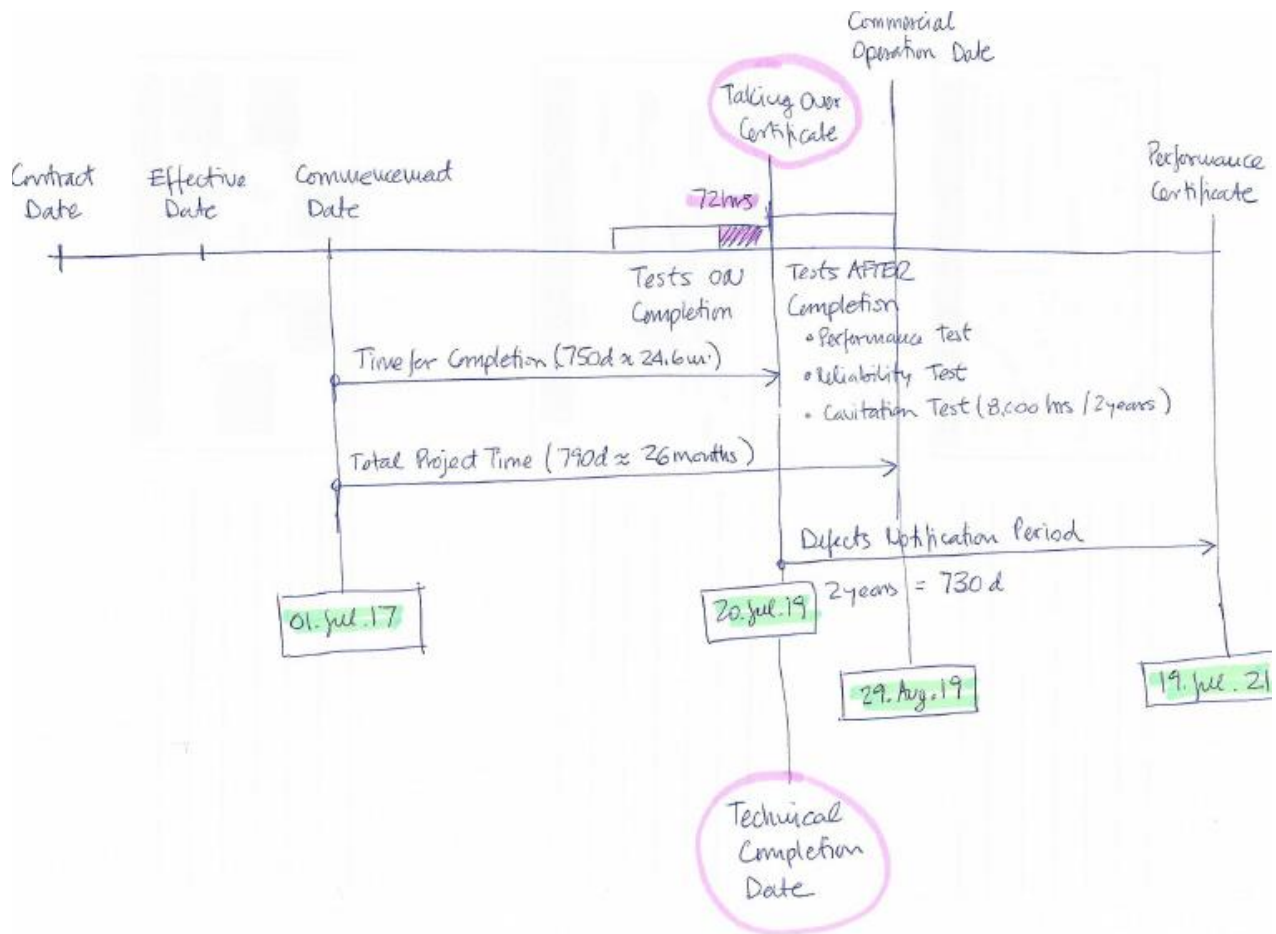
²⁵¹ Sillen I, ¶ 122; Bartrina I, ¶ 50.

²⁵² Email from P. Gonzalez-Orbegoso to A. Ledesma et al. attaching GCZ's updated proposal, April 3, 2017 - Email in English, proposal in Spanish (C-0109); GCZ Work Schedule chart, April 3, 2017 (C-0110).

²⁵³ Email from P. Gonzalez-Orbegoso to A. Ledesma et al. attaching GCZ's updated proposal, April 3, 2017 - Email in English, proposal in Spanish (C-0109); GCZ Work Schedule chart, April 3, 2017 (C-0110).

²⁵⁴ Email from P. Gonzalez-Orbegoso to A. Ledesma et al. attaching GCZ's updated proposal, April 3, 2017 - Email in English, proposal in Spanish (C-0109); GCZ Work Schedule chart, April 3, 2017 (C-0110); Bartrina I, ¶ 54.

²⁵⁵ Handmade illustration showing EPC schedule dates, March 22, 2017 (C-0111); Bartrina I, 51.



I. The RGA Lawsuit and Its Fallout

100. Everything changed on March 17, 2017, when Claimants became aware that the RGA had commenced a contentious administrative proceeding in Arequipa local courts on March 14, 2017 to annul the environmental permits that the Project had received from ARMA in 2014, nearly three years before.²⁵⁶ The RGA Lawsuit posed an immediate existential threat to the Project because, without these permits, the power-generation and transmission concessions would be null and void and the Project essentially would have to start the entire permitting and approval process over from the beginning.²⁵⁷ Challenging the RGA Lawsuit in the Arequipa

²⁵⁶ Email from C. Diez Canseco to S. Sillen, March 17, 2017 (C-0112); Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087).

²⁵⁷ Sillen I, ¶ 122; Jacobson, I, ¶ 46; Bartrina I, ¶ 55.

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courts was also not an option.²⁵⁸ Letting the judicial processes play out, including appeals, could take as much as four years.²⁵⁹ This delay would destroy any chance Claimants had to complete the works schedule and achieve COS by the stipulated deadline.²⁶⁰ For these reasons, after learning of the RGA Lawsuit, Innergex and DEG notified Claimants in late March that their negotiations would be suspended indefinitely.²⁶¹ The Project was suddenly and unexpectedly in crisis mode.

101. The RGA Lawsuit was commenced at the recommendation of the RGA Council.²⁶² The RGA Council issued its recommendation on October 21, 2016 after conducting an internal *ex parte* “investigation” that purportedly found that the Project’s environmental permits were illegal.²⁶³ Claimants were not notified of this investigation and were not given any opportunity to rebut the false allegations or findings.²⁶⁴ Nor were they notified that the RGA Council authorized its lawyers to commence the RGA Lawsuit.²⁶⁵

102. The RGA Lawsuit was meritless and merely a tactic to block continued work on the Project. The Lawsuit argued that ARMA erred when it allowed CHM to secure the environmental permits using a DIA, instead of an EIA, because of the Project’s expected environmental impact.²⁶⁶ This argument, however, is directly contradicted by MINEM’s official report from January 2012 that unambiguously provides that projects, like the Mamacochoa

²⁵⁸ Jacobson I, ¶ 51.

²⁵⁹ Jacobson I, ¶ 51.

²⁶⁰ Jacobson I, ¶ 51.

²⁶¹ Jacobson I, ¶ 50; Sillen I, ¶ 133; Email from J. Lepon to M. Jacobson et al., March 30, 2017 (C-0050).

²⁶² Regional Council of Arequipa's Ordinary Session Minute, October 21, 2016 (C-0049); Bartrina I, ¶ 60; Jacobson I, ¶ 49; Sillen I, ¶¶ 125-126.

²⁶³ Regional Council of Arequipa's Ordinary Session Minute, October 21, 2016 (C-0049); Bartrina I, ¶ 60; Jacobson I, ¶ 49; Sillen I, ¶¶ 125-126.

²⁶⁴ Regional Council of Arequipa's Ordinary Session Minute, October 21, 2016 (C-0049); Bartrina I, ¶ 60; Jacobson I, ¶ 49; Sillen I, ¶¶ 125-126.

²⁶⁵ Regional Council of Arequipa's Ordinary Session Minute, October 21, 2016 (C-0049); Bartrina I, ¶ 60; Jacobson I, ¶ 49; Sillen I, ¶¶ 125-126.

²⁶⁶ Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087).

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Project, that are located in the mountains on unprotected lands need, in principle, only a DIA to secure its environmental permits.²⁶⁷ Moreover, the RGA Lawsuit did not cite to any studies or reports that supported its baseless contention that the Project would have a significant environmental impact.²⁶⁸ Nor did it address the myriad environmental studies the Project had sent the RGA or otherwise communicated through the “Mesas de Trabajo” and in other settings.

103. The RGA Lawsuit also alleged that the permits were illegal because the ARMA official who signed them was on vacation the day they were issued by his office.²⁶⁹ But, as the RGA Lawsuit papers themselves expressly state, the official who signed the permits did so on the day before he went on vacation, thereby undermining this frivolous argument in the four corners of the initiating documents.²⁷⁰

104. Even the RGA Council did not believe in the arguments set forth in the RGA Lawsuit. On April 11, 2017, RGA Council members were interviewed by the regional press about the RGA Lawsuit.²⁷¹ Each council member ignored the arguments advanced by the RGA Lawsuit and instead commented that the real reason the environmental permits should be annulled is that the office within ARMA that issued these permits lacked legal authority.²⁷² This argument was not alleged in the RGA Lawsuit but was just as meritless. As the interviewer noted several times during these interviews, that office had issued 109 similar permits in other projects in years prior and neither the RGA nor ARMA had ever moved to annul them or

²⁶⁷ MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088)

²⁶⁸ Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087).

²⁶⁹ Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087).

²⁷⁰ Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087).

²⁷¹ Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).

²⁷² Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).

challenge them in any way.²⁷³ The council members did not contest this fact and admitted that CHM's permits were the only permits that had ever been challenged in this manner.²⁷⁴

105. On March 24, 2017—just ten (10) days after the RGA's lawsuit was filed—the situation got even worse; the AEP began a baseless criminal investigation against CHM and the ARMA officials who were involved in the reclassification and approvals of the environmental permits.²⁷⁵ The AEP provided CHM with no specification or details of this investigation.²⁷⁶ Nor did the AEP provide any meaningful opportunity for CHM to contest the undefined allegations.²⁷⁷ But Claimants subsequently learned that the investigation was commenced based upon the same spurious allegations as had been framed in the RGA's lawsuit.²⁷⁸ The investigation, like the lawsuit, assumed that ARMA must have engaged in an “irregular” process when it approved the reclassification and permits, although neither identified any plausible legal or factual grounds for challenging the decisions.

106. As Mr. Jacobson wrote to his team, he was very concerned that CHM would not be granted due process protections during this criminal investigation.²⁷⁹ And even putting due process issues aside, the mere delay to the project caused by the baseless criminal investigation could kill the Project.²⁸⁰ He observed: “such investigations, even where there is nothing to see, take a long time to resolve” and, given the regional opposition to the Project, Mr. Jacobson expressed his doubts that CHM would “receive an honest investigation” by the AEP.²⁸¹

²⁷³ Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).

²⁷⁴ Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).

²⁷⁶ Sillen I, ¶ 131.

²⁷⁷ Sillen I, ¶ 131.

²⁷⁸ Santiváñez I, ¶ 47.

²⁷⁹ Jacobson I, ¶ 53; Email from M. Jacobson to S. Sillen et al., April 16, 2017 (C-0053).

²⁸⁰ Jacobson I, ¶ 53; Email from M. Jacobson to S. Sillen et al., April 16, 2017 (C-0053).

²⁸¹ Jacobson I, ¶ 53; Email from M. Jacobson to S. Sillen et al., April 16, 2017 (C-0053).

107. On May 16, 2017, the bad news got worse when the Project learned that the AAA, denied CHM’s application for the civil works authorization—a request that had been submitted by CHM on November 25, 2016.²⁸² This denial began an 8-month ordeal during which the AAA put up roadblocks preventing completion of the Project.²⁸³ In its May 2017 denial, AAA groundlessly stated that CHM had failed to submit certain information to AAA.²⁸⁴ But the TUPA did not require this information in an application and AAA had never previously, despite having ample amounts of time, notified CHM that the information was required or missing. Upon appeal, the central government’s water authority in Lima, Autoridad Nacional del Agua (“ANA”), sided with CHM, rejected AAA’s baseless challenge, and ordered AAA to reverse its decision and grant the permit.²⁸⁵

108. But the ANA’s rejection of the AAA’s attempt to erect roadblocks preventing the Project from moving forward did not stop AAA’s obstruction. On July 5, 2017, AAA issued a materially defective permit that included the wrong term date and failed to include certain of the physical structures that CHM had included in the plans that were submitted with its permit application.²⁸⁶ Even though Claimants noted these defects in various letters and in-person meetings, AAA refused to fix the permit.²⁸⁷ Finally, in December 2017, the ANA administrative court ordered AAA to reissue the permit without these defects.²⁸⁸ Thus, CHM twice had to appeal AAA’s baseless decisions to higher authorities. Around this time, AAA admitted to

²⁸² Directoral Resolution No. 1480-2017-ANA/AAA I C-O, May 16, 2017 (C-0121).

²⁸³ Bartrina I, ¶¶ 65-71.

²⁸⁴ Directoral Resolution No. 1480-2017-ANA/AAA I C-O, May 16, 2017 (C-0121).; Bartrina I, ¶ 64.

²⁸⁵ Bartrina I, ¶ 65.

²⁸⁶ Directoral Resolution No. 1928-2017-ANA/AAA I C-O, July 5, 2017 (C-0122); Bartrina I, ¶ 66.

²⁸⁷ Bartrina I, ¶¶ 66-70.

²⁸⁸ Bartrina I, ¶ 70.

Claimants in an in-person meeting that the agency's intransigence was due to political pressure by the RGA.²⁸⁹

109. In the months following the filing of the RGA Lawsuit, Claimants submitted several requests to MINEM to suspend the RER Contract and defend Claimants from the government's unlawful attacks on the environmental permits.²⁹⁰ Although MINEM had an obligation under the principles of the public-private partnership, good faith obligations under administrative and Civil Law, and a specific commitment to cooperate and assist under Clause 4.3 of the RER Contract,²⁹¹ MINEM did nothing.

110. Claimants notified many U.S. and Peruvian governmental officials of the RGA Lawsuit and its immediate impact on the Project, including the U.S. Ambassador to Peru.²⁹² Everyone was sympathetic to Claimants' situation but indicated that Claimants' best option was to serve Peru with a notice requesting "Trato Directo" – *i.e.*, settlement discussions under the TPA – with the Peruvian commission that handles international investment disputes on behalf of Peru (the "**Special Commission**").²⁹³

111. On June 20, 2017, Latam Hydro and CHM submitted its first Notice of Intent to submit a dispute to consultation and negotiation under Article 10.15 of the TPA regarding their claims under the TPA and RER Contract against Peru arising from the RGA Lawsuit and Peru's interferences with the Project.

112. On July 21, 2017, the Special Commission formally commenced the Trato Directo process and ordered MINEM to retroactively suspend the RER Contract effective as of

²⁸⁹ Bartrina I, ¶ 67.

²⁹⁰ Letter from C.H. Mamacocha to Ministry of Energy and Mines, March 28, 2017 (C-0091); Letter from C.H. Mamacocha to G. Tamayo, Minister of Energy and Mines, April 26, 2017 (C-0139); Letter from CH Mamacocha to A. Vasquez, Vice Minister of Energy, July 17, 2017 (C-0142).

²⁹¹ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

²⁹² Email from S. Sillen to M. Jacobson, July 7, 2017 (C-0055); Jacobson I, ¶ 56.

²⁹³ Jacobson I, ¶¶ 56.

April 21, 2017, the date on which Claimants first requested this suspension.²⁹⁴ This order specifically provides that, as of the date of suspension, all of CHM’s obligations under the RER Contract and the milestone deadlines under the works schedule will be suspended through December 31, 2017 in order to facilitate the “Trato Directo” negotiations period with the Special Commission in hopes of resolving the dispute with the RGA.²⁹⁵

113. The Special Commission’s suspension order reversed MINEM’s decision from July 14, 2017 that had denied CHM’s suspension request, notwithstanding MINEM’s contractual duty to protect the Project’s permits.²⁹⁶ On August 28, 2017, based on the Special Commission’s order, MINEM agreed to suspend CHM’s obligations under the RER Contract and formalized this suspension via contract modification on September 8, 2017 (“**Addendum 3**”).

J. The People of Ayo Strongly Supported the Project that Its Government Was Trying to Undermine

114. The irony of the RGA Lawsuit is that it was pursued by politicians who lived in cities or villages located many hours away from the Project.²⁹⁷ On the other hand, the constituents who lived near the Project site – and, hence, would be most affected by the Project – overwhelmingly supported the Project.²⁹⁸

115. By way of illustration, in July 2017, the people living in Ayo (the village closest to the Project site) signed a petition in support of the Project.²⁹⁹ The petition contains more than 105 signatures, amounting to approximately 80% of the Ayo population. The Municipality of Ayo sent this petition to Governor Osorio in September 2017 along with a cover letter explaining

²⁹⁴ Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).

²⁹⁵ Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), July 21, 2017 (C-0094).

²⁹⁶ MINEM’s Official Letter No. 121-2017-MEM/VME, July 13, 2017 (C-0093).

²⁹⁷ Arequipa, for example, is 347 km away and a seven-hour car ride from Ayo.

²⁹⁸ Jacobson I, ¶ 63.

²⁹⁹ Letter from Ayo residents to Y. Osorio, Regional Governor of Arequipa, September 22, 2017 (C-0058).

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that the citizens of Ayo strongly support the Mamacocha Project because of its vast economic benefits that “will contribute to the development of Ayo and benefit” its citizens.³⁰⁰

116. The Mamacocha Project would have brought significant economic benefits to these communities. The Project would have created numerous jobs during its construction and a small amount of jobs during operation.³⁰¹ As it was, CHM itself employed or hired as many as fifteen (15) to twenty (20) persons in what ultimately were four offices (Lima, Arequipa, Andagua and Ayo) during the permitting and developing stage.³⁰² The hydroelectric plant would have supplied reliable and steady electricity to the people living in Ayo and elsewhere in Peru.³⁰³

117. The people of Ayo and the neighboring community of Andagua had already witnessed the economic benefits of the Project first-hand. As early as June 2012 and through 2019 (even after the Project had ended), Project representatives worked closely with these communities to design and implement numerous social initiatives that benefitted their economies and well-being.³⁰⁴ These initiatives included, *inter alia*: (i) improving the drinking water supply system of Ayo; (ii) installing a sewage water treatment plant in Ayo; (iii) providing veterinary assistance to livestock in these communities; (iv) providing supplies to the schools in those communities, as well as a new roof for the schoolyard in Ayo; (v) donating a truck to the Ayo community; (vi) completing a museum in Andagua; (vii) donating to various businesses in the local avocado, cattle, cheese, milk, and weaving communities; (viii) building roads in Andagua; (ix) providing medical supplies to the local health centers; and (x) publishing two books (pictured below) extolling the culture of Ayo and promoting local artisan products.³⁰⁵

³⁰⁰ Letter from Ayo residents to Y. Osorio, Regional Governor of Arequipa, September 22, 2017 (C-0058).

³⁰¹ Sillen I, ¶ 139.

³⁰² Canseco I, ¶ 14.

³⁰³ Jacobson I, ¶ 62.

³⁰⁴ Canseco I, ¶¶ 23-31; Jacobson I, ¶¶ 60-64.

³⁰⁵ Canseco I, ¶¶ 23-31; Jacobson I, ¶¶ 60-64.



118. In total, Claimants donated approximately US \$360,000 to these communities as part of their social initiatives.³⁰⁶ Had Peru not unlawfully destroyed the Mamacocha Project, the Project would likely have donated many hundreds of thousands of dollars more, as evidenced by Claimants' negotiations with DEG to develop many more social initiatives throughout the expected 40-year life of the Project and beyond.³⁰⁷

K. The RGA Withdraws Its Lawsuit after Admitting It Was a Meritless and Discriminatory Attack on the Mamacocha Project

119. As was later made public by the Regional Governor of Arequipa, Ms. Yamila Osorio, the Special Commission evaluated the merits of the RGA Lawsuit by hiring a reputable Peruvian law firm, Estudio Echeopar, to advise the government whether the lawsuit had any legal merit.³⁰⁸ In or around November 2017, the law firm concluded the lawsuit would not succeed.³⁰⁹ This conclusion had a dramatic impact on the government, including complete reversals by the RGA, AAA, and withdrawal of the obstructing RGA lawsuit.

120. While Claimants have not obtained access to the Estudio Eschecopar opinion, its conclusions are reflected in at least five public documents or statements made soon after it was

³⁰⁶ Jacobson I, ¶ 60.

³⁰⁷ Sillen I, ¶ 95.

³⁰⁸ Regional Executive Resolution No. 665-2017-GRA/GR, Dec. 27, 2017, p. 3 (C-0010).

³⁰⁹ Regional Executive Resolution No. 665-2017-GRA/GR, Dec. 27, 2017, p. 3 (C-0010).

rendered.³¹⁰ Based on the limited public documents currently available, Claimants understand that the Special Commission transmitted Estudio Echeopar's conclusions to the RGA, advised that if the RGA Lawsuit were not dismissed, the RGA would be responsible to pay any award, costs, or expenses resulting from an international investment arbitration brought by Claimants seeking damages for the significant financial harm caused by the RGA Lawsuit, and suggested that Governor order the RGA to withdraw the lawsuit. The Special Commission also warned that the RGA Council Members could face criminal liability for exposing Peru to financial and reputational harm.³¹¹ Finally, the Regional Attorney General recommended that the RGA Council should be investigated for its evasive conduct in failing to justify its actions.³¹²

121. In chronological order, here is how Peru responded to the calamitous conclusion that the RGA lawsuit, which had held up the Project for nearly a year and should never have been commenced. While these actions appear to have been done remarkably quickly, they were done at the point of a gun since the negotiations period reflected in Addendum 3 was about to conclude on December 31, 2020.³¹³ Peru was desperate to try to avoid the filing of an international arbitration seeking compensation for the damages caused by the RGA obstructing, and now, admittedly baseless lawsuit.

122. **First**, on December 19, 2017, Mr. Abelino Roncalla, then-Chair of the Regional Council, sent Governor Osorio a memorandum stating that after examining the Special Commission's directive and Estudio Echeopar's conclusions, "the Regional Executive has the

³¹⁰ Regional Executive Resolution No. 665-2017-GRA/GR, Dec. 27, 2017, p. 3 (C-0010); Osorio Article, Dec. 27, 2017 (C-0011); Oficio No. 1630-2017-GRA/CR, Dec. 19, 2017 (C-0191); Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095); Informe No. 77-GRA/ARMA, Dec. 26, 2017 (C-0190).

³¹¹ Osorio Article, Dec. 27, 2017 (C-0011).

³¹² Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

³¹³ Addendum 3 to the RER Contract, September 8, 2017 (C-0009).

obligation to take such measures as may be necessary to safeguard and protect the [RGA's] interests."³¹⁴ Mr. Roncalla stated that Governor Osorio does not need a resolution from the Regional Council to order unilaterally dismissal of the RGA Lawsuit.³¹⁵

123. **Second**, on December 21, 2017, then-Deputy Regional Attorney General of the RGA ("**Regional AG**") sent Governor Osorio a legal report, admitting that the RGA Lawsuit exposed the RGA and Peru to potential financial liability and recommending the RGA Lawsuit's immediate withdrawal (the "**Regional AG Report**").³¹⁶ Significantly, this report acknowledges that the Regional AG's Office had filed the RGA Lawsuit in March 2017 only because the Regional Council had recommended this action.³¹⁷ The Regional AG Report first acknowledges that "[t]he [Echopar opinion] points out that it is not likely that the court will nullify" the environmental permits.³¹⁸ It then admits that "[the AG's office] had already pointed out that the likelihood of succeeding in" in the RGA lawsuit "would be minimal."³¹⁹ Accordingly, the Regional AG states, "we share the statements put forth by Estudio Echeopar in its Report regarding the low likelihood of obtaining a nullity declaration."³²⁰ The Regional AG continues: "therefore, it is *highly likely* that the [RGA] will be made to pay millions to [CHM.]"³²¹ The Regional AG then concludes in bolded and underlined font:

[I]t is our view that, if deemed appropriate, the authorities should issue the necessary resolution authorizing a withdrawal of the complaint for a declaration that the resolutions are harmful to the public interest.³²²

³¹⁴ Oficio No. 1630-2017-GRA/CR, December 19, 2017 (C-0191).

³¹⁵ Oficio No. 1630-2017-GRA/CR, December 19, 2017 (C-0191).

³¹⁶ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³¹⁷ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³¹⁸ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³¹⁹ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²⁰ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²¹ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²² Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

(Emphasis in original).³²³

124. The Regional AG then discusses the trumped-up *ex parte* investigation and Final Report that the RGA Council had issued (without notifying Claimants or seeking any comment) before filing its lawsuit. The AG states, “[i]t is our view that ... the Regional Council ... should provide support for and defend the validity of its Report.”³²⁴ But, according to the Regional AG Report, the Regional Council had refused to justify its actions, arguing it was the Regional Executive, and not the Council, that should explain its decision. The Regional AG concludes in all caps, underlined font:

SUCH EVASIVE POSITION SHOULD BE ASSESSED BY
YOUR OFFICE IN DUE COURSE.³²⁵

(Emphasis in original).³²⁶

125. The Regional AG Report leaves little doubt that the RGA had acted without a proper administrative record, its lawsuit was unjustified, its actions should be investigated and in addition to damaging Claimants, the lawsuit was “harmful to the public interest.”³²⁷

126. **Third**, on December 26, 2017, then-Director of ARMA, Mr. Benigno Sanz, sent Governor Osorio a report addressing the “[p]otential contingencies against the [RGA] in the event of an international dispute.”³²⁸ This report describes the background of the Regional Council’s investigation and commencement of the lawsuit.³²⁹ It also states that the Special Commission, in its transmittal of the Echeopar Opinion,

found it appropriate to point out to the Arequipa Regional Government that Article 14, paragraph 3, of Law No. 28933, the entity which performed the act or omission that led to the investor’s

³²³ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²⁴ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²⁵ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²⁶ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²⁷ Report No. 278-2017-GRA/PPR, December 23, 2017 (C-0095).

³²⁸ Report No. 77-2017-GRA/ARMA, December 26, 2017 (C-0190).

³²⁹ Report No. 77-2017-GRA/ARMA, December 26, 2017 (C-0190).

claim is the entity that will be required to undertake all costs and payments necessary to comply with the Arbitral Award.... which will be charged to the Arequipa Regional Government's budget.³³⁰

The key conclusion of this Report was that if the lawsuit were dismissed, the underlying environmental permits remain “in full force and effect.”³³¹ This admission by ARMA was a complete reversal of its previous position on December 12, 2016, recommending that the environmental permits should be annulled based on the RGA Council's “investigation” and recommendations.³³²

127. **Fourth**, on December 27, 2017, the Governor of Arequipa issued a public Regional Executive Resolution authorizing the Regional AG to withdraw the RGA's lawsuit (the “**Regional Executive Resolution**”).³³³ The Regional Executive Resolution recounts the history mentioned above, including: (i) the RGA Council “investigation;” (ii) commencement of the RGA Lawsuit; (iii) Claimants' initiation of consultations on June 20, 2017 seeking to resolve the dispute; and (iv) Claimants' emphasis on the “real destructive impact on [Claimants'] investments by the definitive refusal of the creditors [...] to finance the project [before] the date for Financial Closing.”³³⁴ The Regional Executive Resolution goes on to state that, “[g]iven the significance of the situation,” the Special Commission retained an Administrative specialist, Dr. Juan Carlos Morón Urbina at Estudio Ehecopar to “impartially carry out the legal analysis of the legal soundness and viability of the” RGA Lawsuit.³³⁵

128. As described in the Regional Executive Resolution, Dr. Morón concluded in relevant part:

³³⁰ Report No. 77-2017-GRA/ARMA, December 26, 2017 (C-0190).

³³¹ Report No. 77-2017-GRA/ARMA, December 26, 2017 (C-0190).

³³² Resolution No. 033-2016-GRA/ARMA, December 12, 2016 (C-0085).

³³³ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).

³³⁴ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).

³³⁵ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).

- a. The RGA Lawsuit “would have little chance of success;”³³⁶
- b. In addition to reputation damage, Claimants commencement of an investment arbitration against Peru would have “significant economic impact,” including attorneys’ costs, experts and administrative expenses;³³⁷ and
- c. Claimants could seek damages in excess of US \$15 million, including consequential damages and lost profits.³³⁸

129. In light of the Eschecopar opinion and support by the two entities mentioned above (Regional AG and ARMA), Governor Osorio authorized the Regional AG to withdraw the RGA Lawsuit.³³⁹

130. **Fifth**, on December 27, 2017, the Peruvian periodical “Diario Correo” published an interview with Governor Osorio about the just-released Regional Executive Resolution. The article is entitled “Governor of Arequipa: ‘We don’t want to leave time bombs for the next administration.’”³⁴⁰ In the interview, Governor Osorio explains that the TPA imposes international treaty obligations on Peru because the Mamacocha Project is funded with “American capital.”³⁴¹ Governor Osorio states that she ordered the withdrawal of the RGA Lawsuit because if Peru lost an international investment arbitration concerning the RGA Lawsuit, the RGA “could be required to pay up to S/80 million,” *i.e.*, approximately US \$23

³³⁶ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).

³³⁷ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).

³³⁸ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).

³³⁹ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010).

³⁴⁰ Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017, available at <https://diariocorreo.pe/edicion/arequipa/gobernadora-de-arequipa-no-queremos-dejar-bombas-de-tiempo-la-proxima-gestion-794552/> (C-0011).

³⁴¹ Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017, available at <https://diariocorreo.pe/edicion/arequipa/gobernadora-de-arequipa-no-queremos-dejar-bombas-de-tiempo-la-proxima-gestion-794552/> (C-0011).

million, and she “would be leaving a time bomb behind” for the next administration.³⁴² In addition to these financial penalties, Governor Osorio confirms her understanding that Peru could also bring criminal charges against the RGA officials responsible for the RGA Lawsuit for “causing economic damage to the State”:

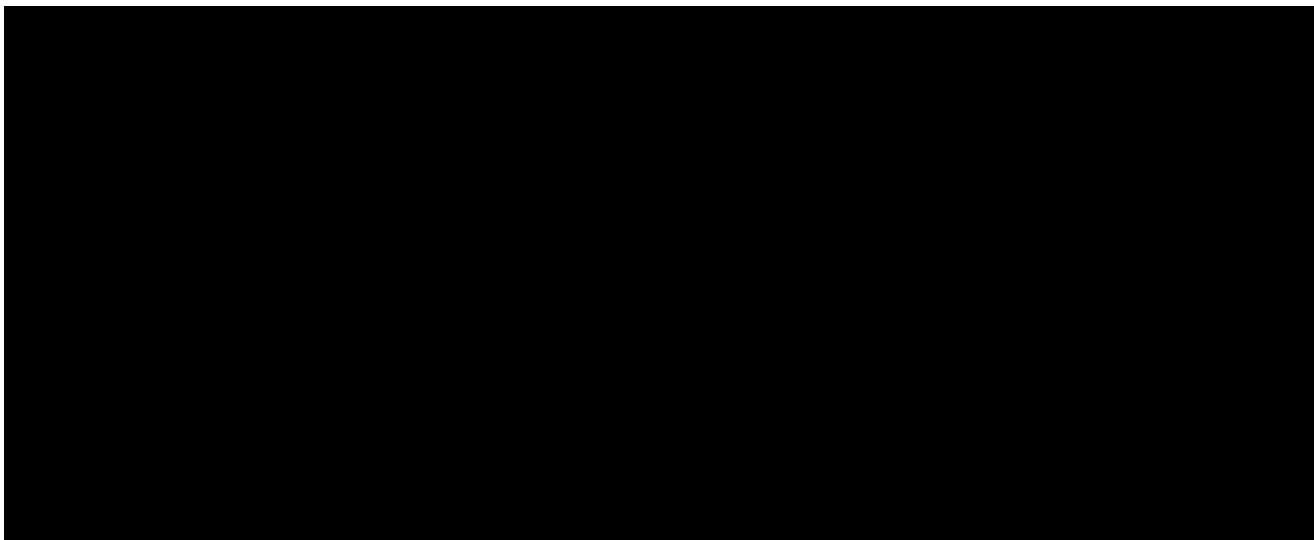
Diario Correo: Is it a fact that the company will go to arbitration?

Governor Osorio: Yes, there is a warning from the [Special Commission] that was issued last week. That’s why any decisions that we make must be made responsibly, because *they could also carry criminal charges for causing economic damage to the State.*

(Emphasis added).³⁴³

131. Despite issuance of the Governor’s Executive Resolution on December 27, 2017, the RGA lawsuit was not dismissed for several more months. Finally, on March 8, 2018, the court accepted the withdrawal of the RGA Lawsuit through Judicial Resolution No. 12-2018.³⁴⁴

L. The AEP Retaliated by Bringing Unfounded Criminal Charges against CHM’s Lead Peruvian Lawyer

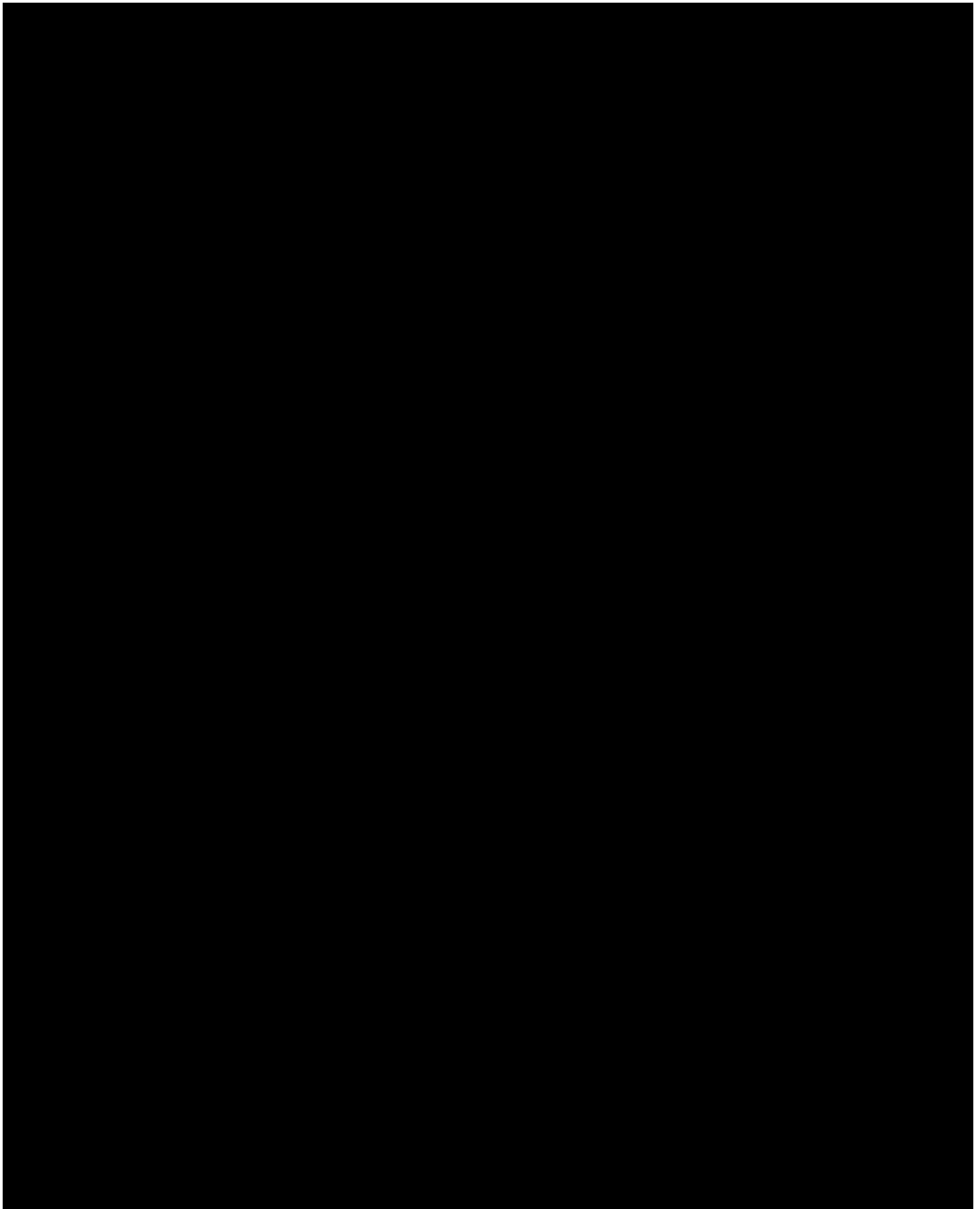


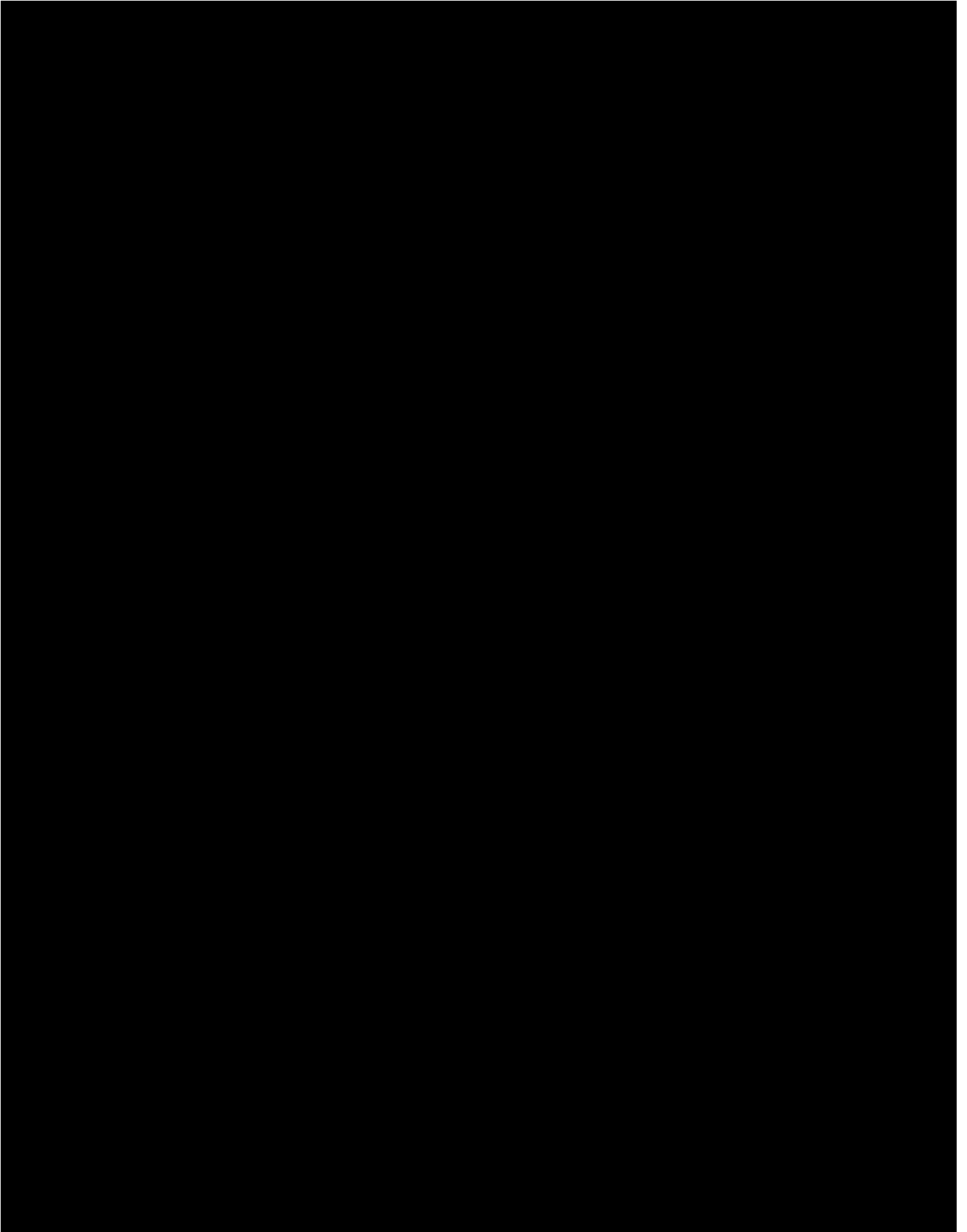
³⁴² Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017, available at <https://diariocorreo.pe/edicion/arequipa/gobernadora-de-arequipa-no-queremos-dejar-bombas-de-tiempo-la-proxima-gestion-794552/> (C-0011).

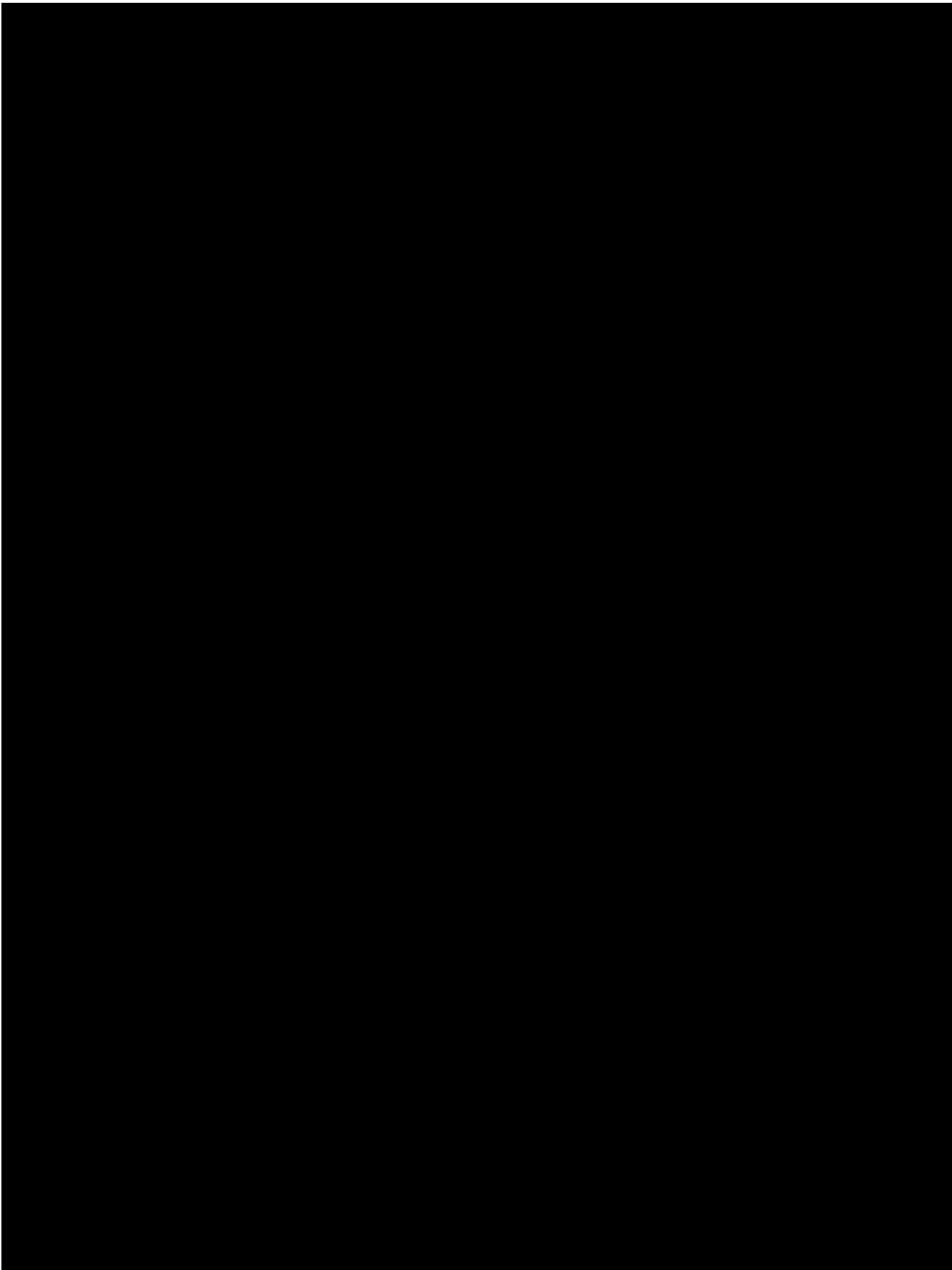
³⁴³ Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017, available at <https://diariocorreo.pe/edicion/arequipa/gobernadora-de-arequipa-no-queremos-dejar-bombas-de-tiempo-la-proxima-gestion-794552/> (C-0011).

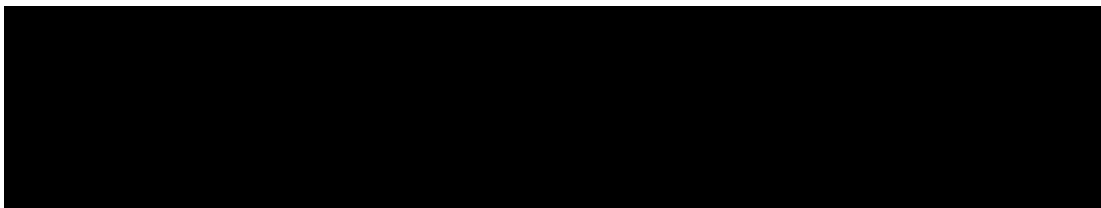
³⁴⁴ Resolution No 12 Proceeding File No. 1554-2017-0-0401-JR-CI-04, March 8, 2018 (C-0192).











M. Claimants Asked Peru to Reaffirm Its 20-Year Guaranteed Revenue Commitment

141. Simply dismissing the RGA Lawsuit was not enough to make Claimants whole. Claimants also needed MINEM to grant extensions to the COS to account for the RGA Lawsuit’s nearly year-long delays to the Project in addition to the compounded delays caused earlier.³⁶⁹ Claimants also needed an extension of the Termination Date to restore the 20-year Term of Validity for the Guaranteed Revenue Concession that Peru promised under the RER Contract.³⁷⁰ Claimants believed that seeking and promptly obtaining these conforming extensions to the works schedule would be unobjectionable and unremarkable.³⁷¹

142. On February 5, 2018, CHM requested extensions to the commercial operation date and the termination date under the RER Contract to February 28, 2021 and December 31, 2041, respectively (the “**Third Extension Request**”).³⁷² These proposed dates were meant to make up for the undisputed government interferences to date, restore the 20-year Guaranteed Revenue commitment under the RER Contract, and afford CHM sufficient time to complete the pre-operation milestones for the Mamacocha Project.³⁷³ Under the GLAP, MINEM had to issue

³⁶⁹ Sillen I, ¶ 145; Bartrina I, ¶ 72; Jacobson I, ¶ 66.

³⁷⁰ Sillen I, ¶ 145; Bartrina I, ¶ 72; Jacobson I, ¶ 66.

³⁷¹ Sillen I, ¶ 145; Bartrina I, ¶ 72; Jacobson I, ¶ 66.

³⁷² Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).

³⁷³ Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).

a ruling on this application within thirty (30) business days.³⁷⁴ But MINEM unjustifiably failed to issue a ruling during this period.

143. In anticipation of Claimants' filing of the Third Extension Request, on December 26, 2017, the Special Commission agreed to extend the Trato Directo period through February 28, 2018.³⁷⁵ On January 17, 2018, MINEM and CHM executed another addendum to the RER Contract that retroactively extended the suspension period through February 28, 2018 ("Addendum 4").³⁷⁶ And on February 27, 2018, the Special Commission extended the Trato Directo period through June 30, 2018.³⁷⁷ On March 26, 2018, MINEM and CHM executed another addendum to the RER Contract that retroactively extended the suspension period through June 30, 2018 ("Addendum 5").³⁷⁸

144. Due to MINEM's failure to respond to the Third Extension Request in a timely manner (*i.e.*, within thirty (30) days as required by the GLAP) Claimants served Peru with a second notice of intent under Article 10.15 on March 7, 2018.³⁷⁹ The notice explained that if the dispute were not resolved through consultation and negotiation, Claimants would commence an arbitration under Article 10.16.³⁸⁰ This second notice emphasized that if Peru were unable or unwilling to extend the COS and Termination Date to compensate for the RGA's interferences, the Project would be rendered economically unviable and Claimants would have no choice but to bring their claims to arbitration to redress this harm.³⁸¹ The notice further highlighted that an extension to the Termination Date was critical because Peru's interferences with the Project had

³⁷⁴ Quiñones Report I, ¶ 107.

³⁷⁵ Direct Negotiation Extension Agreement, Dec. 27, 2017 (C-0194).

³⁷⁶ Addendum 4 to the RER Contract, January 17, 2018 (C-0015).

³⁷⁷ Direct Negotiation Extension Agreement, February 27, 2018 (C-0195).

³⁷⁸ Addendum 5 to the RER Contract, March 26, 2018 (C-0016).

³⁷⁹ Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).

³⁸⁰ Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).

³⁸¹ Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).

taken over four (4) years off of the 20-year Guaranteed Revenue Concession that Peru had promised Claimants and that had induced Claimants' investment in the Mamacocha and Upstream Projects.³⁸²

145. In a letter from CHM to Latam Hydro, dated April 12, 2018, CHM explained that MINEM's unexpected delay in responding to the Third Extension Request was undermining CHM's ability to meet the milestone deadlines, to re-engage with DEG and Innergex, or to develop other lenders or prospective investors.³⁸³ The investors and financial institutions required certainty that the Project could be completed before the COS, but this certainty was fatally undermined by the intervention of the RGA Lawsuit.

146. MINEM's failure to respond to the Third Extension Request continued through the end of the Trato Directo and suspension periods under Addendum 5. Accordingly, on June 28, 2018 the Special Commission extended the Trato Directo period through September 30, 2018.³⁸⁴ On July 23, 2018, MINEM and CHM executed another addendum to the RER Contract that retroactively extended the suspension period through September 30, 2018 ("**Addendum 6**").³⁸⁵

N. MINEM Proposed a Supreme Decree to Provide a Process for Rectifying Its Interferences with RER Projects Awarded in the Third and Fourth Auctions

147. Claimants could not make substantial progress on development of the Project during most of calendar year 2018 because of MINEM's failure to grant the extensions of time requested in February 2018.³⁸⁶ These extensions should have been a natural outgrowth of the government's acknowledgment that the RGA Lawsuit had interrupted the Project for a year. It

³⁸² Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170).

³⁸³ CH Mamacocha letter to Latam Hydro LLC's shareholders, April 12, 2018 (C-0060).

³⁸⁴ Direct Negotiation Extension Agreement, June 28, 2018 (C-0196).

³⁸⁵ Addendum 6 to the RER Contract, July 23, 2018 (C-0017).

³⁸⁶ Bartrina I, ¶ 74.

REDACTED VERSION

was commenced in March 2017 and was finally dismissed in March 2018.³⁸⁷ And without the extension, CHM could not attract financing due to the uncertainties created.³⁸⁸

148. But for reasons not known to Claimants, MINEM continued to delay. Finally, in late August 2018, MINEM told Claimants that it was creating a general solution that would benefit not only CHM, but all other concessionaires from the third and fourth public auctions under the RER Promotion whose projects had been delayed by actions, inactions or interferences by Peru.³⁸⁹ Claimants had become aware that several other RER projects were also in crisis because the contractually defined COS deadline of December 31, 2018 was quickly approaching and the projects would not be able to meet it due to government delays.³⁹⁰

149. Claimants believed that the Mamacocha Project was different from all the other Third Auction projects because CHM was the *only concessionaire* who had sought and obtained MINEM's approvals and modifications of the RER Contract. CHM was also the *only concessionaire* whose COS had been extended beyond the December 31, 2018 deadline set forth in the RER Contract. On information and belief, all other concessionaires who sought extensions did so by declaring *force majeure* and none of those extensions authorized operational start-up beyond the December 31, 2018 deadline.³⁹¹ CHM never declared *force majeure* to make up for the government delays, and concluded that under the RER Contract, RER Promotion and Peruvian law the delays did not constitute *force majeure* events beyond the control of the parties, but rather were interferences that were a direct breach by its counterparty, Peru. MINEM's approval of Addenda 1-2 accepted CHM's legal theory. In sum, Claimants believed that all

³⁸⁷ Benzaquén I, ¶¶ 15, 25.

³⁸⁸ Bartrina I, ¶ 74; Sillen I, ¶ 154.

³⁸⁹ Sillen I, ¶ 156.

³⁹⁰ Sillen I, ¶ 157.

³⁹¹ Santivañez I, ¶ 43.

delays were attributable to Peru (constituting material breaches of the RER Contract), thus requiring MINEM to cure all such delays.³⁹²

150. As a result of this history and interpretation of the RER Contract and Peruvian law, Claimants did not believe that MINEM needed to come up with a general solution, but rather it had sufficient authority and precedence to mitigate its harm to the Mamacocha Project by approving the Third Extension Request, thereby giving CHM sufficient time to complete development, construction and begin operations.³⁹³ But MINEM failed to respond.³⁹⁴

151. Given this additional delay, Claimants agreed with the Special Commission to extend the Trato Directo period through April 1, 2019.³⁹⁵ On September 25, 2018, CHM asked MINEM for a corresponding extension to the suspension period under the RER Contract, but MINEM failed to respond.³⁹⁶ As part of the Trato Directo procedures, CHM had to promise that it would not file its threatened arbitration until after the Trato Directo period elapsed in April 2019, unless a solution could be achieved before then.³⁹⁷

152. In October 2018, MINEM's then-Minister, Francisco Ísmodes, spoke at a well-attended energy industry conference. Minister Ísmodes explained that MINEM expected to publish a new supreme decree that would establish a procedure for concessionaires to apply for extensions to their projects.³⁹⁸ Minister Ísmodes stated that the new procedure would allow

³⁹² Bartrina I, ¶¶ 30, 39, 42.

³⁹³ Sillen I, ¶ 157.

³⁹⁴ Sillen I, ¶ 158.

³⁹⁵ Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), September 21, 2018 (C-0062); Sillen I, ¶ 155; Jacobson I, ¶ 72.

³⁹⁶ Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), September 21, 2018 (C-0062); Sillen I, ¶ 158; Jacobson I, ¶ 72.

³⁹⁷ Sillen I, ¶ 169.

³⁹⁸ Sillen I, ¶ 159.

many hydroelectric projects to move forward and unlock approximately US \$222 million in foreign investments in these projects.³⁹⁹

153. On November 11, 2018, MINEM finally published its proposed supreme decree for public notice and comment.⁴⁰⁰ MINEM also published a “Statement of Reasons,” which explained that the supreme decree was necessary to give back to the RER projects time lost due to unjustified interferences by the government.⁴⁰¹ The Statement of Reasons stated that the decree would: (i) promote the interests and objectives set forth in Legislative Decree No. 1002; (ii) avoid proceedings challenging the government’s conduct or inaction under domestic and international law; (iii) create a predictable framework under which the renewable energy resources projects authorized by Legislative Decree No. 1002 could be carried out to completion; (iv) allow the contracts from the third public auction to be carried out under their original terms (e.g., over a 20-year period); (v) promote stability in renewable energy projects; (vi) result in higher investor confidence in the energy sector; (vii) have a positive impact in local areas where the projects would be built; and (viii) have a positive impact on Peru’s environment.⁴⁰²

154. The proposed Supreme Decree would have created a procedure for concessionaires where they could seek extensions to the COS for *force majeure* events as well as extensions to the COS and Termination Date in the event the delay was attributable to Peru.⁴⁰³ The supreme decree did not allow for extensions to the Termination Date on account of *force majeure* events. To seek these extensions, the concessionaires would have to make a submission

³⁹⁹ Presentation by F. Ismodes (Minister of Energy and Mines) titled "Progress and Challenges of the Energy Sector: Competitiveness and Sustainability", October 2018 (C-0172); Sillen I, ¶ 159.

⁴⁰⁰ Proposed Supreme Decree No. 453-2018-MEM/DM, November 11, 2018 (C-0018).

⁴⁰¹ Proposed Supreme Decree No. 453-2018-MEM/DM, November 11, 2018 (C-0018).

⁴⁰² Proposed Supreme Decree No. 453-2018-MEM/DM, November 11, 2018 (C-0018).

⁴⁰³ Proposed Supreme Decree No. 453-2018-MEM/DM, November 11, 2018 (C-0018).

that detailed the delays, their source, and a corresponding analysis that explains how these delays affect the critical path of the project.⁴⁰⁴

155. On November 11, 2018, the same day as the proposal was published, OSINERGMIN submitted comments opposing the proposed supreme decree.⁴⁰⁵ OSINERGMIN expressly stated that the Peruvian treasury would benefit from the forfeiture of the concessionaires' performance bonds in the total amount of US \$55,897,500, including the US \$5 million bond put up by CH Mamacocha, if Peru just walked away from its prior commitments to these projects.⁴⁰⁶

156. OSINERGMIN also warned that if Peru extended the contracts for these renewable energy projects, Peruvian energy customers could face an increase in their energy prices by as much as 2.3 percent.⁴⁰⁷ The prices set for twenty (20) years in the RER contracts executed in 2014 were substantially higher than the spot price rate in 2018. Lower than anticipated growth in mining sector investment depressed demand for energy in Peru.⁴⁰⁸ Peru's over-promotion of energy projects in different sectors (natural gas, solar, thermal, and hydro) and miscalculation of future energy demands resulted in an over-supply of energy, causing prices to slump. By way of example, the RER Contract guaranteed 20-year payments to CH Mamacocha at US \$62 per megawatt hour, but the "spot energy prices in the Peruvian electricity market had their lowest level for 2018 in a horizon of almost 20 years, reaching valued below" US \$10 per

⁴⁰⁴ Proposed Supreme Decree No. 453-2018-MEM/DM, November 11, 2018 (C-0018).

⁴⁰⁵ Jacobson I, ¶ 76; Sillen I, ¶ 160.

⁴⁰⁶ Email from S. Buenalaya to TEMP_dge72 et al. attaching OSINERGMIN Comments to Proposed Supreme Decree, November 23, 2018 (C-0174).

⁴⁰⁷ Email from S. Buenalaya to TEMP_dge72 et al. attaching OSINERGMIN Comments to Proposed Supreme Decree, November 23, 2018 (C-0174); Sillen I, ¶¶ 162-163.

⁴⁰⁸ Santiváñez I, ¶ 70.

megawatt hour.⁴⁰⁹ OSINERGMIN argued that Peruvian consumers would be required to bear the substantial price-gap had Peru proceeded with the supreme decree.

157. Long-time energy lawyer Dr. Santiváñez described the regulatory situation that MINEM faced:

Under these circumstances, Peru had to face the decision of either (i) letting the regulated prices keep rising due to the RER Promotion, (ii) modify the regulatory framework to natural gas power generation, or (iii) change its policy towards renewable energy promotion and reduce or cancel its commitments to such.

As has become obvious, the decision was made to appease the stronger natural gas power generation interests and thereby decrease MINEM's commitments under the RER Promotion. This policy decision explains how there was a 180-degree shift by MINEM from the date it introduced its proposed Supreme Decree (November 11, 2018) to the date it abandoned it and chose to kill the Mamacocha Project by unlawfully denying CHM's extension request (December 31, 2018).

Put differently, it was a lot easier and less costly to pick a fight with a dozen or so concessionaries of small hydroelectric accounting for 200 to 300 MW renewable power capacity, than to confront a smaller number of transnational power utilities and companies that had already built about 3,500 MW of natural gas power generation in Peru.⁴¹⁰

158. OSINERGMIN's objection, therefore, advocated unlawful "regulatory opportunism."⁴¹¹ It proposed that Peru should abandon its contractual commitments to CH Mamacocha and other renewable energy project developers in order to extricate the government from its self-created financial disaster and avoid the likely adverse political repercussions.⁴¹²

159. As Dr. Santiváñez observes:

[MINEM's] about-face is a textbook example of regulatory opportunism, which is intended to be mitigated by investment

⁴⁰⁹ Santiváñez I, ¶ 71.

⁴¹⁰ Santiváñez I, ¶¶ 72-74.

⁴¹¹ Santiváñez I, ¶¶ 76-77.

⁴¹² Santiváñez I, ¶ 76.

concession contracts (such as the RER Contract) and investment protection clauses of bilateral treaties (such as the TPA). Indeed, investment contracts and investment protection clauses of bilateral treaties are mechanisms to mitigate the risk of regulatory opportunism, allowing investors to be protected against the government's political decisions and policy changes, ignoring their contractual commitments that invited investors into Peru.⁴¹³

160. Again, Claimants believed that the proposed Supreme Decree was not needed to cure the problems facing the Mamacocha Project.⁴¹⁴ MINEM already had more than sufficient authority and a legal obligation to approve the Third Extension Request to mitigate the damages to the Project caused by the admitted unlawful interferences and delays caused by the RGA Lawsuit.

O. Weeks After Acknowledging its Responsibility and Proposing a Procedure for Concessionaires to Seek Redress, Peru Abruptly Reversed Course and Enacted Measures that Killed the Mamacocha and Upstream Projects

161. In December 2018, just weeks after Peru publicly touted the RER projects and reaffirmed its legal obligations under Peruvian and international law to see them through, MINEM abruptly reversed course and enacted measures that repudiated the RER Contract and made the Project impossible to perform.

1. MINEM Abandoned its Proposal to Establish a Process to Compensate Concessionaires for the Government's Interferences

162. On December 27, 2018, MINEM decided not to proceed with implementation of a corrective process to allow affected projects to seek extensions of their work schedules, as it had proposed only weeks before.⁴¹⁵ MINEM's explanation of its about-face directly contradicted MINEM's Statement of Reasons issued just weeks earlier which had emphasized that Peru had an obligation under Peruvian and international law to restore the time to renewable energy

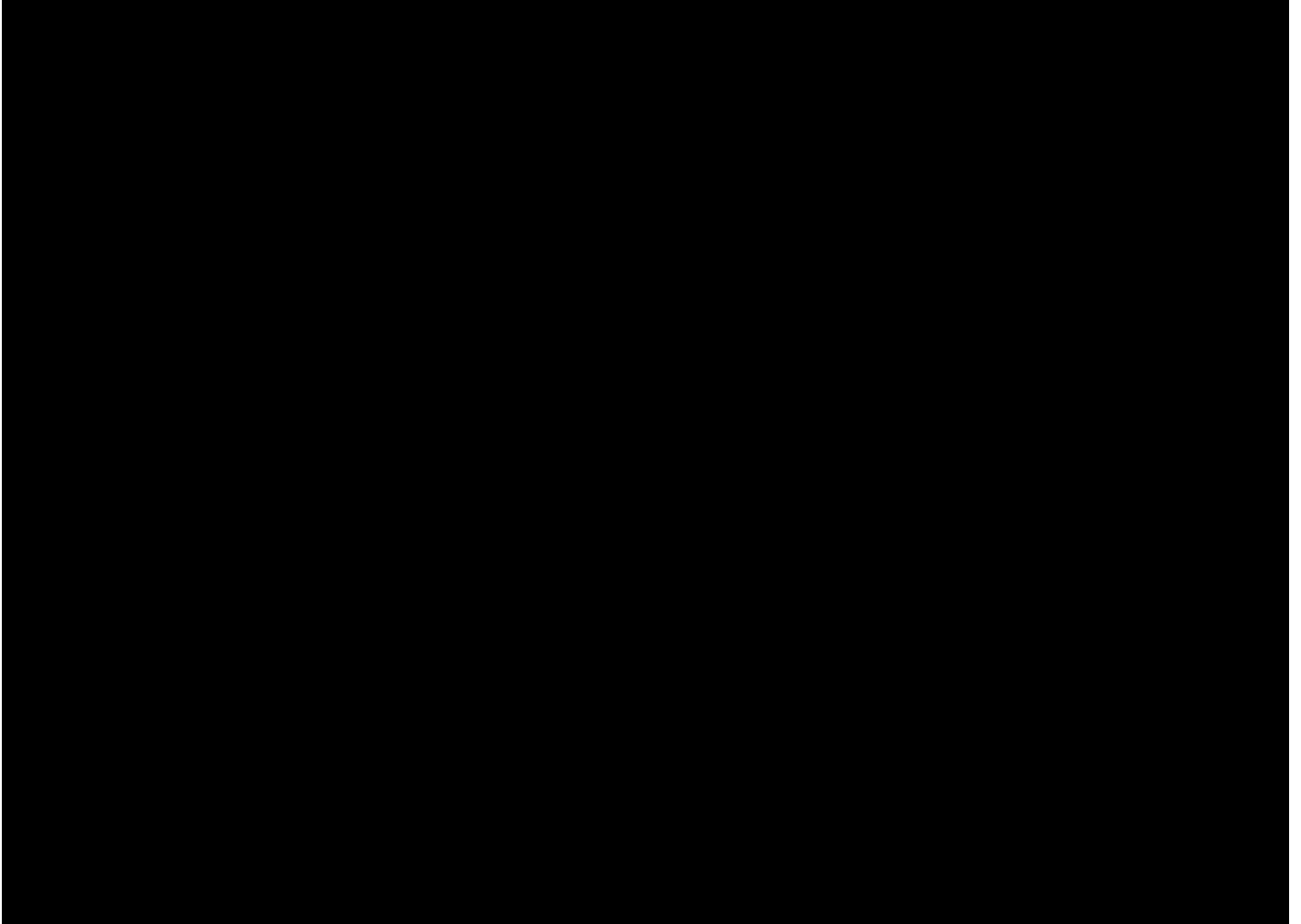
⁴¹³ Santivnez I, ¶ 76.

⁴¹⁴ Sillen I, ¶ 157; Jacobson I, ¶¶ 71-72.

⁴¹⁵ Santivnez I, ¶ 68.

projects lost to interferences and delays attributable to the government.⁴¹⁶ Instead, MINEM's report of December 27, 2018 concluded that it would be politically and economically expedient to let these projects (including the Mamacocho Project) default in order to allow Peru to collect the approximately US \$55 million in performance bonds deposited for the affected projects.⁴¹⁷

2. **MINEM Commenced an Arbitration in Lima Without Consent or Jurisdiction But Relating to the Same Dispute as Claimants Have Properly Brought before this ICSID Tribunal**



⁴¹⁶ Santiv  nez I, ¶ 68.

⁴¹⁷ MINEM Report No. 505-2018-MEM/DGE, December 27, 2018 (C-0175).

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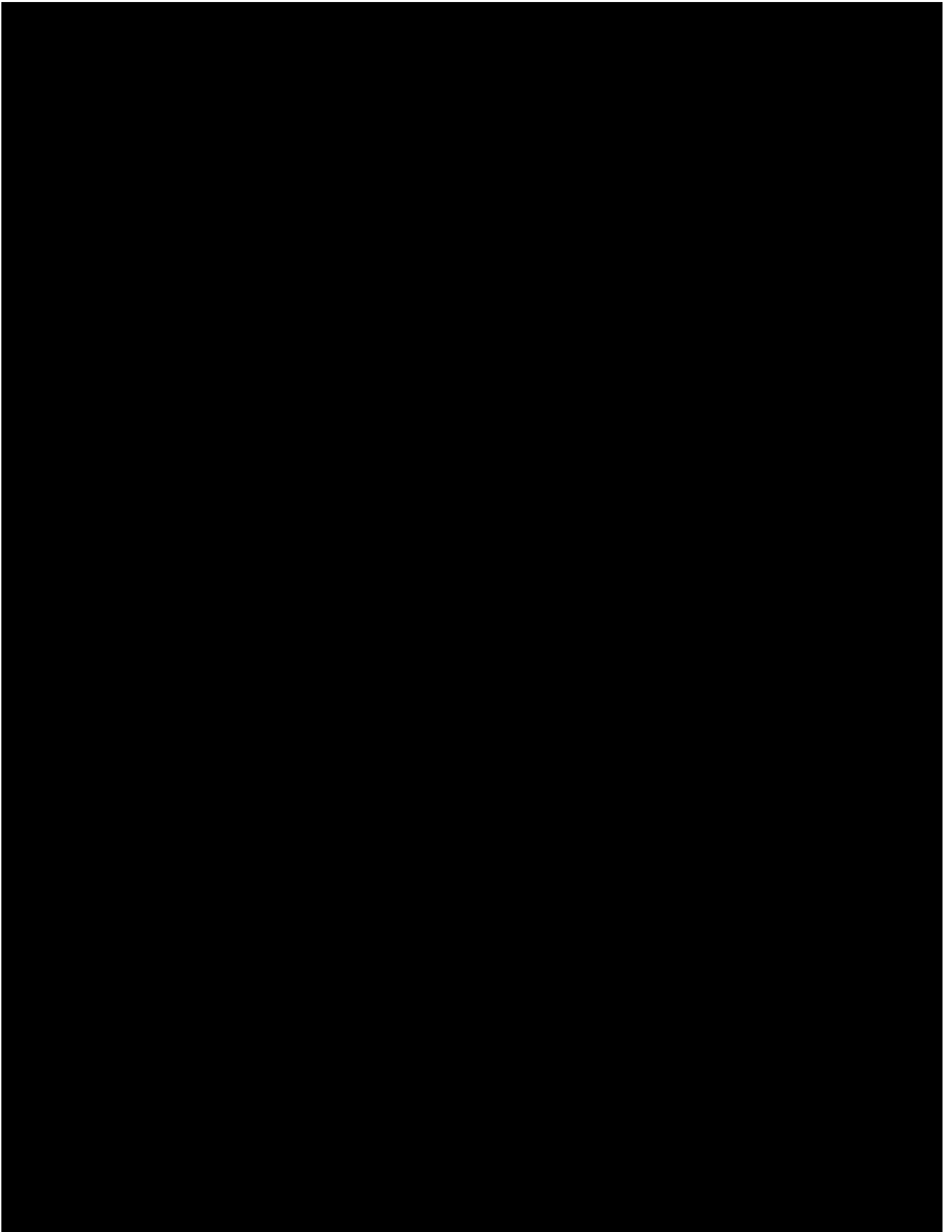
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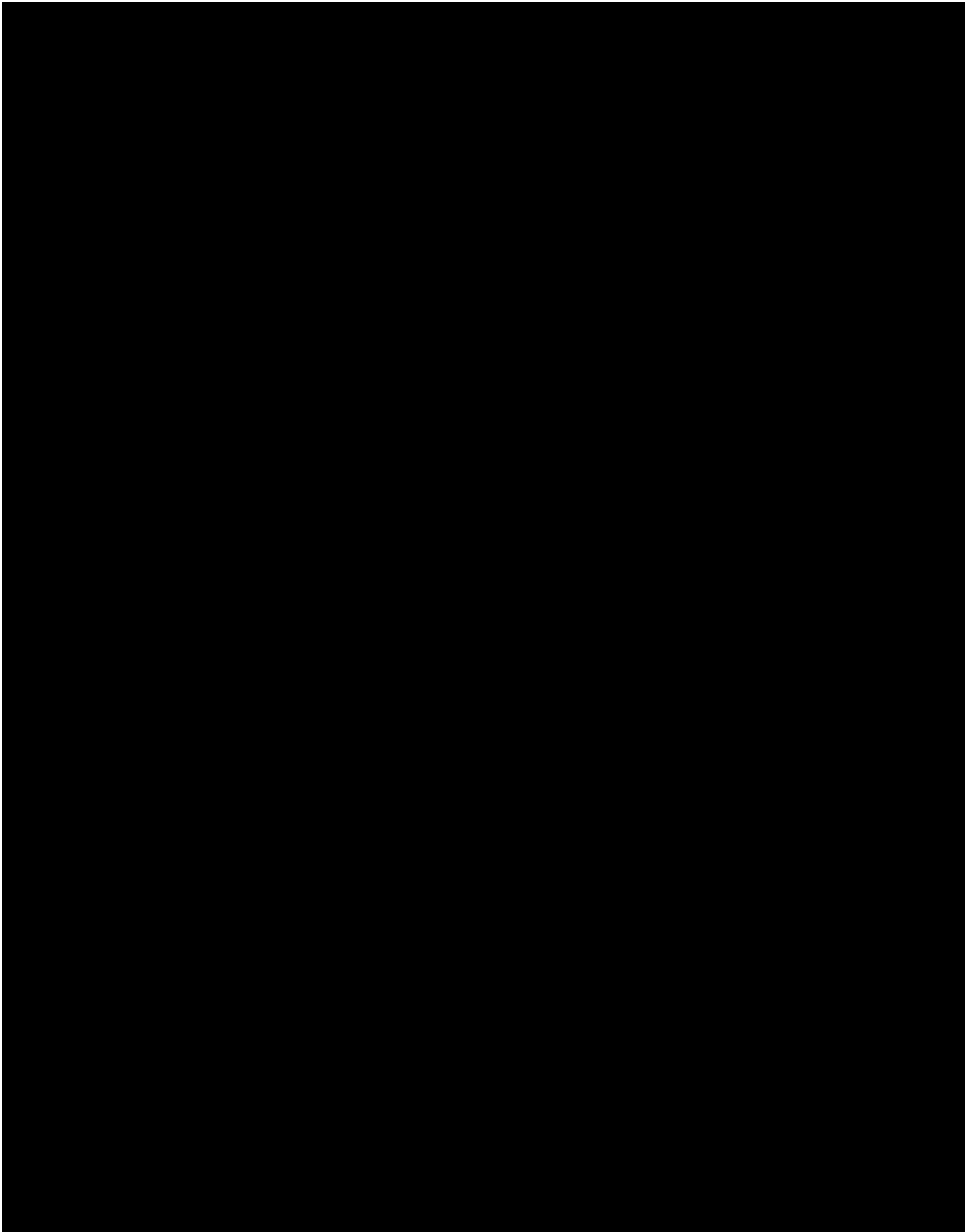
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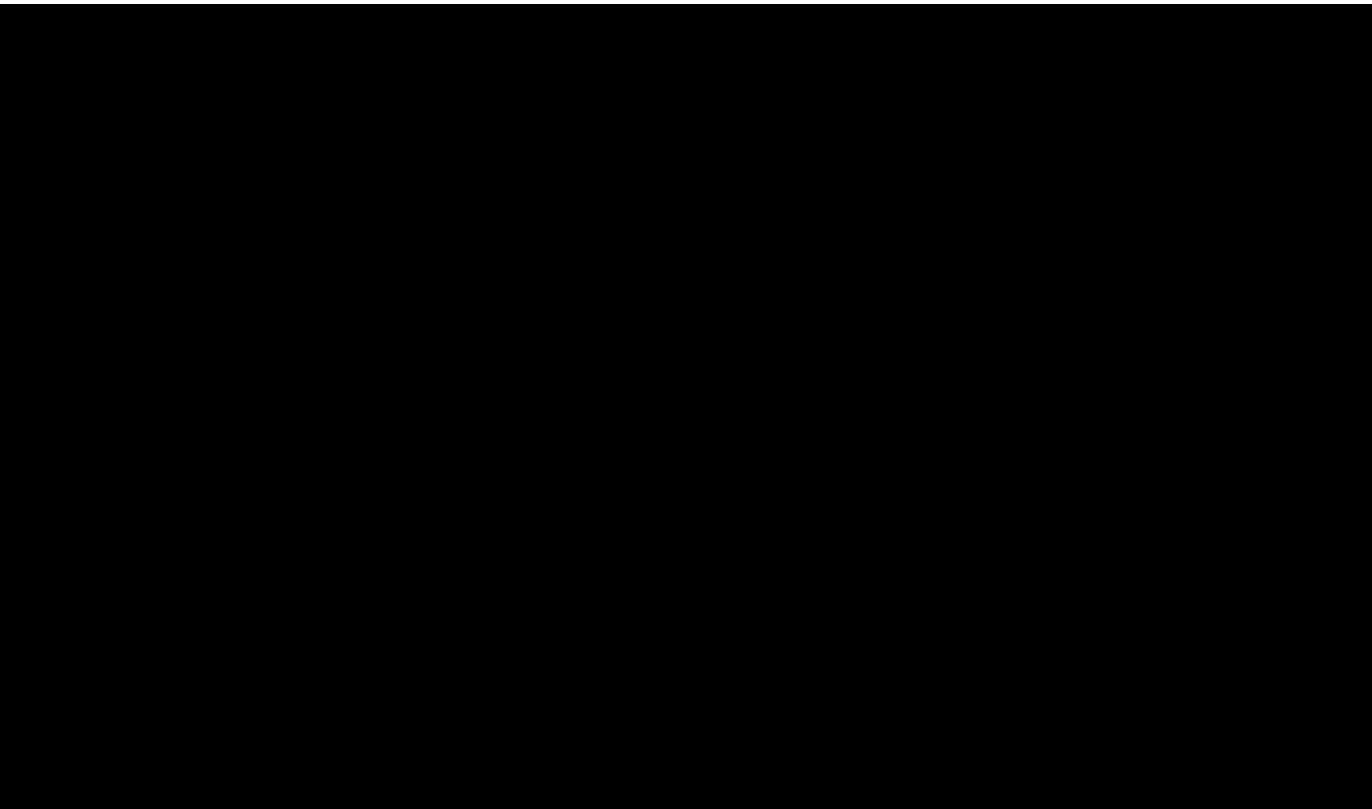
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3. Peru Denied CHM’s Third Extension Request on the Ground that Peru’s Delays Should Count Against CHM, in Contradiction to Its Earlier Statements

170. On December 31, 2018, MINEM issued Report No. 511-2018-MEM/DGE, which formally rejected CHM’s Third Extension Request in its entirety.⁴³⁸ Through this report, MINEM refused to honor the suspension period under Addenda 3-6, finding instead that this 17-month period should be counted *against* CHM.⁴³⁹ This report also marked the first time that MINEM took the position that the COS date could not be extended even in situations where Peru was solely responsible for the project’s delays. This position is completely at odds with the Sosa Report, which reached the exact opposite conclusion. The author of the December 31, 2018 report, Mr. Paul Rojas, also authored the Sosa Report that MINEM was now disavowing.

■ [REDACTED]
■ [REDACTED]
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⁴³⁸ Jacobson I, ¶ 77; Sillen I, ¶ 165; Report No. 511-2018-MEM/DGE, December 31, 2018 (C-0199).

⁴³⁹ Report No. 511-2018-MEM/DGE, December 31, 2018 (C-0199).

171. MINEM’s complete *volte-face* and multi-prong assault in December 2018 made it impossible for Claimants to complete the Project.⁴⁴⁰ As confirmed by HKA, without extensions to the RER Contract to account for Peru’s interferences from 2017 through 2018, there was no way that the Project could achieve commercial operation under the amended works schedule in Addendum 2.⁴⁴¹ This position is underscored by the fact that Peru, through MINEM, was bringing a legal action to undo that works schedule and restore the original deadlines under the RER Contract that had either expired or were set to expire in a matter of days.⁴⁴²

172. From January to May 2019, Claimants wound down their operations in Peru. Employees were laid off. Consultants were terminated. The offices in Lima, Arequipa, Ayo, and Andagua were closed. The Mamacochoa and Upstream Projects were over.⁴⁴³

173. In mid-January 2019, Latam Hydro’s senior officials visited with the Special Commission in person to inquire about a potential resolution. On May 28, 2019, Claimants served Peru with a Notice of Intent to Submit Claims to Arbitration (“Notice of Intent”), that expressly invited Peru to resolve the dispute amicably through consultations and negotiations.⁴⁴⁴

174. After serving the Notice of Intent, Claimants contacted the Special Commission on several occasions in an attempt to resolve this matter amicably, including two separate letters dated June 24, 2019 and July 15, 2019, each repeating Claimants’ preference to enter consultations and negotiations in an effort to reach an amicable resolution to this dispute. Peru did not accept Claimants’ offers, thereby leaving Claimants no choice but to file a Request for Arbitration on August 30, 2019.⁴⁴⁵

⁴⁴⁰ Sillen I, ¶¶ 166-167; Bartrina, ¶ 73.

⁴⁴¹ HKA I, ¶¶ 180-186.

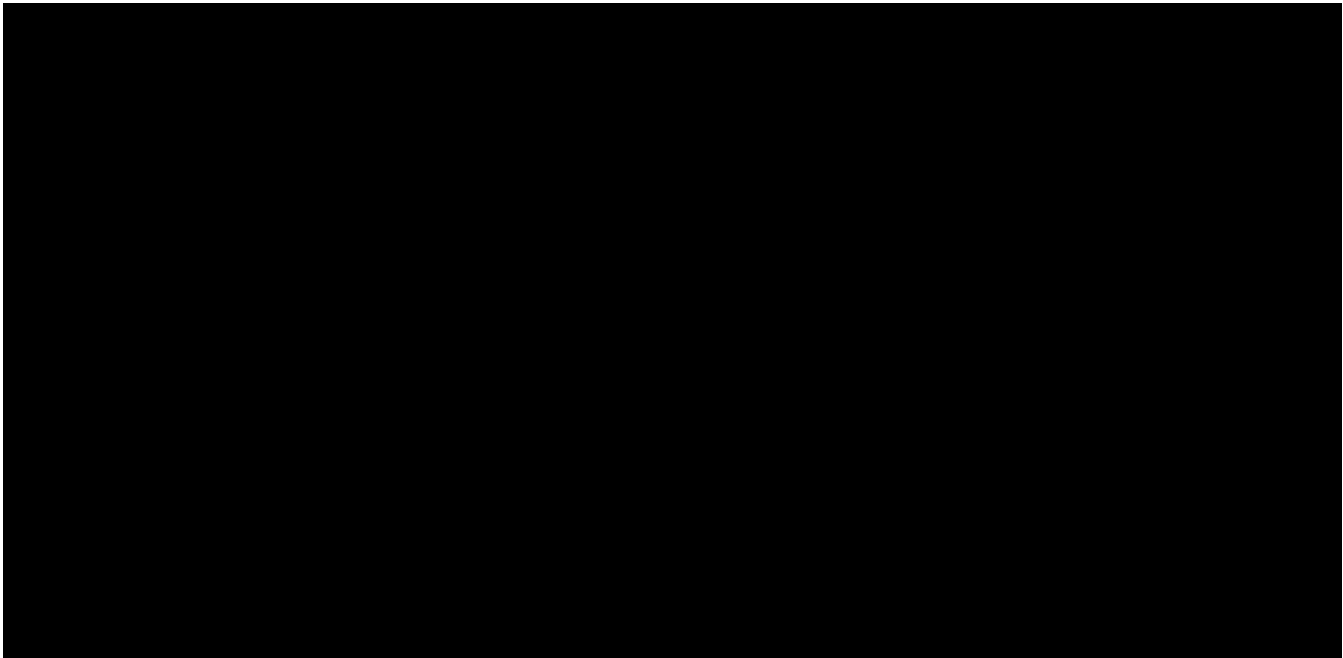
⁴⁴² Sillen I, ¶ 165.

⁴⁴³ Sillen I, ¶¶ 70-71; Jacobson I, ¶¶ 79-80; Bartrina I, ¶¶ 74-76.

⁴⁴⁴ Notice of Intent to Submit a Claim to Arbitration (“Notice of Intent”), May 28, 2019 (C-0023).

⁴⁴⁵ Request for Arbitration, August 30, 2019.

P. Peru's Measures Continue to Harm Claimants



meritless and involves a retroactive application of a criminal statute.

Q. Latam Hydro's Investments in the Mamacocha and Upstream Projects

177. As stated in Section II.D, *supra*, the Mamacocha and Upstream Projects began in or around February 2012 when Mr. Jacobson agreed to fund the development of these Projects in reliance on the incentives and protections that the RER Promotion offered foreign investors, particularly those from the United States. Since then and through December 31, 2018—when Peru's measures ended the Mamacocha and Upstream Projects—Mr. Jacobson was the principal source of funding for these Projects, with investments that consisted of capital contributions and loans used to provide working capital for CHM and obtain the RER Contract, concessions, permits, licenses, authorizations, and other property rights.⁴⁵⁰ He funded these Projects through

■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]

⁴⁵⁰ Jacobson I, ¶ 82.

REDACTED VERSION

The Jacobson/Sorenesen Revocable Trust (US), a revocable *inter vivos* trust that holds certain of his and his wife's assets.⁴⁵¹

178. On October 18, 2011 Mr. Jacobson formed Greinvest Americas LLC, and on February 15, 2012, Mr. Jacobson formed Greinvest Latin America (BVI) Ltd. (collectively, “**Greinvest**”) to fund the development of potential projects in Latin America.⁴⁵² From their formation to May 5, 2014, Greinvest made all investments in the Mamacocha and Upstream Projects using the funds that Mr. Jacobson provided through his trust.⁴⁵³

179. On November 15, 2012, CHM, formerly known as Hidroeléctrica Laguna Azul S.R.L.,⁴⁵⁴ was formed under the applicable laws of Peru, in anticipation of Mr. Jacobson's planned project development activities.⁴⁵⁵ At all relevant times, CHM has been directly or indirectly owned and controlled by U.S. persons or entities.⁴⁵⁶ On February 18, 2014 when the RER Contract was signed, CHM was controlled and beneficially owned by Mr. Jacobson.⁴⁵⁷

180. On May 5, 2014, in response to CHM being awarded the RER Contract, Mr. Jacobson and his former eBay, Inc. colleague, Mr. Gary Bengier, created Latam Hydro to serve as the principal financing vehicle for the Mamacocha and Upstream Projects.⁴⁵⁸ From its creation until the present, Latam Hydro has been the sole investor in these Projects, making its investments either as capital contributions (equity) or loans.⁴⁵⁹ Latam Hydro's investments are funded by Mr. Jacobson, through his revocable trust, and by Mr. Bengier, through The Bengier

⁴⁵¹ Jacobson I, ¶ 83.

⁴⁵² Jacobson I, ¶ 81.

⁴⁵³ Jacobson I, ¶¶ 82-83.

⁴⁵⁴ Hidroeléctrica Laguna Azul changed its name to CH Mamacocha S.R.L. on February 7, 2017. See Registration of Hidroeléctrica Laguna Azul S.R.L.'s name changed to CH Mamacocha S.R.L., February 22, 2017 (C-020).

⁴⁵⁵ Registration of Hidroeléctrica Laguna Azul S.R.L.'s (today CH Mamacocha S.R.L.) Articles of Incorporation, November 23, 2012 (C-021).

⁴⁵⁶ M. Jacobson Passport (C-027); G. Bengier Passport (C-0200); Jacobson I, ¶ 16.

⁴⁵⁷ Jacobson I, ¶ 82.

⁴⁵⁸ Latam Hydro LLC, Certificate of Formation, May 5, 2014 (C-0019).

⁴⁵⁹ Jacobson I, ¶ 83.

Revocable Trust (US), a revocable *inter vivos* trust that holds certain of his and his wife's assets. Their respective levels of contribution varied over time.⁴⁶⁰

181. On May 7, 2014, Greinvest signed a Capital Contribution Agreement with Latam Hydro under which Mr. Jacobson assigned and transferred all of his interests in Greinvest to Latam Hydro as a capital contribution.⁴⁶¹ As of that date, Latam Hydro became the 100% owner of Greinvest.⁴⁶²

182. From January 2014 through December 2016, Latam Hydro's investments in the Mamacocha and Upstream Projects were made through several levels of entities that Greinvest owned and controlled that were located in the U.S., the British Virgin Islands, Cyprus, Belgium, and Chile.⁴⁶³ As Mr. Jacobson explains:

I created this structure to benefit from various tax-related and investment-protection provisions contained in international treaties among these countries. These intermediary entities were formed to attract equity investors who could take advantage of the special double taxation treaty

⁴⁶⁰ Jacobson I, ¶ 83.

⁴⁶¹ Jacobson I, ¶ 84; Capital Contribution Agreement, May 7, 2014 (C-0064).

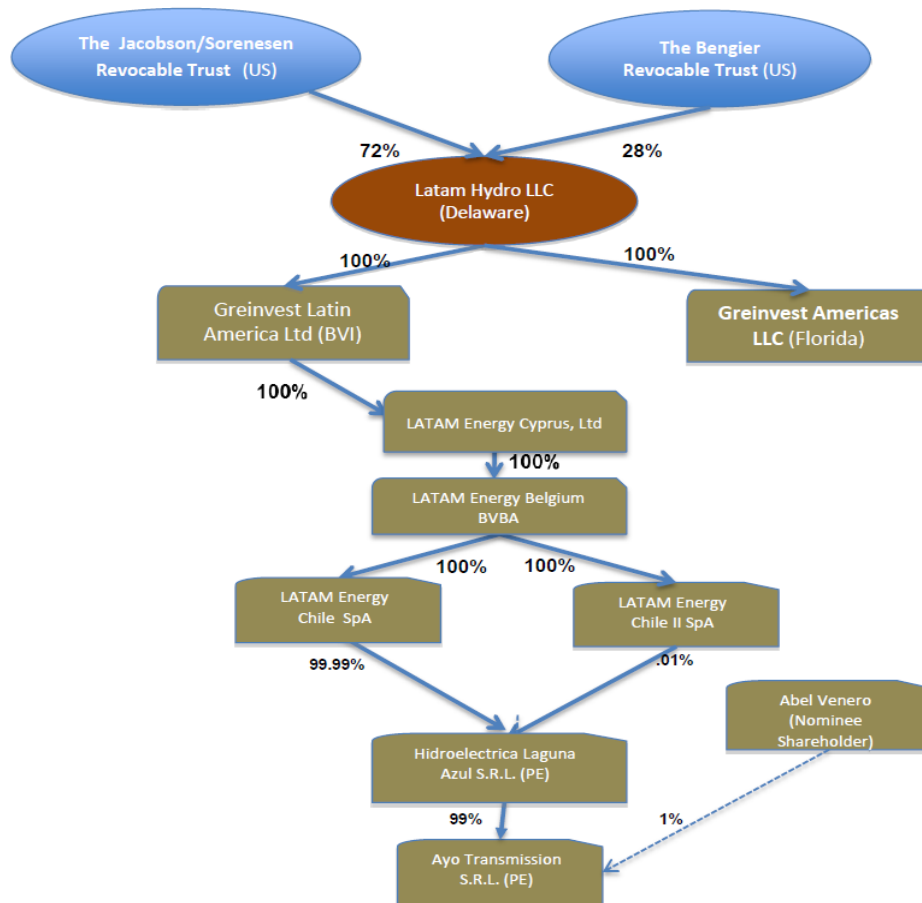
⁴⁶² Greinvest Latin America Ltd, Board Resolution regarding Transfer of Shares to Latam Hydro LLC (May 7, 2014) (C-0065); Greinvest Latin America Ltd, Jacobson Instrument of Transfer of Shares to Latam Hydro LLC (May 7, 2014) (C-0066); Greinvest Latin America Ltd Share Certificate (owner Latam Hydro LLC) (May 7, 2014) (C-0067); Greinvest Americas LLC, Jacobson Instrument of Transfer of Membership Units to Latam Hydro LLC (May 7, 2014) (C-0068); Greinvest Americas LLC Membership Unit Certificate (May 7, 2014) (C-0069).

⁴⁶³ Latam Hydro LLC was a 100% direct shareholder of Greinvest Latin America Ltd, and a 100% direct shareholder of Greinvest Americas LLC (Florida). *See* Greinvest Latin America Ltd Share Certificate (owner Latam Hydro LLC) (May 7, 2014) (C-0067), Greinvest Americas LLC, Jacobson Instrument of Transfer of Membership Units to Latam Hydro LLC (May 7, 2014) (C-0068). Greinvest Latin America Ltd was a 100% direct shareholder of Latam Energy Cyprus Ltd. *See* Transfer of Ownership of Savrocorp Solutions Ltd shares to Greinvest Latin America Ltd (October 24, 2013) (C-0077), Certificate of Change of Name Savrocorp Solutions Ltd to Latam Energy Cyprus Ltd (November 14, 2013) (C-0078); Latam Energy Cyprus Ltd was a 100% direct shareholder of Latam Energy Belgium BVBA. *See* Latam Energy Belgium BVBA, Extract of Articles of Association (September 12, 2013) (C-0079). Latam Energy Belgium BVBA was a 100% direct shareholder of (i) Latam Energy Chile SpA and (ii) Latam Energy Chile II SpA. *See* Publication of Abstracts of Constitution of Latam Energy Chile SpA and Latam Energy Chile II SpA, October 5, 2013 (C-0025). Latam Energy Chile SpA was 99.9% direct shareholder of Hidroeléctrica Laguna Azul SRL, and Latam Energy Chile SpA was 0.01% direct shareholder of Hidroeléctrica Laguna Azul SRL. *See* Registration of Transfer of Participations from Roberto Jesus Santiváñez and Jorge Alejandro Santiváñez to Latam Energy Chile SpA and Latam Energy Chile II SpA and Modification of Statutes, December 13, 2013 (C-0024). Additionally, Latam Hydro LLC is a 100% shareholder of Greinvest Americas LLC (Florida). Greinvest Latin America Ltd (BVI) changed its name to Latam Hydro BVI Ltd on October 14, 2015. *See* Certificate of Change of Name Greinvest Latin America Ltd (October 14, 2015) (C-0080). Additionally, Hidroeléctrica Laguna Azul S.R.L (today CH Mamacocha) was a 99% shareholder of Ayo Transmission S.R.L. *See* Constitution of Ayo Transmission S.R.L (July 17, 2014) (C-0081).

and investment treaty benefits afforded to investors from the investor's home country.⁴⁶⁴

183. As depicted below, almost all of Latam Hydro's investments ultimately flowed down to CHM through this structure to pay for the costs and expenses of the Mamacocha and Upstream Projects while the rest went to a Greinvest affiliate in Florida to pay the salaries of Latam Hydro personnel and other expenses related to these Projects.⁴⁶⁵

CHM OWNERSHIP STRUCTURE: MAY 2014 – DECEMBER 2016

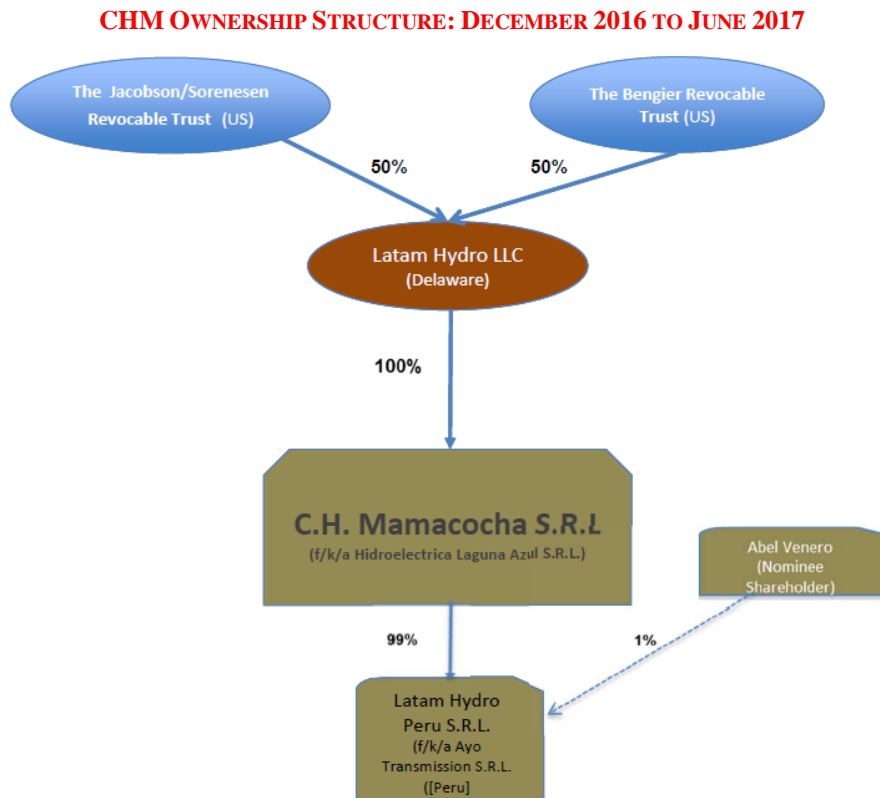


184. But this corporate structure was never used for its intended purpose, as the Mamacocha Project did not attract investors from a country that would have benefited from a corporate structure based on double taxation or investment treaties with Peru. Ultimately, the

⁴⁶⁴ Letter from Ms. Kwandy D. Smeele to Mr. J.R.M. van de Kimmenade, September 5, 2013 (C-0026).

⁴⁶⁵ Jacobson I, ¶ 86.

structure proved unnecessary because the equity investor Latam Hydro targeted, Innergex, would not have received the tax-related benefits that this structure was created to provide.⁴⁶⁶ On December 19, 2016, as depicted below, Messrs. Jacobson and Bengier decided to collapse this corporate structure and make Latam Hydro the 100% direct owner of CHM.⁴⁶⁷ They accomplished this by having Latam Energy Chile SpA and Latam Energy Chile SpA II transfer their shares of CHM to Latam Hydro LLC.⁴⁶⁸



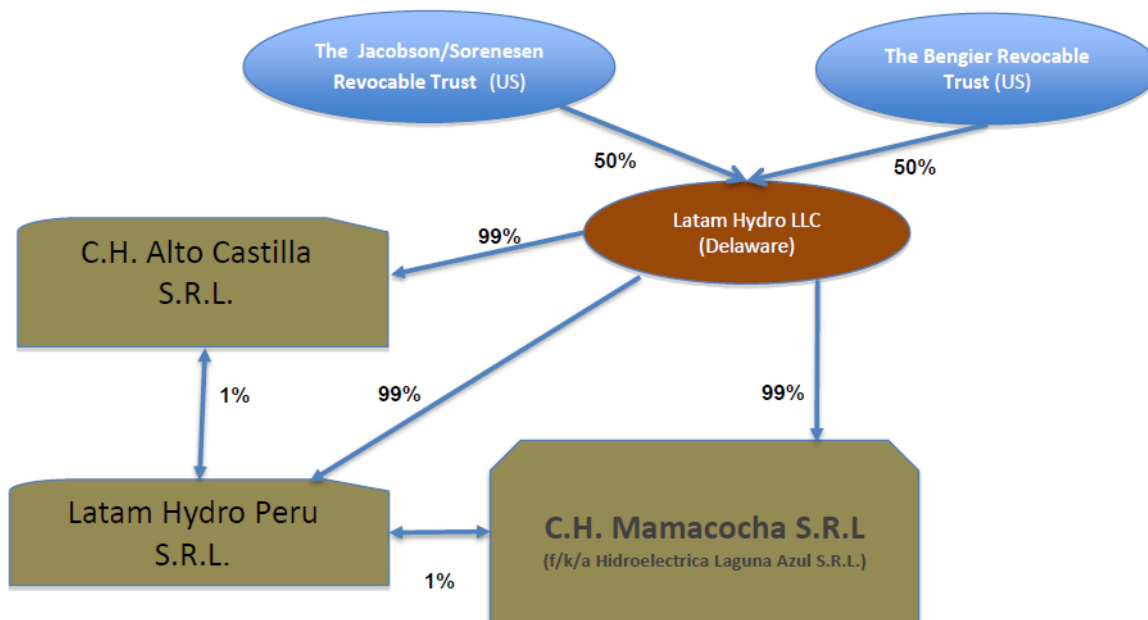
⁴⁶⁶ Jacobson I, ¶ 87.

⁴⁶⁷ Registration of Transfer of Participations from Latam Energy Chile SpA and Latam Energy Chile SpA II to Latam Hydro LLC and Modification of Statute, December 26, 2016 (C-0070). In June 2016 Latam Hydro LLC and Latam Hydro Peru S.R.L. (formerly known as Ayo Transmission S.R.L.) acquired 100% shares of C.H. Alto Castilla S.R.L., a company that was created as a vehicle to handle the Upstream Projects. See Registration Transfer of Participations and Modification of Bylaws CH Alto Castillo S.R.L, June 26, 2016 (C-0071).

⁴⁶⁸ Registration of Transfer of Participations from Latam Energy Chile SpA and Latam Energy Chile SpA II to Latam Hydro LLC and Modification of Statute (December 26, 2016) (C-0070); Jacobson I, ¶ 87.

185. In June 2017, as depicted below, Latam Hydro restructured the ownership of its subsidiaries in Peru, including CHM,⁴⁶⁹ and Latam Hydro became the direct owner of 99.99 % of CHM's shares and an indirect owner of 0.01% of CHM's shares.⁴⁷⁰

CHM OWNERSHIP STRUCTURE: JUNE 2017 THROUGH THE PRESENT



186. Accordingly, at all relevant times, CHM has been 100% owned and controlled, directly or indirectly, by a U.S. citizen or a U.S. entity. As explained by Mr. Jacobson, “at all times investments in the Mamacocha and Upstream Projects were made by Latam Hydro or entities owned by Latam Hydro (*e.g.*, CHM and Greinvest).”⁴⁷¹

187. As detailed above, Peru's measures ended the Mamacocha and Upstream Projects on December 31, 2018. [REDACTED]

⁴⁶⁹ Jacobson I, ¶ 88.

⁴⁷⁰ CH Mamacocha by Shareholder's Agreement increased its capital and Latam Hydro Peru SRL became a shareholder with one participation, and therefore, CH Mamacocha's shareholders became Latam Hydro LLC (with 19.679.366 participations), and Latam Hydro Peru SRL (with one participation). See Registration of Increase of Capital and Modification of Articles of CH Mamacocha (June 22, 2017) (C-0072).

⁴⁷¹ Jacobson I, ¶ 89.

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[REDACTED]

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III. THE TRIBUNAL HAS JURISDICTION OVER THE TREATY AND CONTRACT CLAIMS

A. The Tribunal Has Jurisdiction Over This Dispute Under the TPA and the ICSID Convention

188. As a preliminary matter, Latam Hydro brings claims (a) on its own behalf under Article 10.16(1)(a)(i)(A) of the Treaty for Peru's breaches of its obligations under Section A of the Treaty and (b) on behalf of CHM under Article 10.16(1)(b)(i)(C) for Peru's breaches of an investment agreement.

1. Latam Hydro Is a Protected Investor Under the TPA

189. TPA Article 10.28 defines "investor of a Party" as follows:

. . . a Party or state enterprise thereof, or 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; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.⁴⁷³

190. TPA Article 10.28 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."⁴⁷⁴

191. TPA Article 1.3 defines an "enterprise" as:

. . . 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.⁴⁷⁵

192. Latam Hydro is an "enterprise of" the United States of America. Latam Hydro is a limited liability company duly constituted under the laws of the State of Delaware in May

⁴⁷³ TPA, February 1, 2009, Art. 10.28 (C-0001).

⁴⁷⁴ TPA, February 1, 2009, Art. 10.28 (C-0001).

⁴⁷⁵ TPA, February 1, 2009, Art. 1.3 (C-0001).

2014, with Delaware File Number 5527780, and maintains its principal place of business at 1865 Brickell Avenue, A-1603, Miami, Florida 33129-1645, United States.⁴⁷⁶

193. Latam Hydro has “made an investment in the territory of another Party,” namely, Peru.⁴⁷⁷ Consequently, Latam Hydro is a United States “enterprise” of a Party and thus qualifies as a protected “investor” under the Treaty.

2. Latam Hydro Can Bring Claims Under the Treaty for CHM

194. Article 10.16(1)(b)(i)(C) of the Treaty allows a claimant to submit a claim to arbitration “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.”⁴⁷⁸ Therefore, Latam Hydro also submits claims for arbitration on behalf of CHM under Article 10.16(1)(b)(i)(C) for Peru’s breaches of an investment agreement, the RER Contract.

195. CHM, formerly known as Hidroeléctrica Laguna Azul S.R.L.,⁴⁷⁹ is a legal entity constituted or organized under applicable laws of Peru on November 15, 2012.⁴⁸⁰ CHM is a Peruvian “enterprise” and a juridical person.

196. As described in Section II.Q, until May 2014, CHM was controlled and beneficially owned by Mr. Jacobson.⁴⁸¹ From May 2014 until December 19, 2016, CHM was indirectly owned and controlled by Latam Hydro, through several levels of entities that Latam Hydro owned and controlled that were located in the U.S., the British Virgin Islands, Cyprus, Belgium, and Chile.⁴⁸² On December 19, 2016, beginning with the Chilean subsidiaries, the

⁴⁷⁶ Latam Hydro LLC, Certificate of Formation, May 5, 2014 (C-0019).

⁴⁷⁷ See *supra* Section II.Q.

⁴⁷⁸ TPA, February 1, 2009, Art. 10.16(1)(b)(i)(C) (C-0001).

⁴⁷⁹ Hidroeléctrica Laguna Azul changed its name to CH Mamacocha S.R.L. on February 7, 2017. See Registration of Hidroeléctrica Laguna Azul S.R.L.’s name changed to CH Mamacocha S.R.L., February 22, 2017 (C-0020).

⁴⁸⁰ Registration of Hidroeléctrica Laguna Azul S.R.L.’s (today CH Mamacocha S.R.L.) Articles of Incorporation, November 23, 2012 (C-0021).

⁴⁸¹ See *supra* Section II.Q.

⁴⁸² See *supra* Section II.Q.

intermediate corporate levels were collapsed –thereby making Latam Hydro the 100% direct owner of CHM on that date.⁴⁸³ As explained by Mr. Jacobson, “[i]n June 2017, Latam Hydro restructured the ownership of its subsidiaries in Peru, and Latam Hydro became the direct owner of 99.99% of CHM’s shares and an indirect owner of 0.01% of CHM’s shares.”⁴⁸⁴

197. Accordingly, at all relevant times, CHM has been 100% owned and controlled, directly or indirectly, by a U.S. citizen or U.S. entity.⁴⁸⁵

198. As the concessionaire, CHM engaged in developing the Mamacocha Project with the expectation that doing so would result in an economic benefit to CHM and its parent company Latam Hydro. Accordingly, Latam Hydro also brings claims on behalf of CHM under TPA Article 10.16(1)(b)(i)(C) for Peru’s breaches of an investment agreement (the RER Contract).⁴⁸⁶

3. The Dispute Arises Out of Investments Protected Under the Treaty

199. TPA Article 10.28 defines “investment” as:

. . . every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of 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, debentures, other debit instruments, and loans;

⁴⁸³ See *supra* Section II.Q. Latam Energy Chile SpA and Latam Energy Chile SpA II transferred their shares to Latam Hydro LLC, and therefore Latam Hydro LLC became the 100% direct shareholder of CHM. Registration of Transfer of Participations from Latam Energy Chile SpA and Latam Energy Chile SpA II to Latam Hydro LLC and Modification of Statute (December 26, 2016) (C-0024); Jacobson I, ¶ 87.

⁴⁸⁴ See *supra* Section II.Q. Registration of Increase of Capital and Modification of Articles of CH Mamacocha (June 22, 2017) (C-0072). Jacobson I, ¶ 88.

⁴⁸⁵ Jacobson I, ¶ 16.

⁴⁸⁶ TPA, February 1, 2009, Art. 10.16(1)(b)(i)(C) (C-0001).

- (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
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.⁴⁸⁷

200. As explained by Professor Newcombe and Dr. Paradell:

Normally an investment consists of a bundle of rights, both tangible and intangible. These might include leases of property, licenses and permits, contracts, inventory and other assets. As a consequence, investors have a legitimate expectation that these acquired rights will be protected and treated in accordance with state representations upon which the investor has relied.⁴⁸⁸

201. International arbitration tribunals and commentators widely acknowledge that the notion of “investments” in bilateral investment treaties extends to both direct and indirect investments.⁴⁸⁹ As detailed previously, Latam Hydro has at all relevant times directly or indirectly held 100% ownership interest in CHM and fully controlled CHM and the Project, which constitute its investments.⁴⁹⁰ Under Article 10.28, Latam Hydro’s investment encompasses: an enterprise (CHM); ownership of shares in an enterprise (CHM); loans to CHM; concession contracts; concessions; licenses, authorizations and permits; tangible and intangible property rights, among other forms of its investments.

⁴⁸⁷ TPA, February 1, 2009, Art. 10.28 (original footnote reference omitted) (C-0001).

⁴⁸⁸ Newcombe A. & Paradell L., “Standards of Treatment” in *Law and Practice of Investment Treaties* (Kluwer Law International, 2009), p. 283 (CL-0075).

⁴⁸⁹ *Guaracachi America, Inc., and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL Case No. 2011-17, Award, January 31, 2014, ¶ 348 (CL-0032); *See Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003, ¶ 63 (CL-0015) (“Provided the direct or indirect ownership or control is established, rights under a contract held by a local company constitute an investment protected by the BIT.”).

⁴⁹⁰ *Jacobson I*, ¶ 89.

202. Latam Hydro began investing indirectly in Peru starting in 2012.⁴⁹¹ Since that time, Mr. Jacobson and Latam Hydro have made substantial contributions of capital, amounting to tens of millions of dollars, towards the development of the Mamacocha Project. As explained by Mr. Jacobson:

Funding initially went to specific Greinvest entities that used these funds to pay all of the costs of the Mamacocha and Upstream Projects. When we created CHM in 2012, Greinvest used my funds to finance CHM's activities and pay Greinvest personnel, such as Stefan Sillen (former President) and Andres Bartrina (former Project Manager and Technical Consultant). On February 18, 2014 when the RER Contract was signed, CHM was controlled and beneficially owned by me.

When we created Latam Hydro on May 5, 2014, I funded the Mamacocha and Upstream Projects by directing money from my living trust directly to Latam Hydro. Mr. Bengier, the other owner and member of Latam Hydro, also funded the Mamacocha and Upstream Projects via loans and capital contributions directly to Latam Hydro from his and his wife's revocable *inter vivos* trust, The Bengier Revocable Trust (US). Mr. Bengier stopped investing in these Projects in 2017, soon after Peru began enacting a series of targeted measures that destroyed the Mamacocha Project.

Also in May 2014, Greinvest signed a Capital Contribution Agreement with Latam Hydro, through which I assigned and transferred Greinvest's interests in the Mamacocha and Upstream Projects to Latam Hydro as a capital contribution. As of that date, Latam Hydro became the sole owner of Greinvest and the sole beneficial owner of CHM.

From 2014 through 2016, Latam Hydro invested in CHM through several levels of entities that it owned and controlled which were located in the U.S., the British Virgin Islands, Cyprus, Belgium, and Chile. I created this structure to benefit from various tax-related and investment-protection provisions contained in international treaties among these countries.⁴⁹²

203. As explained above, in May 2014, Latam Hydro became the 100% indirect shareholder of CHM.⁴⁹³ Through CHM, Latam Hydro commissioned studies,⁴⁹⁴ hired

⁴⁹¹ Jacobson I, ¶¶ 14, 17, 28, 82.

⁴⁹² Jacobson I, ¶¶ 82-85.

⁴⁹³ Jacobson I, ¶ 83.

⁴⁹⁴ Sillen I, ¶¶ 24, 31, 38, 51. Bartrina I, ¶¶ 6, 24, 57.

personnel,⁴⁹⁵ obtained environmental permits and archaeological approvals conferred pursuant to domestic law,⁴⁹⁶ obtained concessions for the transmission line and for the power generation plant,⁴⁹⁷ obtained easements pursuant to Peruvian Law,⁴⁹⁸ among others. Latam Hydro also made loans and equity contributions to CHM to finance CHM's operations in Peru.⁴⁹⁹

204. Therefore, Latam Hydro's activities in Peru qualify as "investments."⁵⁰⁰

4. Peru Has Consented to Arbitration Under the Treaty and the ICSID Convention

a. Claimants Have Fulfilled the Requirements of the Treaty

205. The TPA Chapter 10, Section B provides for Investor-Dispute Settlement "in the event of an investment dispute" between qualifying investors and a Party to the TPA.⁵⁰¹ The TPA's requirements as stipulated in Chapter 10, Section B (among other provisions) will be addressed in turn below.

206. TPA Article 10.15 provides that "the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures."⁵⁰² As discussed in Sections II.N, Claimants engaged in numerous consultations and negotiations with the Republic of Peru in good faith, but without

⁴⁹⁵ Canseco I, ¶¶ 14-18.

⁴⁹⁶ Sillen I, ¶¶ 67, 73; Bartina I, ¶ 37.

⁴⁹⁷ Sillen I, ¶ 96; Bartina I, ¶ 40.

⁴⁹⁸ Sillen I, ¶ 120.

⁴⁹⁹ Jacobson I, ¶¶ 82-83.

⁵⁰⁰ Many have looked to *Salini v. Morocco* for a definition of "investment." *Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001 (CL-0051). The *Salini* criteria include: (a) a contribution of the investor to the host State; (b) a certain duration of the investment; (c) a participation in the risks of the transaction; and (d) a contribution to the host State's economic Development. *Id.*, at ¶ 52. A majority of tribunals have followed the *Salini* approach, albeit with certain variations regarding the interrelationship of factors. For example, in *Bernhard von Pezold v. Zimbabwe*, the tribunal noted that some tribunals are departing from the *Salini* test to adopt "a simpler test involving contribution, duration and risk." *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/5, Award, July 28, 2015, ¶ 28 (CL-0018). Under either definition, Latam Hydro's activities in Peru qualify as investments.

⁵⁰¹ TPA, February 1, 2009, Art. 10.16 (C-0001).

⁵⁰² TPA, February 1, 2009, (C-0001).

success. Claimants' efforts were ultimately unsuccessful, and any attempt to resolve the dispute could no longer be possible.⁵⁰³

207. Claimants submitted its Notice of Intent to Submit a Claim to Arbitration on May 28, 2019. Claimants again attempted to engage in negotiations and consultations, again, without success.⁵⁰⁴ On August 30, 2019, Claimants' filed their Request for Arbitration under Article 10.16 of the TPA. TPA Article 10.16 provides, in material part:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation or 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; and
 - (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,
 - (B) an investment authorization, or
 - (C) an investment agreement; and
 - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

⁵⁰³ See above, Section II.N.

⁵⁰⁴ See above, Section II.O.

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed directed damages directly related to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.⁵⁰⁵

208. As fully outlined in Section IV, Latam Hydro's principal claims fall under TPA Article 10.16(1)(a)(i)(A) as they relate to Peru's obligations under Section A, *inter alia*, to accord fair and equitable treatment to Latam Hydro and its investments, to refrain from directly or indirectly expropriating Latam Hydro's investments, and to treat Latam Hydro and its investments no less favorably than investors and investments from non-Party States.

209. In addition, as further developed in Section IV, Latam Hydro has submitted claims on behalf of CHM in accordance with TPA Article 10.16(1)(b)(i)(C) for Peru's breaches of an investment agreement. The RER Contract is an "investment agreement," as defined in Article 10.28 of the TPA because it is a "written agreement between a national authority of [Peru] and a covered investment (*i.e.*, CHM) . . . on which the covered . . . investor (*i.e.*, Latam Hydro) relies in establishing or acquiring a covered investment (*i.e.*, the Mamacocha Project and CHM) other than the written agreement itself, that grants rights to the covered investment (*i.e.*, CHM) . . . to supply services to the public on behalf of [Peru], such as power generation or distribution, water treatment or distribution, or telecommunications." CHM's claims and damages under Article 10.16(1)(b)(i)(C), relate directly to the Mamacocha Project, the covered investments that was established or acquired in reliance on the "investment agreement" (*i.e.*, the RER Contract).

210. With respect to both categories of claims, Claimants have "incurred loss or damage by reason of, or arising out of," these breaches, as explained in Section VI.A.⁵⁰⁶

⁵⁰⁵ TPA, February 1, 2009, Art. 10.16 (C-0001).

⁵⁰⁶ TPA, February 1, 2009, Arts. 10.16(1)(A)(ii), 10.16(2)(A)(ii) (C-0001).

211. Peru's consent to arbitrate investment disputes before ICSID is laid out in the TPA Article 10.17, which reads in material part:

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; . . .⁵⁰⁷

212. Article 10.17 unequivocally sets forth Peru's offer to arbitrate and consent to the jurisdiction of ICSID over Claimants' claims. Claimants perfected Peru's consent to ICSID arbitration by initiating these proceedings.⁵⁰⁸

213. Moreover, the TPA provides for the fulfillment of certain procedural requirements prior to the submission of a claim to arbitration. Those requirements are found in various provisions of the TPA as outlined below.

214. Article 10.16 of the TPA provides in pertinent part:

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").
[. . .]
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:

⁵⁰⁷ TPA, February 1, 2009, Art. 10.17 (C-0001).

⁵⁰⁸ See Resolution and Waiver of the Board of Directors of Latam Hydro LLC, August 14, 2019 (C-0003); Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 (C-0004).

(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. . .⁵⁰⁹

215. Additionally, Article 10.18 of the TPA establishes certain conditions and limitations on consent of each Party, as follows:

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under 10.16.1(a)) or the enterprise (for claims under Article 10.16.1(b)) has incurred loss or damage.
2. No claim may be submitted to arbitration under this Section unless:
 - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
 - (b) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
 - (ii) for claims submitted to arbitration under 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16. . . .
4. (a) No claim may be submitted to arbitration:
 - (i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or
 - (ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),

⁵⁰⁹ TPA, February 1, 2009, Art. 10.16 (C-0001).

if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.

- (b) For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.⁵¹⁰

216. The requirements under the TPA to submit a dispute to ICSID arbitration have been fulfilled in this case:

- a. Claimants offered Peru to engage in negotiations or consultations before submitting the present dispute to ICSID arbitration in accordance with Articles 10.15 and 10.16 of the TPA. Despite the Claimants' good faith efforts to resolve this dispute with Peru amicably, no settlement was reached.⁵¹¹
- b. Claimants provided Peru with their Notice of Intent on May 28, 2019, more than 90 days before submitting its claims to ICSID arbitration.
- c. By the time Claimants filed their Request for Arbitration on August 30, 2019, six months had elapsed since the events giving rise to the claims.
- d. By the time Claimants filed their Request for Arbitration, less than three years had elapsed since Claimants first acquired, or should have first acquired, knowledge of Peru's breaches of the TPA and knowledge that Claimants had incurred loss or damage. As explained in Section IV.A and B, the first measure by the Peruvian Government that caused damage to Latam Hydro and CHM was the Lawsuit

⁵¹⁰ TPA, February 1, 2009, Art. 10.18 (C-0001).

⁵¹¹ *See above*, Section II.O.

initiated by the Regional Council of Arequipa, which Claimants learned about in March 2017.⁵¹²

- e. In the Request for Arbitration, Latam Hydro on its own behalf, and on behalf of CHM expressly consented in writing to arbitration in accordance with the procedures set out in the TPA.⁵¹³
- f. Claimants have expressly waived any right to initiate or continue before any administrative tribunal or court under the laws of any Party to the TPA, or other dispute settlement proceedings, any proceeding with respect to any measure alleged to constitute a breach of (a) an obligation under Section A of Chapter 10 of the TPA; (b) an investment authorization, as defined in Article 10.28 of the TPA; or (c) an investment agreement, as defined in Article 10.28 of the TPA. As stated in the Request for Arbitration, the waiver shall be interpreted as broadly as necessary to satisfy Claimants' requirement to submit an express waiver under Article 10.18(2)(b) of the TPA.⁵¹⁴
- g. Claimants have not submitted this dispute for resolution before Peru's administrative tribunals or courts, or to any other binding dispute settlement procedures. CHM did not file any counterclaims against MINEM in the Lima Arbitration because of this waiver.

217. Therefore, Claimants have satisfied all requirements to access ICSID arbitration under the TPA, and Claimants' claims are within the jurisdiction of the Tribunal.

⁵¹² Benzaquen I, ¶ 15.

⁵¹³ Request for Arbitration, Section VII.D.

⁵¹⁴ See Resolution and Waiver of the Board of Directors of Latam Hydro LLC, August 14, 2019 (C-0003); Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 (C-0004).

b. Claimants Have Fulfilled the Jurisdictional Requirements Under the ICSID Convention

218. Article 25 of the ICSID Convention establishes the requirements to access ICSID

Arbitration as follows:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(...)

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

219. Article 25 of the ICSID Convention provides that ICSID has jurisdiction over (a) legal disputes; (b) that arise directly out of an investment; (c) between an ICSID Contracting State and (i) a national of another Contracting State and/or (ii) a national of the Contracting State party to the dispute that, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the ICSID Convention, and (d) which the parties to the dispute have consented to submit to arbitration.

220. All of these elements are satisfied in the present dispute:

a. There is a legal dispute arising from Peru's breach of its obligations under the TPA, as set out above;

- b. The dispute arises directly out of the Claimants' investments in Peru, which are qualifying investments under the TPA and the ICSID Convention, as described above;
- c. The dispute has arisen between Peru, an ICSID Contracting State,⁵¹⁵ and Claimants, namely Latam Hydro, a national of an ICSID Contracting State (United States), on its own behalf and on behalf of CHM (a juridical person having the nationality of Peru), in accordance with the TPA and ICSID Convention.
- d. Peru consented to submit this dispute to ICSID arbitration pursuant to Article 10.17 of the TPA. As stated above, Latam Hydro on its own behalf, and on behalf of CHM expressly consented in writing to arbitration in accordance with the procedures set out in Article 10.18 of the Treaty.
- e. CHM has been at all relevant times foreign-controlled and qualifies as a "national of another Contracting State" for purposes of the ICSID Convention, as described below.

221. CHM has been owned and controlled, directly or indirectly, by a U.S. citizen or U.S. entity at all relevant times.⁵¹⁶ Peru acknowledged CHM as a foreign-controlled entity throughout the Parties' course of conduct, and indeed required foreign investors to establish local operating companies to comply with the requirement that all RER Program concessionaires be Peruvian entities.⁵¹⁷ Most importantly, Peru included an ICSID arbitration clause in the RER

⁵¹⁵ The ICSID Convention entered into force for Peru on September 8, 1993, following its signature of the Convention on September 4, 1991, and the deposit of its instrument of ratification on August 9, 1993.

⁵¹⁶ Jacobson I, ¶ 89.

⁵¹⁷ See Letter from Claimants to A. Conover, September 18, 2019 (C-0210)

Contract between Peru and CHM and this contract was renegotiated six times without modification of the ICSID arbitration clause. Arbitral practice and eminent scholars are unified in the conclusion that Article 25(2)(b) of the ICSID Convention is satisfied when an ICSID arbitration clause is included in an investment agreement, such as the RER Contract.⁵¹⁸ As Professor Schreuer explains:

When a Contracting State signs an investment agreement, containing an ICSID arbitration clause, with a foreign controlled juridical person with the same nationality as the Contracting State and it does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting State, the Contracting State could be deemed to have agreed to such treatment by having agreed to the ICSID arbitration clause. This is especially the case when the Contracting State's laws require the foreign investor to establish itself locally as a juridical person in order to carry out an investment.”⁵¹⁹

222. For the avoidance of doubt, it is entirely uncontroversial for a shareholder and local subsidiary, such as Latam Hydro and CHM, to both assert claims before ICSID.⁵²⁰

⁵¹⁸ See, e.g., *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, ¶¶ 12-14 (CL-0013) (holding that an ICSID arbitration clause that named the local company constituted an express agreement within the meaning of Article 25(2)(b)); *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Award, October 21, 1983, 2 ICSID Reports 15/16 (CL-0033) (reinforcing *Amco Asia* and finding that the mere existence of an ICSID arbitration clause indicated an express agreement of foreign nationality); *LETCO v. Liberia*, ICSID Case No. 83/2, Award, March 31, 1986, ¶ 16.10 (CL-0083) (concluding that the mere fact an ICSID clause was provided in the concession agreement constituted an agreement to treat the domestic company as a national of another Contracting State); R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford, 2012), p. 51 (CL-0078) (“[S]ome treaties provide in general terms that companies constituted in one state but controlled by nationals of the other state shall be treated as nationals of the other state for the purposes of Article 25(2)(b). The proviso in a treaty that a local company, because of foreign control, will be treated as a national of another contracting state is part of the terms of the offer of consent to jurisdiction made by the host state. When the offer to submit disputes to ICSID is accepted by the investor, that proviso becomes part of the consent agreement between the parties to the dispute.”).

⁵¹⁹ Christoph Schreuer, *ICSID CONVENTION: A COMMENTARY* (2009), p. 304 (CL-0084) (internal quotations omitted).

⁵²⁰ See *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, May 11, 2005, ¶ 44 (CL-0056) (explaining that “[i]t is conceivable that where the various investor companies resort to arbitration, some can do so as shareholders and others as companies of the nationality of the State that is a party to the dispute, on the basis of the various corporate arrangements and control structures”). Likewise, in *Vivendi v. Argentina (I)*, *MTD v. Chile*, and *Lucchetti v. Peru*, the first claimants had standing under the respective BITs as foreign investors by virtue of their shareholdings, while the second claimants did so as a company incorporated locally but controlled by the former. See *Vivendi v. Argentina (I)*, ICSID Case No. ARB/97/3, Award, November 21, 2000, ¶ 24 (CL-0064); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶¶ 93-94 (CL-0039); *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Peru*, Award, February 7, 2005, ¶ 15 (CL-0035).

Accordingly, the requirements of the second prong in Article 25(2)(b) of the ICSID Convention are met with respect to CHM.

223. In light of the foregoing, the Tribunal has jurisdiction to adjudicate the dispute under the TPA and under the ICSID Convention.

B. The Tribunal Has Jurisdiction Under the Contract

224. CHM brings claims on its own behalf under Clause 11.3(a) of the RER Contract for Peru's breaches of its obligations under the RER Contract and Peruvian Law. The RER Contract expressly authorizes CHM to bring claims under the ICSID Rules of Arbitration where, as here, the amount in dispute exceeds Twenty Million Dollars (US \$20,000,000) or its equivalent in national currency.

225. This source of jurisdiction for this Tribunal to resolve CHM's contractual claims against Peru is directly in the RER Contract.⁵²¹

1. The Republic of Peru is liable to CHM for Peru's breaches under the RER Contract

226. As a preliminary matter, the Government of Peru, as a single unit, is the counterparty of CHM in the RER Contract. The express language of the preamble of the RER Contract states that Peru is a party to the RER Contract, acting through MINEM:

This Concession Contract for the Supply of Renewable Energy (the "Contract") is made and entered into by and between the Peruvian State, herein represented by the Ministry of Energy and Mines (the "Grantor"), and the Concessionaire Company, subject to the following terms and conditions.⁵²²

⁵²¹ In addition, the Tribunal has jurisdiction to resolve the CHM's claims as per the language of the TPA, Article 10.16(1)(b)(i)(C) of the Treaty which allows Latam Hydro to submit a claim to arbitration "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," *i.e.*, CHM, for Peru's breach of an investment agreement, *i.e.*, the RER Contract.

⁵²² RER Contract, February 18, 2014, Preamble (C-0002).

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227. Peru's role is also confirmed by Clause 1.4.31 of the RER Contract, which defines the Ministry as “[t]he Ministry of Energy and Mines, which enters into this Contract *on behalf of the Government*.”⁵²³ By Ministerial Resolution No. 023-2014-MEM/DM, dated January 17, 2014, which is an integral part of the RER Contract, the MEM “authorized the General Director of Electricity, on behalf of the Ministry of Energy and Mines as the Grantor, to sign, *on behalf of the Peruvian State*, the Concession Agreements for the Supply of Renewable Energy to the National Interconnected Electric System (SEIN)...”⁵²⁴

228. According to Claimants' expert, Dr. Quiñones, the Peruvian State was obliged through the RER Contract to comply with its provisions, binding each and every entity that composes it.⁵²⁵ Dr. Quiñones further explains that “MINEM acts as a mere representative of the Government of the Republic of Peru” when it signed the RER Contract.⁵²⁶

229. Claimants' expert, Dr. Benavides, agrees with this conclusion. According to his opinion, “[t]he Peruvian State normatively approved that the Concession Contract be executed by MINEM, but on behalf of the State. The party to the Contract is, therefore, the State. The intervention of MINEM is as a representative or instrumentality of the State, for the purposes of the formality of signing the Contract.”⁵²⁷ This means that the party to the RER Contract is the Peruvian State and not MINEM. The Contract includes, reaches, extends to, and binds all entities that are part of the Peruvian State, and not only MINEM.⁵²⁸

⁵²³ RER Contract, February 18, 2014, Clause 1.4.31 (C-0002) (emphasis added).

⁵²⁴ Ministerial Resolution No. 023-2014-MEM/DM, January 17, 2014 (Annexed to the RER Contract) (C-0002).

⁵²⁵ Quiñones Report I, ¶ 49.

⁵²⁶ Quiñones Report I, ¶ 49.

⁵²⁷ Benavides Report I, ¶ 97.

⁵²⁸ Benavides Report I, ¶ 101; *see also* RER Contract, February 18, 2014, Clause 1.4.2 (C-0002) (“Government Authority” is defined as “any judicial, legislative, political or administrative authority of Peru”).

230. Likewise, Article 43 of Peru’s Political Constitution provides that “[t]he State is one and indivisible. It’s form of government is unitary.”⁵²⁹

231. Accordingly, Peru is unequivocally a party to the RER Contract under the express language of the RER Contract and in accordance with Peru’s Political Constitution. As explained by Dr. Benavides:

Regardless of which State entity is used, formally and instrumentally, as the vehicle for the signing of the Concession Contract, said entity does so, necessarily, on behalf of the State, in its entirety. The Contract was entered into by the State of the Republic of Peru, acting "*through the Ministry of Energy and Mines*" or, what is the same, by the Ministry of Energy and Mines, "*on behalf of the State*". This means that the effects of the Contract extend to all the dependencies, entities, agencies, offices and institutions that are part of the State, to all the Ministries, to the other bodies of the Executive Power, to the Regional, Municipal and Local Governments, to the Congress of the Republic and, in general, to any entity part of the State, such as the Public Ministry and the Judicial Power.⁵³⁰

232. The Peruvian State and not MINEM is liable to CHM for any breaches to the RER Contract. The specific breaches will be discussed in Section V.

2. CHM brings Contract Claims on Its Own Behalf Under Clause 11.3(a) of the RER Contract

a. Clause 11.3(a) of the RER Contract Allows CHM to bring Contractual Claims before ICSID

233. CHM, a Party to the RER Contract, brings claims on its own behalf under Clause 11.3(a) of the RER Contract for Peru’s breaches of its obligations under the RER Contract and Peruvian law.

234. Chapter 11 of the RER Contract, titled “Dispute Resolution,” sets forth the method for resolving controversies under the RER Contract. Clause 11.1 sets the framework

⁵²⁹ Quiñones Report I, ¶ 49.

⁵³⁰ Benavides Report I, ¶ 102.

under which disputes will be resolved, distinguishing different dispute settlement procedures for Technical or Non-Technical disputes. It provides, in relevant part:

Any conflict or dispute that may arise between the Parties as to the interpretation, execution, fulfillment or any aspect concerning the existence, validity or termination of the Contract shall be defined as a Technical Dispute or a Non-Technical Dispute.

Where it is agreed that the dispute is a Technical Dispute, it shall be settled in accordance with the procedure provided for in Clause 11.2. *Any conflicts or disputes other than those of a technical nature (each referred to as a “Non-Technical Dispute”) shall be settled in accordance with the procedure provided for in Clause 11.3.*

If the Parties do not agree on whether the conflict or dispute is a Technical Dispute or a Non-Technical Dispute, then such conflict or dispute shall be considered a Non-Technical Dispute and shall be settled in accordance with the relevant procedure provided for in Clause 11.3.

No Technical Dispute shall arise out of grounds for termination of the Contract, which shall be deemed Non-Technical Disputes in all cases.⁵³¹

235. As will be analyzed in Section V, Peru breached several provisions of the RER Contract and Peruvian law, enacting measures that interfered with the development of the Project and making it impossible for CHM to achieve commercial operation. It is undisputed that Peru’s contractual breaches are “Non-Technical” in nature, and therefore the parties agreed that “conflicts and disputes” regarding them would be resolved in accordance with Clause 11.3 of the RER Contract, which provides, in relevant part:⁵³²

11.3 Non-Technical Disputes shall be settled through national or international arbitration of law, as follows:

- a) Disputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency shall be settled through international arbitration of law by means of a procedure carried out in accordance with the Rules for Conciliation and Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID)

⁵³¹ RER Contract, February 18, 2014, Clause 11.1 (C-0002).

⁵³² Even if the parties were to disagree on whether the conflicts or disputes raised are “Non-Technical,” Clause 11.1 provides that in the event of disagreement, the conflict or dispute will be considered Non-Technical and settled in accordance with Clause 11.3. RER Contract, February 18, 2014, Clause 11.1 (C-0002).

established in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States approved by Peru through Legislative Resolution No. 26210, to whose standards the Parties submit unconditionally. Where the Concessionaire Company does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rules referred to in subparagraph b) below.

...

- b) Disputes involving amounts equivalent to or lower than Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency, or which cannot be quantified or assessed in money, shall be settled through national arbitration of law by means of a procedure carried out in accordance with the Arbitration Rules of the National and International Arbitration Center of the Chamber of Commerce of Lima, to whose standards the Parties submit unconditionally. Legislative Decree No. 1071, which regulates Arbitration, shall apply in the alternative. The Arbitration shall be carried out in the city of Lima, Peru, and shall be conducted in Spanish. The relevant arbitration award shall be rendered no later than ninety (90) days following the constitution of the Arbitral Tribunal.⁵³³

236. Article 11.3(a) of the RER Contract embodies CHM and Peru's consent for ICSID to hear Non-Technical disputes in an arbitration commenced under ICSID Rules of Arbitration and seated in Washington, DC. As explained by Dr. Benavides:

The arbitration clause serves a fundamental role in the RER Contract structure. The staggered application of arbitration clauses is a usual resource used not only in concession contracts, infrastructure projects and energy projects, but also in construction and works contracts. The rationale behind a provision defining different types of arbitration, arbitration tribunals, arbitration venues and procedures, considering the type of dispute and amount involved, are naturally linked to matters related to specialty, cost, expeditiousness and legal certainty.

For a foreign investor who executes a long-term contract with the Government, in a field as sensible as the energy sector, the degree of certainty and reliance on international arbitration in a foreign venue before an institution like the ICSID, should a controversy arise with a considerable economic incidence, implies a warranty that affords legal certainty and equal basic treatment. If such warranty is not complied with,

⁵³³ RER Contract, February 18, 2014, Clause 11.3(a) (C-0002).

the Government would be in breach of one of the key elements to the RER Contract⁵³⁴.

237. CHM need only satisfy two criteria: first, that the amount of the “dispute” exceeds US \$20 million in value and second, the Concessionaire company needs to comply with the requirements to resort to ICSID. As discussed below, both criteria are satisfied here.

238. As discussed in section VI.A, CHM has the right to claim damages under Peruvian law for breaches of the RER Contract. Claimants’ quantum experts Messrs. Santiago Dellepiane and Andrea Cardani of Berkeley Research Group (“**BRG**”) have calculated the quantum of damages to be approximately US \$47.049 million inclusive of pre-award interest and of additional consequential damages incurred by Claimants, as of September 14, 2020.⁵³⁵ As explained by the experts, Claimants are entitled to compensation in an amount that wipes out the consequences of Peru’s acts and omissions. The experts came to this value figure using the DCF methodology to determine the fair market value of the Mamacocha Project as of March 14, 2017, plus post-breach, pre-award interest calculated up to the date of filing of Claimants’ Memorial.⁵³⁶ Based upon BRG’s expert report, the amount in dispute between the parties exceeds US \$20 million and thus, the dispute must be resolved in an ICSID arbitration under Clause 11.3(a).

239. Moreover, as described above in Section III.A above, CHM satisfies the second limb of Article 25(2)(b) of the ICSID Convention and qualifies as a “National of another Contracting State” for purposes of the ICSID Convention.⁵³⁷ CHM is a foreign-controlled company, directly or indirectly owned and controlled by a U.S. citizen or U.S. entity at all relevant times.⁵³⁸ Peru recognized CHM as a foreign-controlled company throughout the

⁵³⁴ Benavides Report I, ¶¶ 162-163.

⁵³⁵ Post-award interest shall be subsequently added to this figure, which will be updated accordingly.

⁵³⁶ Section VI.A.2.

⁵³⁷ See above, Section III.A.

⁵³⁸ Jacobson I, ¶ 89.

Parties' course of conduct.⁵³⁹ Peru also required all foreign investors to establish local operating companies to sign the RER Contracts and participate in the RER Program. It also "submit[ted] unconditionally" to the ICSID Rules in Clause 11.3(a) of the RER Contract.⁵⁴⁰ Therefore, Peru expressly knew and intended at all times that it would be answerable in an ICSID arbitration should it breach its obligations under the RER Contract, assuming the value threshold were exceeded, as here. An ICSID arbitration clause expressly provided in a contract executed by the State is an unequivocal manifestation of consent to resolve disputes before ICSID. As Professors Jan Paulsson and Lucy Reed have observed, "[i]n contract-based ICSID arbitration (as in private international commercial arbitration), the parties generally give their consent simultaneously, in an arbitration clause contained in their investment contract[.]"⁵⁴¹ Such a clause is an unequivocal manifestation of consent to resolve disputes before ICSID.

240. Therefore, the Tribunal has jurisdiction to decide CHM's contract and Peruvian law claims under Clause 11.3(a) of the RER Contract. These contractual claims are brought not only by CHM directly on its own behalf under Clause 11.3(a) of the RER Contract, but also by Latam Hydro on behalf of CHM under Article 10.16(1)(b)(i)(C) of the TPA, for breaches of an "investment agreement."

C. THE TRIBUNAL HAS JURISDICTION UNDER THE RER CONTRACT

241. CHM brings claims on its own behalf under Clause 11.3(a) of the RER Contract for Peru's breaches of its obligations under the RER Contract and Peruvian Law. The RER Contract expressly authorizes CHM to bring claims under the ICSID Rules of Arbitration where,

⁵³⁹ See Letter from Claimants to A. Conover, September 18, 2019 (C-0210).

⁵⁴⁰ RER Contract, February 18, 2014, Clause 11.3(a) (C-0002).

⁵⁴¹ L. Reed, J. Paulsson et al., "Chapter 3: ICSID Investment Treaty Arbitration," GUIDE TO ICSID ARBITRATION (Kluwer, 2010), p. 53. (CL-0076).

as here, the amount in dispute exceeds Twenty Million Dollars (US \$20,000,000) or its equivalent in national currency.

242. This source of jurisdiction for this Tribunal to resolve CHM’s contractual claims against Peru is directly in the RER Contract.⁵⁴²

1. The Republic of Peru is liable to CHM for Peru’s breaches under the RER Contract

243. As a preliminary matter, the Government of Peru, as a single unit, is the counterparty of CHM in the RER Contract. The express language of the preamble of the RER Contract states that Peru is a party to the RER Contract, acting through MINEM:

“The Concession Agreement for the Supply of Renewable Energy (hereinafter, the Agreement), *concluded by the Government of the Republic of Peru*, which acts through the Ministry of Energy and Mines (hereinafter, the Grantor), and the Concessionaire Company is hereby recorded; under the following terms and conditions . . .⁵⁴³

244. Peru’s role is also confirmed by Clause 1.4.31 of the RER Contract, which defines the Ministry as “[t]he Ministry of Energy and Mines, *which on behalf of the State* signs the present Contract.”⁵⁴⁴ By Ministerial Resolution No. 023-2014-MEM/DM, dated January 17, 2014, which is an integral part of the RER Contract, the MEM “authorized the General Director of Electricity, on behalf of the Ministry of Energy and Mines as the Grantor, to sign, *on behalf of the Peruvian State*, the Concession Agreements for the Supply of Renewable Energy to the National Interconnected Electric System (SEIN). . .”⁵⁴⁵

⁵⁴² In addition, the Tribunal has jurisdiction to resolve the CHM’s claims as per the language of the TPA, Article 10.16(1)(b)(i)(C) of the Treaty which allows Latam Hydro to submit a claim to arbitration “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,” *i.e.*, CHM, for Peru’s breach of an investment agreement, *i.e.*, the RER Contract.

⁵⁴³ RER Contract, February 18, 2014, Preamble (C-0002).

⁵⁴⁴ RER Contract, February 18, 2014, Clause 1.4.31 (C-0002) (emphasis added).

⁵⁴⁵ Ministerial Resolution No. 023-2014-MEM/DM, January 17, 2014 (Annexed to the RER Contract) (C-0002).

245. According to Claimants' expert, Dr. María Teresa Quiñones, the Peruvian State was obliged through the RER Contract to comply with its provisions, binding each and every entity that composes it.⁵⁴⁶ Dr. Quiñones further explains that "MINEM acts as a mere representative of the Government of the Republic of Peru" when it signed the RER Contract.⁵⁴⁷

246. Claimants' expert, Dr. Eduardo Benavides, agrees with this conclusion. According to his opinion, "[t]he Peruvian State normatively approved that the Concession Contract be executed by MINEM, but on behalf of the State. The party to the Contract is, therefore, the State. The intervention of MINEM is as a representative or instrumentality of the State, for the purposes of the formality of signing the Contract."⁵⁴⁸ This means that the party to the RER Contract is the Peruvian State and not MINEM. The Contract includes, reaches, extends to, and binds all entities that are part of the Peruvian State, and not only MINEM.⁵⁴⁹

247. Likewise, Article 43 of Peru's Political Constitution provides that "[t]he State is one and indivisible. It's form of government is unitary."⁵⁵⁰

248. Accordingly, Peru is unequivocally a party to the RER Contract under the express language of the RER Contract and in accordance with Peru's Political Constitution. As explained by Dr. Benavides:

Regardless of which State entity is used, formally and instrumentally, as the vehicle for the signing of the Concession Contract, said entity does so, necessarily, on behalf of the State, in its entirety. The Contract was entered into by the State of the Republic of Peru, acting "*through the Ministry of Energy and Mines*" or, what is the same, by the Ministry of Energy and Mines, "*on behalf of the State*". This means that the effects of the Contract extend to all the dependencies, entities, agencies, offices and institutions that are part of the State, to all the Ministries, to the other bodies of the Executive Power, to the Regional, Municipal and Local

⁵⁴⁶ Quiñones Report, ¶ 49.

⁵⁴⁷ Quiñones Report, ¶ 49.

⁵⁴⁸ Benavides Report, ¶ 97.

⁵⁴⁹ Benavides Report, ¶ 101; *see also* RER Contract, February 18, 2014, Clause 1.4.2 (C-0002) ("Government Authority" is defined as "any judicial, legislative, political or administrative authority of Peru").

⁵⁵⁰ Quiñones Report, ¶ 49.

Governments, to the Congress of the Republic and, in general, to any entity part of the State, such as the Public Ministry and the Judicial Power.⁵⁵¹

249. The Peruvian State and not MINEM is liable to CHM for any breaches to the RER Contract. The specific breaches will be discussed in Section V.

2. CHM brings Contract Claims on Its Own Behalf Under Clause 11.3(a) of the RER Contract

a. Clause 11.3(a) of the RER Contract Allows CHM to bring Contractual Claims before ICSID

250. CHM, a Party to the RER Contract, brings claims on its own behalf under Clause 11.3(a) of the RER Contract for Peru's breaches of its obligations under the RER Contract and Peruvian law.

251. Chapter 11 of the RER Contract, titled "Dispute Resolution," sets forth the method for resolving controversies under the RER Contract. Clause 11.1 sets the framework under which disputes will be resolved, distinguishing different dispute settlement procedures for Technical or Non-Technical disputes. It provides, in relevant part:

Conflicts and disputes that may arise between the Parties regarding interpretation, execution, compliance, and any other aspect related to the existence, validity, or termination of the Agreement, shall be defined as Technical Disputes or Non-Technical Disputes.

In the event that it is agreed that it is a Technical Dispute, it will be settled according to the procedure provided in Clause 11.2. *Conflicts or disputes that are not of a technical nature (each one referred to as "Non-Technical Dispute") will be settled according to the procedure provided for in Clause 11.3.*

In the event that the Parties do not agree on whether the conflict of dispute is a Technical Dispute or a Non-Technical Dispute, then such conflict or dispute shall be considered a Non-Technical Dispute and shall be settled according to the respective procedure provided in Clause 11.3.⁵⁵²

⁵⁵¹ Benavides Report, ¶ 102.

⁵⁵² RER Contract, February 18, 2014, Clause 11.1 (C-0002).

252. As will be analyzed in Section V, Peru breached several provisions of the RER Contract and Peruvian law, enacting measures that interfered with the development of the Project and making it impossible for CHM to achieve commercial operation. It is undisputed that Peru's contractual breaches are "Non-Technical" in nature, and therefore the parties agreed that "conflicts and disputes" regarding them would be resolved in accordance with Clause 11.3 of the RER Contract, which provides, in relevant part:⁵⁵³

11.3 Non-Technical Disputes will be settled through arbitration of law, national or international, according to the following:

c) Disputes whose amount exceeds Twenty Million Dollars (US\$ 20,000,000) or its equivalent in national currency, will be settled through international arbitration of law through a procedure processed in accordance with the Rules of Conciliation and Arbitration of the International Center for Settlement of Investment Disputes (ICSID), established in the Convention on the Settlement of Investment Disputes between States and Nationals of other States, approved by Peru by means of Legislative Resolution No. 26210, to whose standards the Parties submit unconditionally. If the Concessionaire Company does not comply with the requirement to attend the ICSID, this Dispute will be subject to the rules referred to in subparagraph b) of this number.

...

d) Those disputes whose amount is equal to or less than Twenty Million Dollars (US\$ 20,000,000) or its equivalent in national currency, or which cannot be quantified or assessed in money, will be settled through national arbitration of law, through a procedure processed in accordance with the Arbitration Rules of the National and International Arbitration Center of the Chamber of Commerce of Lima, to which the Parties unconditionally submit, with Legislative Decree No. 1071, the Legislative Decree that Rules Arbitration, being of supplementary application. Arbitration will take place in the city of Lima, Peru, and will be conducted in Spanish. The arbitration award will be issued within a period of no more than ninety (90) Days following the date of installation of the Arbitral Tribunal.⁵⁵⁴

⁵⁵³ Even if the parties were to disagree on whether the conflicts or disputes raised are "Non-Technical," Clause 11.1 provides that in the event of disagreement, the conflict or dispute will be considered Non-Technical and settled in accordance with Clause 11.3. RER Contract, February 18, 2014, Clause 11.1 (C-0002).

⁵⁵⁴ RER Contract, February 18, 2014, Clause 11.3(a) (C-0002).

253. Article 11.3(a) of the RER Contract embodies CHM and Peru's consent for ICSID to hear Non-Technical disputes in an arbitration commenced under ICSID Rules of Arbitration and seated in Washington, DC. As explained by Dr. Benavides,

The arbitration clause serves a fundamental role in the RER Contract structure. The staggered application of arbitration clauses is a usual resource used not only in concession contracts, infrastructure projects and energy projects, but also in construction and works contracts. The rationale behind a provision defining different types of arbitration, arbitration tribunals, arbitration venues and procedures, considering the type of dispute and amount involved, are naturally linked to matters related to specialty, cost, expeditiousness and legal certainty.

For a foreign investor who executes a long-term contract with the Government, in a field as sensible as the energy sector, the degree of certainty and reliance on international arbitration in a foreign venue before an institution like the ICSID, should a controversy arise with a considerable economic incidence, implies a warranty that affords legal certainty and equal basic treatment. If such warranty is not complied with, the Government would be in breach of one of the key elements to the RER Contract⁵⁵⁵.

254. CHM need only satisfy two criteria: first, that the amount of the "dispute" exceeds US \$20 million in value and second, the Concessionaire company needs to comply with the requirements to resort to ICSID. As discussed below, both criteria are satisfied here.

255. As discussed in section VI.A, CHM has the right to claim damages under Peruvian law for breaches of the RER Contract. Claimants' quantum experts Messrs. Santiago Dellepiane and Andrea Cardani of Berkeley Research Group ("BRG") have calculated the quantum of damages to be approximately US \$47.049 million inclusive of pre-award interest and of additional consequential damages incurred by Claimants, as of September 14, 2020.⁵⁵⁶ As explained by the experts, Claimants are entitled to compensation in an amount that wipes out the consequences of Peru's acts and omissions. The experts came to this value figure using the DCF

⁵⁵⁵ Benavides Report, ¶¶ 162-163.

⁵⁵⁶ Post-award interest shall be subsequently added to this figure, which will be updated accordingly.

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methodology to determine the fair market value of the Mamacocha Project as of March 14, 2017, plus post-breach, pre-award interest calculated up to the date of filing of Claimants' Memorial.⁵⁵⁷ Based upon BRG's expert report, the amount in dispute between the parties exceeds US \$20 million and thus, the dispute must be resolved in an ICSID arbitration under Clause 11.3(a).

256. Moreover, as described above in Section III.A above, CHM satisfies the second limb of Article 25(2)(b) of the ICSID Convention and qualifies as a "National of another Contracting State" for purposes of the ICSID Convention.⁵⁵⁸ CHM is a foreign-controlled company, directly or indirectly owned and controlled by a U.S. citizen or U.S. entity at all relevant times.⁵⁵⁹ Peru recognized CHM as a foreign-controlled company throughout the Parties' course of conduct.⁵⁶⁰ Peru also required all foreign investors to establish local operating companies to sign the RER Contracts and participate in the RER Program. It also "submit[ted] unconditionally" to the ICSID Rules in Clause 11.3(a) of the RER Contract.⁵⁶¹ Therefore, Peru expressly knew and intended at all times that it would be answerable in an ICSID arbitration should it breach its obligations under the RER Contract, assuming the value threshold were exceeded, as here. An ICSID arbitration clause expressly provided in a contract executed by the State is an unequivocal manifestation of consent to resolve disputes before ICSID. As Professors Jan Paulsson and Lucy Reed have observed, "[i]n contract-based ICSID arbitration (as in private international commercial arbitration), the parties generally give their consent simultaneously, in an arbitration clause contained in their investment contract[.]"⁵⁶² Such a clause is an unequivocal manifestation of consent to resolve disputes before ICSID.

⁵⁵⁷ Section VI.A.2.

⁵⁵⁸ See above, Section III.A.

⁵⁵⁹ Jacobson I, ¶ 89.

⁵⁶⁰ Letter from Claimants to A. Conover, September 18, 2019 (C-0210).

⁵⁶¹ RER Contract, February 18, 2014, Clause 11.3(a) (C-0002).

⁵⁶² L. Reed, J. Paulsson et al., "Chapter 3: ICSID Investment Treaty Arbitration," GUIDE TO ICSID ARBITRATION (Kluwer, 2010), p. 53. (CL-0076).

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257. Therefore, the Tribunal has jurisdiction to decide CHM’s contract and Peruvian law claims under Clause 11.3(a) of the RER Contract. These contractual claims are brought not only by CHM directly on its own behalf under Clause 11.3(a) of the RER Contract, but also by Latam Hydro on behalf of CHM under Article 10.16(1)(b)(i)(C) of the TPA, for breaches of an “investment agreement.”

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

A. Peru's Representations and Commitments Created Legitimate Investment-Backed Expectations that Peru Undermined Through Various Measures

258. This case is about promises made and promises broken. Through the RER Promotion, RER Contract, and other public documents, Peru made promises designed to induce foreign investment in its renewable energy sector. Some of these promises concerned key incentives, like the Guaranteed Revenue Concession,⁵⁶³ while others concerned key protections, like the right to ICSID arbitration.⁵⁶⁴ Latam Hydro reasonably relied on these promises when it invested under the Mamacocha and Upstream Projects and continued to rely upon them as it expended many millions of dollars to implement the Project. But, through no fewer than seven (7) attributable measures, Peru reversed, contradicted, or declared null these promises, to Latam Hydro's financial detriment.

259. Peru created the RER Promotion in 2008 to “eliminat[e] barriers”⁵⁶⁵ to foreign investment in Peruvian RER projects. In so doing, Peru assured investors that this investment scheme would be consistent with the investment protections under the TPA. Peru awarded investors bankable investment agreements (*i.e.*, RER Contracts) that formalized the incentives and protections under the RER Promotion as well as those under Peru's “domestic” laws, such as the Civil Code, GLAP, and the TUPA. Peru also published reports and resolutions that explained how the RER Promotion should be implemented.⁵⁶⁶ Latam Hydro reasonably relied on these public commitments, promises, and representations to form the following legitimate, investment-backed expectations, as provided in the table below:

⁵⁶³ RER Contract, February 18, 2014, Clause 1.4.37 (C-0002).

⁵⁶⁴ RER Contract, February 18, 2014, Clause 11.3(a) (C-0002).

⁵⁶⁵ Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).

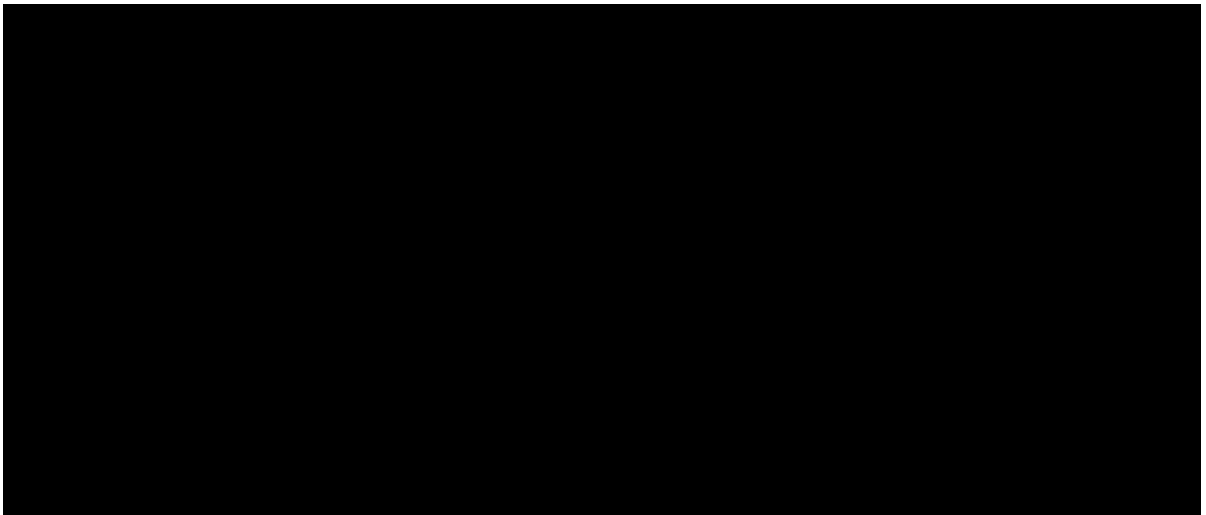
⁵⁶⁶ *See, supra*, Section II.C.

Reasonable Expectations Relating to Contractual Commitments		
No.	Reasonable Expectation	Illustrative Sources
1.	Peru would implement the RER Contract consistently, without discriminatory treatment, and in good faith	TPA, Arts. 10.4(1), 10.4(2), 10.5; Legislative Decree No. 1002, Preamble; Civil Code, Art. 1362; and Sosa Report
2.	CHM would receive a commercially bankable 20-year Guaranteed Revenue Concession as long as it performed diligently	RER Contract, Clause 1.4.37; Civil Code, Arts. 1328, 1314; and the Statement of Reasons (November 2018)
3.	Peru would not interfere with CHM's performance without compensating CHM or extending the relevant deadlines to account for its interference	TPA, Arts. 10.5, 10.7; Civil Code, Art. 1432; the Sosa Report; and the Statement of Reasons (November 2018)
4.	Peru would not change its interpretations of MINEM's authority to extend and modify the RER Contract after it had already authorized and executed two contract modifications	TPA, Art. 10.5; RER Contract, Clause 2.2; Civil Code, Art. 1362; and Sosa Report
5.	Peru would assist CHM to receive all permits, authorizations, and concessions necessary to advance the Project without undue delay	TPA, Art. 10.4(1), 10.4(2); RER Contract, Clause 4.3; GLAP, Arts. 55, 131, 142, 143; and Sosa Report
6.	MINEM had authority to execute Addenda 1-2 on behalf of Peru and these mutually executed contract modifications were fully in accordance with Peruvian law	TPA, Art. 10.5; RER Contract, Addenda 1-2, Clause 2.2; Ministerial Resolutions Nos. 320-2015-MEM/DM and 559-2016-MEM/DM; Sosa Report
7.	The mutually agreed suspensions of the RER Contract, Addenda 3-6, were lawful and afforded Peru time to overcome the RGA's obstruction of the Project	Addenda 3-6; Ministerial Resolutions Nos. 356-2017-MEM/DM, 543-2017-MEM/DM, 084-2018-MEM/DM, and 251-2018-MEM/DM; and Civil Code, Art. 1362
8.	Disputes valued at more than US \$20 million would be resolved by arbitration seated outside Peru in a proceeding administered by ICSID	RER Contract, Clause 11.3(a); and Civil Code, Art. 1362

Reasonable Expectations Relating to Regulatory Performance		
No.	Reasonable Expectation	Illustrative Sources
1.	Peru was committed to ensuring the successful accomplishment of the permitting phase	RER Contract, Clause 4.3; Civil Code, Art. 1362; the Sosa Report; and the Statement of Reasons (November 2018)
2.	Peru's permitting agencies would adhere to the fixed review periods and other requirements in their TUPA	Report No. RER/MCCQ/10-01-12; Civil Code, Art. 1362; GLAP Arts. 55, 131, 142, 143
3.	CHM was only required to submit a DIA to secure its plant environmental permit	Report No. 0026-2012-MEM-AAE-NAE/MEM; Civil Code, Art. 1362; ARMA Resolution Nos. 110-2014-GRA/ARMA-SG and 158-2014-GRA/ARMA-SG
4.	ARMA's resolutions granting the Project's environmental permits were properly vetted, tested, and approved and would not be changed unilaterally	ARMA Resolution Nos. 110-2014-GRA/ARMA-SG and 158-2014-GRA/ARMA-SG; and Civil Code, Art. 1362
5.	AAA would grant CHM a civil works authorization permit that was valid and free from defects	TUPA
Reasonable Expectations Relating to Due Process and Non-Discrimination		
No.	Reasonable Expectation	Illustrative Sources
1.	CHM would be treated in good faith and in a non-arbitrary manner	TPA, Art. 10.5; and Civil Code, Art. 1362
2.	CHM would not face a criminal investigation or prosecution merely for submitting an application for reconsideration using an <i>ex post facto</i> law	TPA, Art. 10.5; Constitution of Peru, Art. 20.2; and Civil Code, Art. 1362
3.	ARMA would not discriminate against CHM by challenging CHM environmental permits on patently meritless grounds while failing to challenge 109 similar resolutions for other projects	TPA, Arts. 10.5, 10.7; and Civil Code, Art. 1362

260. Peru, however, enacted the measures below (in chronological order) that shattered these expectations and wiped out Latam Hydro's covered investments:

- a. The RGA's commencement of the RGA Lawsuit, dated March 14, 2017, which sought the annulment of the environmental permits for the Mamacocha Project;
- b. The AEP's commencement of an investigation and subsequent criminal proceeding, dated March 24, 2017, based entirely on the allegations set forth in the RGA Lawsuit;
- c. The AAA's issuance of a resolution, dated May 16, 2017, that denied CHM's application for the critical works authorization for the Mamacocha Project;
- d. The AAA's issuance of a materially defective works authorization for the Mamacocha Project, dated July 5, 2017, which forced CHM to seek a new one;



- g. MINEM's denial of CHM's Third Extension Request, dated December 31, 2018, which refused to account for Peru's interferences to the Mamacocha Project and the 17-month suspension period under the RER Contract.

261. These actions and omissions are attributable "measures" under the TPA and international law that inflicted damage on Claimants by ending its Project.

262. The TPA broadly provides that a “measure includes any law, regulation, procedure, requirement, or practice.”⁵⁶⁷ Further, Article 10.1 of the TPA, in relevant part, enshrines the principle of State attribution:

Article 10.1: Scope and Coverage

1. This Chapter *applies to measures adopted or maintained by a Party* relating to:

(a) investors of another Party;

(b) covered investments; [. . .]

2. *A Party’s obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.*⁵⁶⁸

263. International law is consistent with the TPA. Investment arbitration jurisprudence confirms that the concept of a State “measure” is to be construed broadly.⁵⁶⁹ Citing the seminal ICJ case on the matter, *Fisheries Jurisdiction Case (Spain v. Canada)*, the *Saluka v. Czech Republic* tribunal confirmed that “in its ordinary sense the word [‘measure’] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby.”⁵⁷⁰ A measure may constitute a distinct and identifiable action by the State in its official capacity that affects an investor’s rights. For instance, the tribunal in *Commerce Group v. El Salvador*, expressly held that “the revocation of the environmental permits squarely constitutes a measure taken” and “it was that revocation which put an end to

⁵⁶⁷ TPA, February 1, 2009, Art. 1.3 (C-0001).

⁵⁶⁸ TPA, February 1, 2009, Art. 10.1(2) (C-0001). (emphasis added)

⁵⁶⁹ *SAUR International v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, ¶ 364 (CL-0054).

⁵⁷⁰ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 459 (CL-0052).

Claimants' mining and processing activities.”⁵⁷¹ A measure may also take the form of a State's inaction; for instance, a “continuing practice of [a State] to withhold permits and concessions in furtherance of” the intended purpose of the investment.⁵⁷²

264. Under international law governing attributable State conduct, a State is responsible for the actions or omissions of each governmental organ including regional and local authorities.⁵⁷³ This principle of attribution is set out in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”):

Article 4 – Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has the status in accordance with internal law of the State.⁵⁷⁴

265. In accordance with Article 4 of the ILC Articles, the State is thus held responsible under international law for the conduct of all the organs, instrumentalities, and officials that form part of its organization and act in that capacity, whether or not they have separate legal personality under its domestic law. As applied here, no matter where the State organ falls in the

⁵⁷¹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011, ¶ 112 (CL-0024).

⁵⁷² *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, June 1, 2012, ¶ 3.43 (CL-0043).

⁵⁷³ See *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, ¶ 605 (finding that for an actionable measure, “it makes no difference whether the deprivation was caused by actions or inactions” by the State); *Saluka v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 459 (CL-0052) (holding that the “term ‘measures’ covers any action or omission of the Czech Republic”).

⁵⁷⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, T’L L. COMM’N (2001), VOL. II, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), Art. 4 (“ILC Articles”) (CL-0072); see also *id.*, Commentary to Art. 4, ¶¶ 8-9 (CL-0072) (“[T]he principle on article 4 applies equally to organs of the central government and those of regional or local units. This principle has long been recognized. . . . It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State’s international obligations. . . . That rule has since been consistently applied.”)

hierarchy of governmental bodies—*e.g.*, a central ministry, regional government, or administrative body—Peru is liable for any official conduct or inaction by that organ. Peru is thus liable for the acts of MINEM, RGA and local governments as well as their officials, the ministers, governors and mayors.

266. Consequently, the seven measures highlighted above are attributable to Peru. Through these wrongful measures, as will be established below, Peru: (i) breached Article 10.5 of the TPA by failing to treat Claimants and their investments fairly and equitably in violation of the minimum standard of treatment; (ii) breached Article 10.7 of the TPA by indirectly expropriating the Mamacocha Project; and (iii) breached Article 10.4 of the TPA by conferring more favorable treatment to investors of other States with respect to Peru’s obligations to grant permits and adhere to its contractual commitments.

267. As discussed in Section III, *supra*, Latam Hydro has submitted claims on behalf of CHM in accordance with the TPA, Article 10.16(1)(b)(i)(C) for Peru’s breaches of an investment agreement. The RER Contract constitutes an “investment agreement,” as defined in Article 10.28 of the TPA.⁵⁷⁵ The specific breaches of the investment agreement, *i.e.*, RER Contract, will be discussed in Section V, *infra*. In addition, as discussed in Section IV.D.2, *infra*, Peru’s breaches of the RER Contract are elevated to breaches of the TPA by operation of the MFN clause contained in the TPA, Article 10.4.

B. Peru Failed to Accord Latam Hydro and Its Investments Fair and Equitable Treatment under Article 10.5 of the Treaty

268. As an investor covered by the TPA, Latam Hydro is entitled to fair and equitable treatment (or “FET”) under the minimum standard of treatment, as required under Article 10.5,

⁵⁷⁵ TPA, February 1, 2009, Art. 10.28 (C-0001).

against measures by Peru that may affect its covered investments in the Mamacocha Project.

Article 10.5 of the TPA provides in full:

Article 10.5: Minimum Standard of Treatment

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.⁵⁷⁶

269. Although Article 10.5(2)(a) partially clarifies the FET standard under the TPA’s minimum standard of treatment, the TPA neither defines FET nor identifies the obligations imposed on States other than the express clarification that FET prevents States from denying justice in legal proceedings.⁵⁷⁷ Annex 10-A, however, confirms that FET under the minimum standard of treatment goes beyond merely ensuring procedural due process and should be interpreted to include “all customary international law principles” that typically apply to States under this standard, stating:

⁵⁷⁶ TPA, February 1, 2009, Art. 10.5 (C-0001).

⁵⁷⁷ TPA, February 1, 2009, Art. 10.5(2)(a) (C-0001).

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 principles that protect the economic rights and interests of aliens.*⁵⁷⁸

270. As discussed below, FET under the minimum standard of treatment affords Latam Hydro and its investments the following “protect[ions]”: (i) preserving an investor’s legitimate expectations; (ii) acting with transparency; (iii) not engaging in arbitrary conduct; (iv) refraining from discriminatory conduct; and (v) acting in good faith. Moreover, while bad faith on the part of the State necessarily will establish a violation of the minimum standard of treatment,⁵⁷⁹ an investor need not demonstrate bad faith to engage the international responsibility of the State.⁵⁸⁰

271. As far as Claimants are aware, no investment tribunal has issued a decision that interprets the scope of the FET standard under the TPA. Claimants submit, however, that the jurisprudence arising from the North American Free Trade Agreement (“NAFTA”) and the Dominican Republic–Central America Free Trade Agreement (“DR-CAFTA”) is instructive on this issue. Article 10.5(1) of the TPA, as written, is a verbatim replica of Article 10.5(1) of DR-CAFTA.⁵⁸¹ U.S. Government and commentators have observed that Article 10.5(1) of DR-CAFTA and Article 1105 of NAFTA are substantively identical, particularly with respect to the scope of their respective obligations that States afford covered investments FET under the minimum standard of treatment in accordance with customary international law.⁵⁸²

⁵⁷⁸ TPA, February 1, 2009, Annex 10-A (C-0001). (emphasis added)

⁵⁷⁹ See *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 296 (CL-0019).

⁵⁸⁰ See *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, October 3, 2006, ¶ 129 (CL-0034) (“The Tribunal is not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment.”).

⁵⁸¹ Dominican Republic–Central America–United States FTA, Chapter 10, August 2, 2005 (CL-0067).

⁵⁸² See, e.g., D.A. Gantz, *Settlement of Disputes Under the Central America–Dominican Republic–United States Free Trade Agreement*, 30 B.C. Int’l & Comp. L. Rev. 331 (2007) pp. 356-357 (CL-0071); United States Trade

272. Tribunals analyzing the provisions of NAFTA and DR-CAFTA have found that FET under the minimum standard of treatment is akin to the so-called autonomous FET standard. The seminal decision in *Tecmed v. Mexico* is widely considered to have provided the definitive interpretation on the autonomous FET standard under international law:

The foreign investor expects the host State to *act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives*, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. *The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions . . . that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*⁵⁸³

273. Investment tribunals interpreting FET under the minimum standard of treatment have found it to be congruent with the *Tecmed* tribunal's description of the autonomous FET standard. In the seminal case on FET under the minimum standard of treatment, the NAFTA tribunal in *Waste Management, Inc. v. Mexico (II)*, after surveying prior NAFTA awards, held that a State breaches FET under the minimum standard of treatment when its conduct is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, involves a lack of due process, lacking transparency, and violates the investor's legitimate expectations. The tribunal set forth:

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

Representative, The Dominican Republic – Central America – United States Free Trade Agreement: Summary of the Agreement (CL-0077); *see also* North American Free Trade Agreement (1994), Art. 1105 (CL-0095); Interpretation of the Free Trade Commission of Certain Chapter Eleven Provisions (2001) (CL-0074).

⁵⁸³ *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154 (CL-0059).

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*.⁵⁸⁴

274. In a more recent NAFTA case, the tribunal in *Merrill & Ring* described FET under the minimum standard of treatment as follows:

[T]he standard protects against all such acts or behavior that might infringe a sense of *fairness, equity and reasonableness*. Of course, the concepts of fairness, equity and reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the *concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair*. . . .

[A]gainst the backdrop of the *evolution of the minimum standard of treatment* discussed above, the Tribunal is satisfied that *fair and equitable treatment has become part of customary international law*.⁵⁸⁵

275. The *Merrill & Ring v. Canada* tribunal also observed that the principal elements of FET under the minimum standard of treatment “are to a large extent the expression of general principles of law and hence also part of international law.”⁵⁸⁶ Drawing upon prior NAFTA decisions, the tribunal then concluded there is “no doubt” that FET under the minimum standard of treatment imposes on States the obligations of “[g]ood faith and the prohibition of arbitrariness[,]” the “availability of a secure legal environment[,]” “transparency,” and the

⁵⁸⁴ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB (AF)/00/3, Award, April 30, 2004, ¶¶ 98-99 (CL-0065). (emphasis added)

⁵⁸⁵ *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, March 31, 2010, ¶¶ 210-211 (CL-0036) (emphasis added).

⁵⁸⁶ *Merrill & Ring v. Canada*, Award, ¶¶ 187, 193.

prohibition of “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process.”⁵⁸⁷

276. In the context of DR-CAFTA, the *RDC v. Guatemala* tribunal endorsed wholesale the *Waste Management II* standard, finding that a violation of FET under the minimum standard of treatment arises from 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.”⁵⁸⁸

277. In summary, FET under the minimum standard of treatment, as afforded under Article 10.5 and Annex 10-A of the TPA, and in conjunction with numerous decisions from investment tribunals that interpreted identical or substantively identical BITs, requires Peru to treat Latam Hydro and its covered investments fairly and equitably by: (i) protecting Latam Hydro’s legitimate expectations; (ii) acting with transparency; (iii) not acting arbitrarily; (iv) not acting in a discriminatory manner; and (v) acting in good faith.

278. A State breaches an investor’s legitimate expectations through measures where the State reneges, reverses, or contradicts prior promises or commitments,⁵⁸⁹ or when the State upends or destabilizes the legal framework under which the investments were predicated.⁵⁹⁰ As one tribunal explained, protecting legitimate expectations prevents the State from “arbitrarily

⁵⁸⁷ *Merrill & Ring v. Canada*, Award, ¶¶ 187, 208.

⁵⁸⁸ *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 219 (CL-0049) (emphasis added); see also *TECO v. Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, ¶ 456 (CL-0060) (“the minimum standard is part and parcel of the international principle of good faith” and there “is no doubt . . . that the principle of good faith is part of customary international law”).

⁵⁸⁹ See *RDC v. Guatemala*, Award, ¶ 233 (CL-0049); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 621 (CL-0030).

⁵⁹⁰ See *Murphy v. Ecuador (II)*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, ¶ 248 (CL-0040).

changing the rules of the game” that undermines the State’s representations to induce the investment.⁵⁹¹

279. A State’s transparency obligation has been interpreted as an absence of any administrative ambiguity or opacity, such that the legal framework for the investor’s operations are readily apparent.⁵⁹² A State will breach this obligation when, for instance, it takes measures that keep an investor “in contractual limbo” without clarifying the reasons underlying those measures⁵⁹³ or contradicts prior assurances.⁵⁹⁴

280. A State measure is deemed arbitrary when it has no rational relationship with the purported goal of that measure or is otherwise inconsistent, prejudicial or capricious.⁵⁹⁵ Indeed, “[a] willful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard.”⁵⁹⁶ Tribunals also find that a measure is arbitrary if it is “unreasonable” or “disproportionate” in nature.⁵⁹⁷

281. A State is said to discriminate against an investor or investment when it “unduly treats differently investors who are in similar circumstances.”⁵⁹⁸ State intent is not determinative of discriminatory measures, but rather “the impact of the measure on the investment.”⁵⁹⁹

⁵⁹¹ *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, ¶ 420 (CL-0012); see also *Sempra Energy Int’l v. Argentina*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 300 (CL-0055).

⁵⁹² See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed. 2012), p. 149 (CL-0078); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, ¶ 76 (CL-0037).

⁵⁹³ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, September 27, 2016, ¶¶ 376-380 (CL-0066).

⁵⁹⁴ See *Crystallex Int’l Corp. v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶¶ 591, 597 (CL-0026); *Metalclad v. Mexico*, Award, ¶¶ 85-101 (CL-0037).

⁵⁹⁵ See *LG&E v. Argentina*, Award, ¶ 158 (CL-0034).

⁵⁹⁶ *TECO v. Guatemala*, Award, ¶ 621 (CL-0060).

⁵⁹⁷ *Copper Mesa v. Ecuador*, UNCITRAL Case No. PCA Case No. 2012-2, Award, March 15, 2016, ¶ 6.84 (CL-0025).

⁵⁹⁸ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, ¶ 368 (CL-0044).

⁵⁹⁹ *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 321 (CL-0057); see also *LG&E v. Argentina*, Award, ¶ 146 (CL-0034).

282. A State breaches its obligation of good faith when it fails to act fairly or reasonably in its dealings with the investor and its investment.⁶⁰⁰ Investment jurisprudence has found that this principle “permeates the whole approach to the protection granted under treaties and contracts” and is “at the heart of the concept of fair and equitable treatment.”⁶⁰¹

283. As explained below, each of Peru’s wrongful measures, whether viewed cumulatively or in isolation, violated Peru’s obligation to treat Latam Hydro and its investments fairly and equitably under Article 10.5 of the TPA.

1. Peru Acted Arbitrarily, Discriminatorily, Inconsistently, and Without Good Faith When It Filed the RGA Lawsuit, as Peru Has Admitted

284. Peru breached its obligation to accord Latam Hydro and its investments FET when it commenced the RGA Lawsuit on March 14, 2017. The RGA Lawsuit sought to annul a resolution the same government granted three years earlier. This resolution approved the environmental permit for the Project’s hydroelectric plant. If the RGA Lawsuit proved to be successful, the Project would lose this permit as well as the power-generation concession. Just the threat of this potential outcome was sufficient to render Financial Close impossible to achieve, as was demonstrated when DEG and Innergex ended their financial negotiations with Latam Hydro upon learning about the RGA Lawsuit.

285. The RGA Lawsuit alleged that these permits were improper because: (i) CHM was allegedly required to submit an EIA to obtain these permits, as opposed to a DIA; and (ii) the ARMA official that granted these permits was on vacation on the day these permits were issued. The RGA also challenged these permits on the grounds that the ARMA office that issued

⁶⁰⁰ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, ¶¶ 286-287 (CL-0058).

⁶⁰¹ *Sempra v. Argentina*, Award, ¶¶ 298-299 (CL-0055); *see also* R. Dolzer, “Fair and Equitable Treatment: Today’s Contours,” 12 *Santa Clara J. Int’l L.* 7 (2014), pp. 16-17 (CL-0070).

these permits allegedly lacked actual authority to do so, notwithstanding that it had issued similar permits for other projects on at least 109 prior occasions.⁶⁰²

286. In making its investment, Peru had made promises to Latam Hydro in the RER Contract, RER Promotion, TPA and Peru's applicable laws that it would be protected from arbitrary, wanton, and possibly malicious conduct of government officials. Claimants relied upon those promises when expending substantial funds for due diligence and in making its investment. CHM had obtained the challenged permits after substantial due diligence about the permitting requirements and process. The permits were issued through the regular administrative process. Despite Peru's explicit promises, RGA officials started an after-the-fact challenge in a lawsuit in which they did not even believe in the grounds asserted. The RGA Lawsuit could not be any more arbitrary and malicious.

287. MINEM, which had committed in Clause 4.3 of the RER Contract to assist with permitting, also breached its commitment. MINEM failed to offer any assistance with respect to this unlawful attack, notwithstanding CHM's multiple written requests. Peru's conduct violated no fewer than five separate components under the FET standard.

288. **First**, by bringing the RGA Lawsuit, Peru breached Latam Hydro's legitimate expectations that: (i) the Mamacocha Project was a Category I project and, consequently, CHM required only a DIA to secure its plant environmental permit; (ii) ARMA had authority to grant the environmental permits for the Mamacocha Project; (iii) ARMA's resolutions granting the Project's environmental permits had been vetted, tested, and approved by ARMA and were not subject to change; (iv) the RGA would not commence or continue for nearly a year a baseless lawsuit that brought the Project to a halt; and (v) MINEM would partner with CHM to protect

⁶⁰² Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).

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and ensure the validity of the Project's permits. Latam Hydro's reasonable reliance on these expectations resulted in sizable investments that it now seeks to recover in this case. Although Peru later dismissed this RGA Lawsuit on account that it was meritless and subjected Peru to significant financial and reputational harm, Peru failed to restore the year this RGA Lawsuit took away from the Project, which ultimately proved to be fatal.

289. Tribunals have found a breach of this FET component when a State tries to revoke legal authorizations many years after granting them. For example, in *RDC v. Guatemala*, the tribunal found that Guatemala breached the investor's legitimate expectations when the State brought a lawsuit to undo a legal framework and related contracts years after their creation.⁶⁰³ In so holding, the tribunal found that "the Government should be precluded from raising violations of its own law as a defense when, for a substantial period of time it knowingly overlooked them, obtained benefits from them, and it had the power to correct them."⁶⁰⁴

290. Tribunals have also held that a State breaches an investor's legitimate expectation when it changes positions on the legal requirements necessary to obtain a permit. For instance, in *Tethyan Copper v. Pakistan*, the tribunal concluded that a State's denial of a mining permit undermined the investor's legitimate expectations in violation of FET.⁶⁰⁵ In that case, the State "created legitimate expectations on Claimant's part that it would be entitled to convert its exploration license into a mining lease 'subject only to compliance with routine Government requirements'" and breached that expectation when the regional regulatory authority denied the license by applying a separate set of requirements.⁶⁰⁶

⁶⁰³ *RDC v. Guatemala*, Award, ¶ 235 (CL-0049).

⁶⁰⁴ *RDC v. Guatemala*, Award, ¶ 234 (CL-0049).

⁶⁰⁵ *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability, ¶ 958 (CL-0062).

⁶⁰⁶ *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability, ¶ 1264 (CL-0062).

291. Similarly, here, the RGA Lawsuit attempted to change the long-held requirements for the plant environmental permit. After years of laws, resolutions, and reports providing that the Mamacocha Project needed only a DIA to secure this permit, the RGA Lawsuit baselessly sought to revoke this permit based on different rules that had never been applied to the Project, nor any other RER project. Importantly, this measure came after Latam Hydro had reasonably formed the legitimate expectation that its permits were secure and had invested millions of dollars in reliance on that expectation.

292. **Second**, the RGA Lawsuit breached the good faith component under the FET standard. Public documents obtained from the RGA demonstrate that the RGA commenced this Lawsuit for the bad-faith purpose of destroying the Mamacocha Project. Specifically, the December 21, 2017 report – the Regional AG Report – from the Regional Attorney General’s Office to Governor Osorio acknowledges that the Attorney General’s Office had internally concluded the RGA Lawsuit *completely lacked merit*, but the RGA filed the lawsuit nonetheless *only because* the RGA Council had demanded this measure be taken.⁶⁰⁷ Notably, the RGA Council had already been responsible for political attacks against the Project and had made it clear in the press that it would do anything to thwart the Project. Its demand that the RGA Lawsuit be filed arose from an internal “investigation” that, by design, did not notify or include Claimants or anyone sympathetic to the Project. The Regional AG Report states that when the Regional Attorney General’s Office asked the RGA Council to justify the legal or factual conclusions of its Final Report, which had led to filing of the RGA Lawsuit, the RGA Council

⁶⁰⁷ Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

refused to respond on several occasions and acted so evasively that the Attorney General thought the RGA Council, itself, should be investigated.⁶⁰⁸

293. Eventually, the Special Commission hired an independent law firm to assess the merits of the RGA Lawsuit. That firm concluded what the RGA had always known: the RGA Lawsuit was a meritless strike suit designed to destroy the Mamacocha Project. Based on this finding, the Special Commission suggested the RGA withdraw the Lawsuit immediately while pointing out that if it did not, it could face civil and criminal penalties. It was with this backdrop that the Regional Attorney General's Office sent Governor Osorio its Report. The Attorney General's Office made two recommendations. First, withdraw the Lawsuit immediately to avoid incurring civil and criminal penalties. Second, investigate the RGA Council's bad faith, "EVASIVE" conduct.⁶⁰⁹ Within days, Governor Osorio issued the Regional Executive Order that ordered the Lawsuit's dismissal.

294. Tribunals have found that where, as here, a government maliciously tries to impede a project for political reasons such measures are without good faith and in violation of the FET standard. For example, in *Vivendi v. Argentina (II)*, an investor's local subsidiary that had a concession for water distribution and wastewater treatment services was subjected to political advances that unduly manipulated the tariff regime. The tribunal found a breach of FET when the provincial government "improperly and without justification, mounted an illegitimate 'campaign' against the concession, the Concession Agreement, and the 'foreign' concessionaire from the moment it took office, aimed either at reversing the privatisation or forcing the

⁶⁰⁸ Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

⁶⁰⁹ Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095). (emphasis in original)

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concessionaire to renegotiate” lower tariffs.⁶¹⁰ The tribunal concluded that measures that “threat[en]” to renege on contractual commitments for political reasons violate the good-faith component under the FET standard.⁶¹¹

295. Similarly, tribunals have found that where, as here, a State brings a lawsuit against a project without providing proper notice or giving the investor a chance *ex ante* to present its case, the good-faith component of FET has been violated. For example, in *Swisslion v. Macedonia*, the investor executed a contract with a Macedonian government ministry to undertake investments in a food processing company. The Macedonian government brought a lawsuit against the claimant without giving proper notice or engaging in a fair dialogue with claimant before taking this drastic measure. The tribunal found that Macedonia breached the good-faith component of FET because “the State had a duty to deal fairly with the investor by engaging with it, in particular to advise it of any concerns it may have had that the investment might not be in compliance with the investor’s contractual obligations.”⁶¹²

296. Accordingly, Peru breached its duty to treat Latam Hydro’s covered investments with the requisite good faith when it undertook an *ex parte* investigation and then commenced the RGA Lawsuit. The Regional AG Report confirms the RGA knew this lawsuit was meritless and the Regional AG recommended its dismissal when the Special Commission independently concluded the Lawsuit was an unmerited attack on the Project.⁶¹³ Further, the RGA Council’s sham “investigation” and refusal to substantiate the merits of this Lawsuit, even to its own lawyers, underscores the bad-faith nature of this measure.

⁶¹⁰ *Vivendi v. Argentina (II)*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 7.4.19 (CL-0064).

⁶¹¹ *Vivendi v. Argentina (II)*, Award, ¶ 7.4.31 (CL-0064).

⁶¹² *Swisslion v. Macedonia*, Award, ¶¶ 286-287 (CL-0058).

⁶¹³ Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

297. **Third**, the RGA Lawsuit breached Peru's obligation to refrain from taking arbitrary measures. As evidenced by the Regional AG Report and the Regional Executive Order, the RGA Lawsuit had no merit.⁶¹⁴ Its principal argument that the Project required an EIA instead of a DIA went against MINEM's report from January 31, 2012 that stated that projects in the mountains located on unprotected lands required a DIA, not an EIA.⁶¹⁵ Further, this argument contradicted the environmental laws and regulations applicable to renewable energy projects that made clear that projects that were expected to have a minimal impact on the surrounding environment, like the Mamacocho Project, needed only a DIA to secure the permits.⁶¹⁶

298. Last, the RGA's argument was contradicted by the fact that *every hydroelectric project* under the RER Promotion that secured environmental permits did so using a DIA, not an EIA.⁶¹⁷

299. The RGA's other arguments similarly lacked merit. The RGA Lawsuit suggested that the resolutions were improper because they were executed by an ARMA officer that was on vacation at the time, but that same office had issued 109 similar permits in other projects in years prior and neither the RGA nor ARMA challenge those other permits.⁶¹⁸

300. Tribunals have also found arbitrary conduct when the State enacts meritless measures under the guise of formalistic legal justifications. For *example*, in *RDC v. Guatemala*,

⁶¹⁴ Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

⁶¹⁵ MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).

⁶¹⁶ MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).

⁶¹⁷ MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, January 31, 2012 (C-0088).

⁶¹⁸ Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087); Transcript of Councilman Edy Medina Interview, April 11, 2017 (C-0089); Transcript of Councilman James Posso Interview, April 11, 2017 (C-0090).

the investor won a concession to develop and operate railroads. Years into the project, the State brought a lawsuit declaring the concession null and void because it was “*lesivo*” (injurious to the state). The tribunal held the lawsuit was arbitrary in nature because it lacked merit and amounted to an unreasonable attack “under the cloak of formal correctness allegedly in defense of the rule of law.”⁶¹⁹ Further, the tribunal noted that the *lesivo* process, much like the RGA Lawsuit here, “has characteristics which may be easily abused by the Government” because “‘illegality’ having equal status with *lesividad* means that an extraordinary remedy may become routine once any ‘illegality’ of a Government act has been identified by the Government itself.”⁶²⁰

301. Tribunals have also found arbitrary conduct when the State places the investor on a proverbial “roller-coaster” of inconsistent decisions tied to a key permit for the project in question.⁶²¹ For example, in *Crystallex v. Venezuela*, the State reversed a prior decision granting a mining permit, citing environmental concerns.⁶²² The tribunal noted that Venezuela had the authority to raise environmental concerns, but the abrupt reversal of the State’s position “in the Permit denial letter presents significant elements of arbitrariness” because the denial letter raised issues never discussed with the investor.⁶²³

302. A finding of a FET violation is likewise warranted here. The RGA Lawsuit is substantively identical to the “*lesivo*” challenge in *RDC v. Guatemala* because in both instances the State brought a lawsuit to revoke previously granted authorizations on arguments that lacked merit and amounted to nothing but a transparent attempt to end the Project. Similarly, the three-

⁶¹⁹ *RDC v. Guatemala*, Award, ¶ 234 (CL-0049).

⁶²⁰ *RDC v. Guatemala*, Award, ¶ 233 (CL-0049).

⁶²¹ *Crystallex v. Venezuela*, Award, ¶¶ 598-600 (CL-0026).

⁶²² *Crystallex v. Venezuela*, Award, ¶¶ 588-590 (CL-0026).

⁶²³ *Crystallex v. Venezuela*, Award, ¶ 591 (CL-0026).

year gap between the ARMA resolutions and the RGA Lawsuit, coupled with the surprise nature of the RGA's actions, is exactly the type of "roller-coaster" behavior that tribunals have found to be arbitrary in nature.

303. **Fourth**, the RGA Lawsuit breached the transparency component under FET because the RGA never substantiated the basis for this drastic reversal in policy with respect to the Project's environmental permits. Indeed, the Lawsuit, itself, is a six-page document containing only conclusory allegations without citing to any policy changes, environmental studies, or evidentiary documents that supported the argument that the Project should have used an EIA, instead of a DIA, to secure these permits. The only purported basis for this Lawsuit was an internal, *ex parte* "investigation" by the RGA Council in which Claimants were not invited to participate. Far from being transparent, the RGA Council never disclosed the findings of this "investigation" nor the legal bases that substantiated bringing the Lawsuit in the first place. Even the RGA's lawyers were unable to obtain this basic level of transparency from the RGA Council, as confirmed by the Regional AG Report.

304. Tribunals have found that when a government takes inconsistent positions with respect to key permits, the transparency protections under FET are breached. For example, in *Metalclad v. Mexico*, the State granted the investor permits for a landfill project that, according to the State, were sufficient under the governing laws. Relying on those assurances, the investor proceeded to complete the project. Several months thereafter, the municipal government issued a stop-work order on the basis the investor did not secure a municipal construction permit. Based on this set of facts, the *Metalclad* tribunal found a breach of FET under the minimum

standard of treatment because the State had “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment.”⁶²⁴

305. Tribunals also find that measures that put a project in “contractual limbo” violate the transparency component under FET. For example, in *Windstream v. Canada*, the State unexpectedly issued a moratorium on offshore development, which had the effect of canceling claimant’s offshore wind energy project. The tribunal did not find that the decision to impose a moratorium on offshore wind development, or the process that led to it, was, in itself, wrongful.⁶²⁵ However, the tribunal determined that the government had done “little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium.”⁶²⁶ In particular, the tribunal found that the government had failed to clarify the situation, either by promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream’s contract, or by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy and terminating Windstream’s contract in accordance with the applicable law.⁶²⁷ As a result, the tribunal found that Canada breached FET under NAFTA’s minimum standard of treatment because these measures lacked transparency as required under customary international law.⁶²⁸

306. The RGA Lawsuit similarly put the Mamacocha Project in contractual limbo. The Project was on the cusp of achieving Financial Close and beginning construction with the belief that its environmental permits were safe. Once the RGA Lawsuit commenced, however,

⁶²⁴ *Metalclad v. Mexico*, Award, ¶¶ 85-101 (CL-0037).

⁶²⁵ *Windstream v. Canada*, Award, ¶ 376 (CL-0066).

⁶²⁶ *Windstream v. Canada*, Award, ¶ 379 (CL-0066).

⁶²⁷ *Windstream v. Canada*, Award, ¶ 379 (CL-0066).

⁶²⁸ *Windstream v. Canada*, Award, ¶ 380 (CL-0066).

REDACTED VERSION

there was mass confusion as to the viability of the environmental permits, leading to the indefinite cancellation of the financial negotiations and the suspension of the RER Contract. The RGA Council's failure to substantiate this facially inconsistent measure only stoked this confusion, which ultimately resulted in a year-long delay that foreshadowed, and indeed ultimately caused, the end of the Mamacocha Project.

307. **Fifth**, the RGA Lawsuit is also *per se* discriminatory because it specifically targeted the Mamacocha Project. As noted above, every hydro project in the RER Promotion received its plant environmental permit using a DIA. Only the Mamacocha Project was sued for having used a DIA, instead of an EIA. Moreover, as the RGA Council members admitted in public interviews, the RGA Council's challenge to ARMA's authority to issue the Project's environmental permits was the first time such a challenge had been levied, notwithstanding that ARMA had previously issued *109 environmental permits for other projects* before approving the Project's permits.

308. Arbitral practice confirms that in determining whether measures are discriminatory, what matters is the "impact of the measure on the investment."⁶²⁹ For instance, in *Saluka v. Czech Republic*, claimant initiated an investor-State claim due to the Czech National Bank's decision to bail out other banks but not the bank in which claimant had invested.⁶³⁰ The tribunal found the Czech Republic to have breached the prohibition of discrimination under FET by according the investment "differential treatment without a reasonable justification," which, in that case, was the State's failure to provide financial assistance to the investor's bank when other banks had been provided such assistance.⁶³¹ Given the State's failure to offer a "reasonable

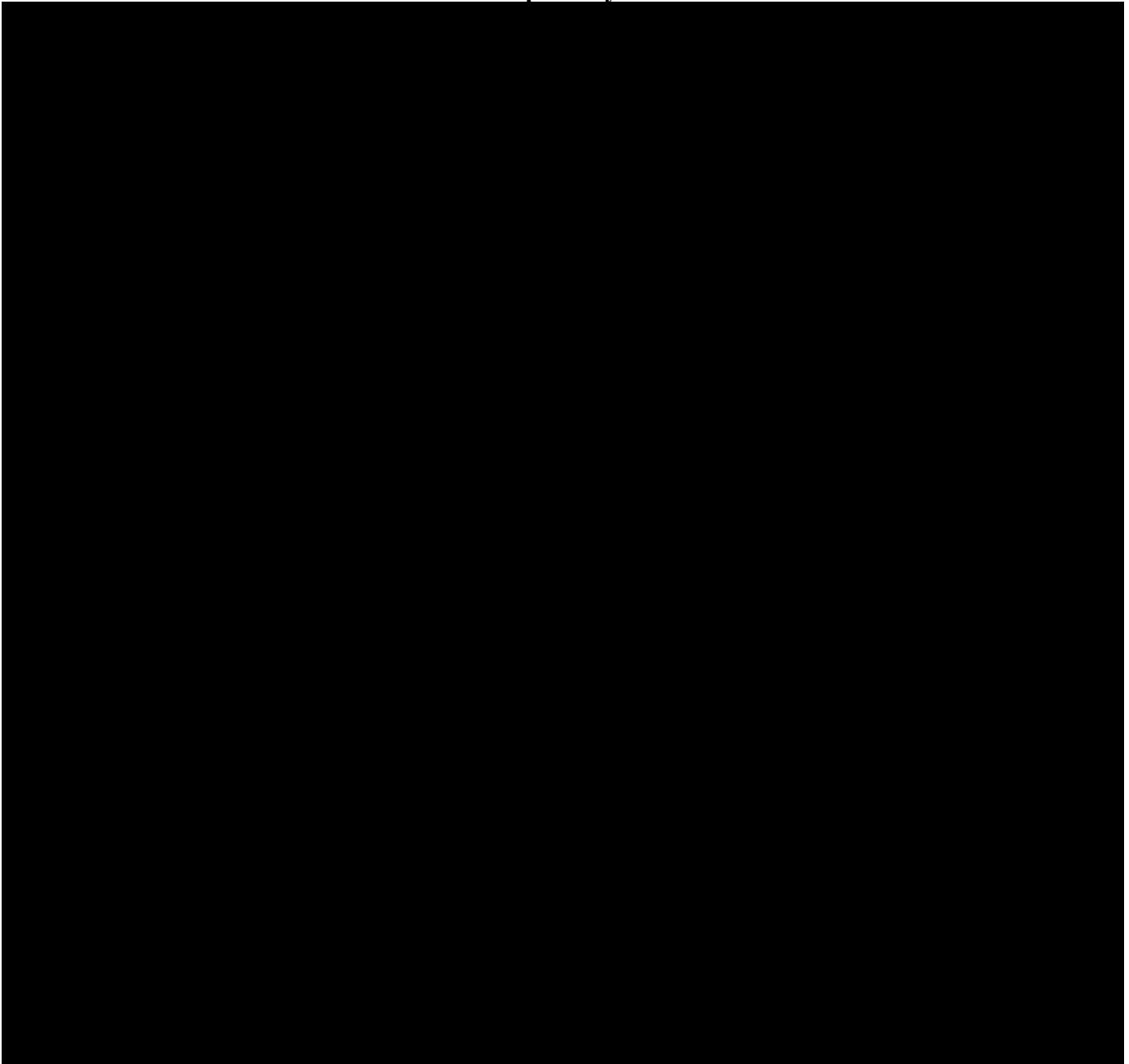
⁶²⁹ *Siemens v. Argentina*, Award, ¶ 321 (CL-0057); see also *LG&E v. Argentina*, Award, ¶ 146 (CL-0034).

⁶³⁰ See *Saluka v. Czech Republic*, Partial Award (CL-0052).

⁶³¹ *Saluka v. Czech Republic*, Partial Award, ¶ 498 (CL-0052).

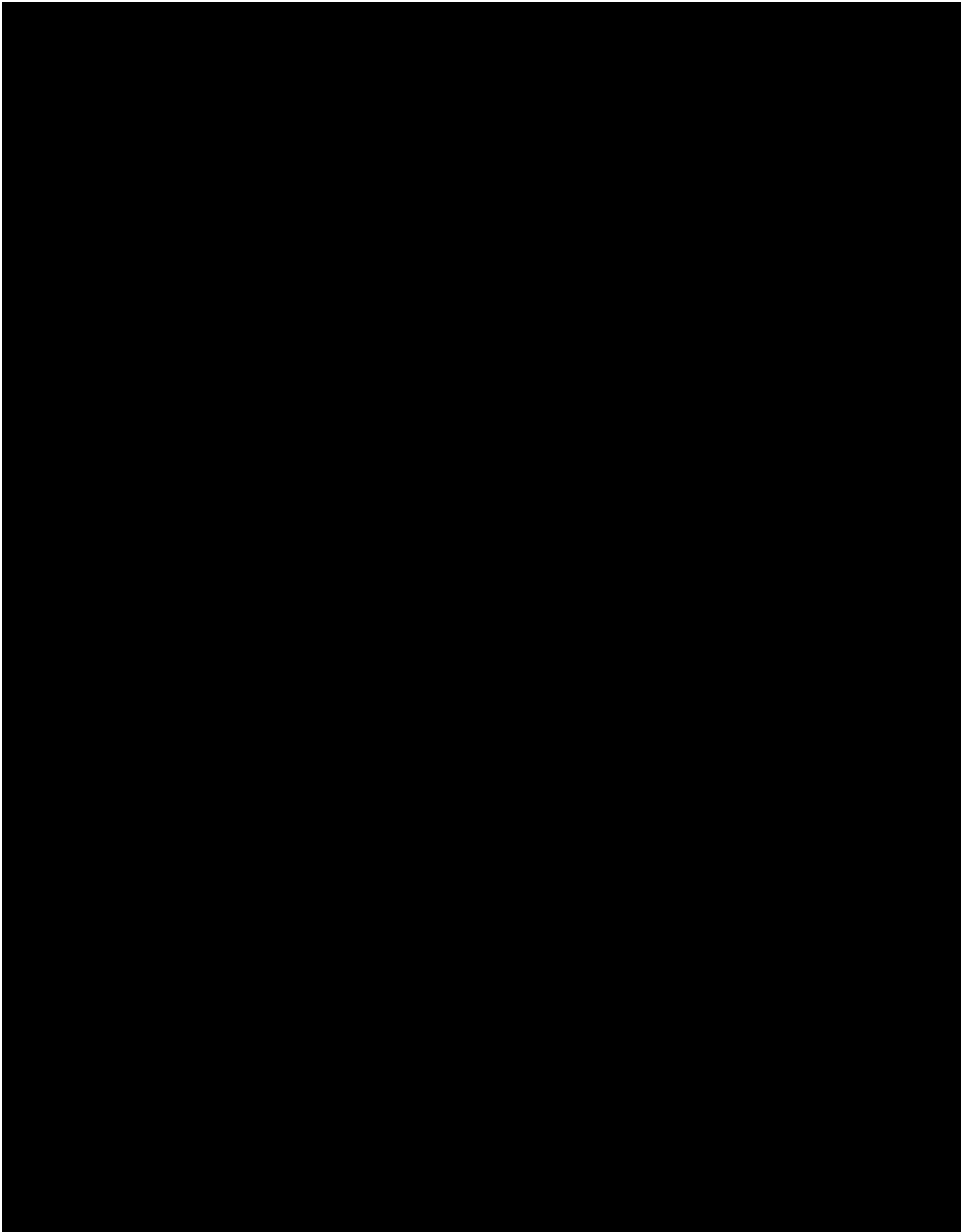
justification” for the investment’s “differential treatment,” the tribunal found the State breached FET for not conducting itself in “an even-handed and consistent manner.”⁶³² Accordingly, Peru’s failure to treat the Project even-handedly without justification similarly violates FET.

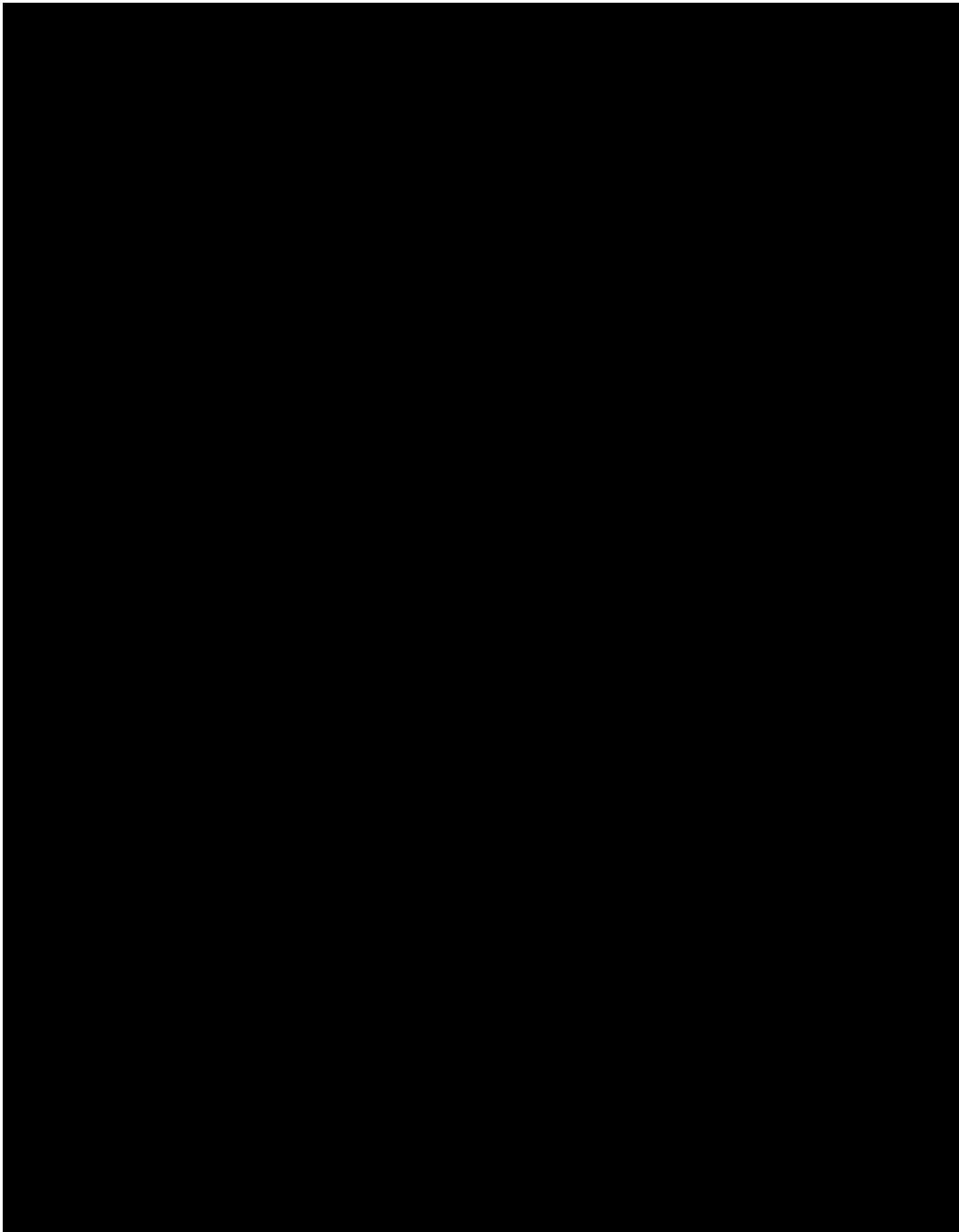
2. The AEP’s Criminal Investigation Is Based on the Since-Dismissed RGA Lawsuit and Separately Violates FET

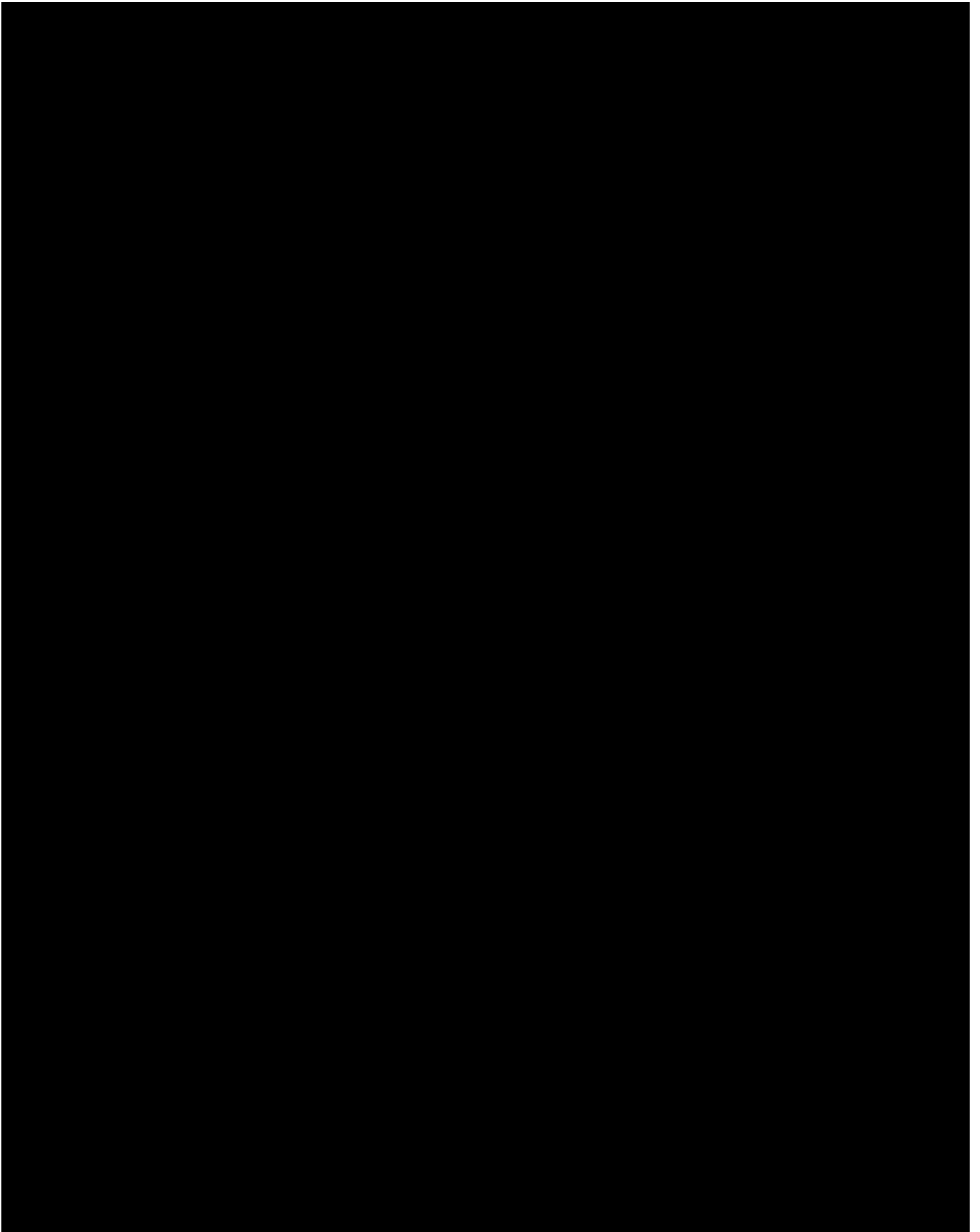


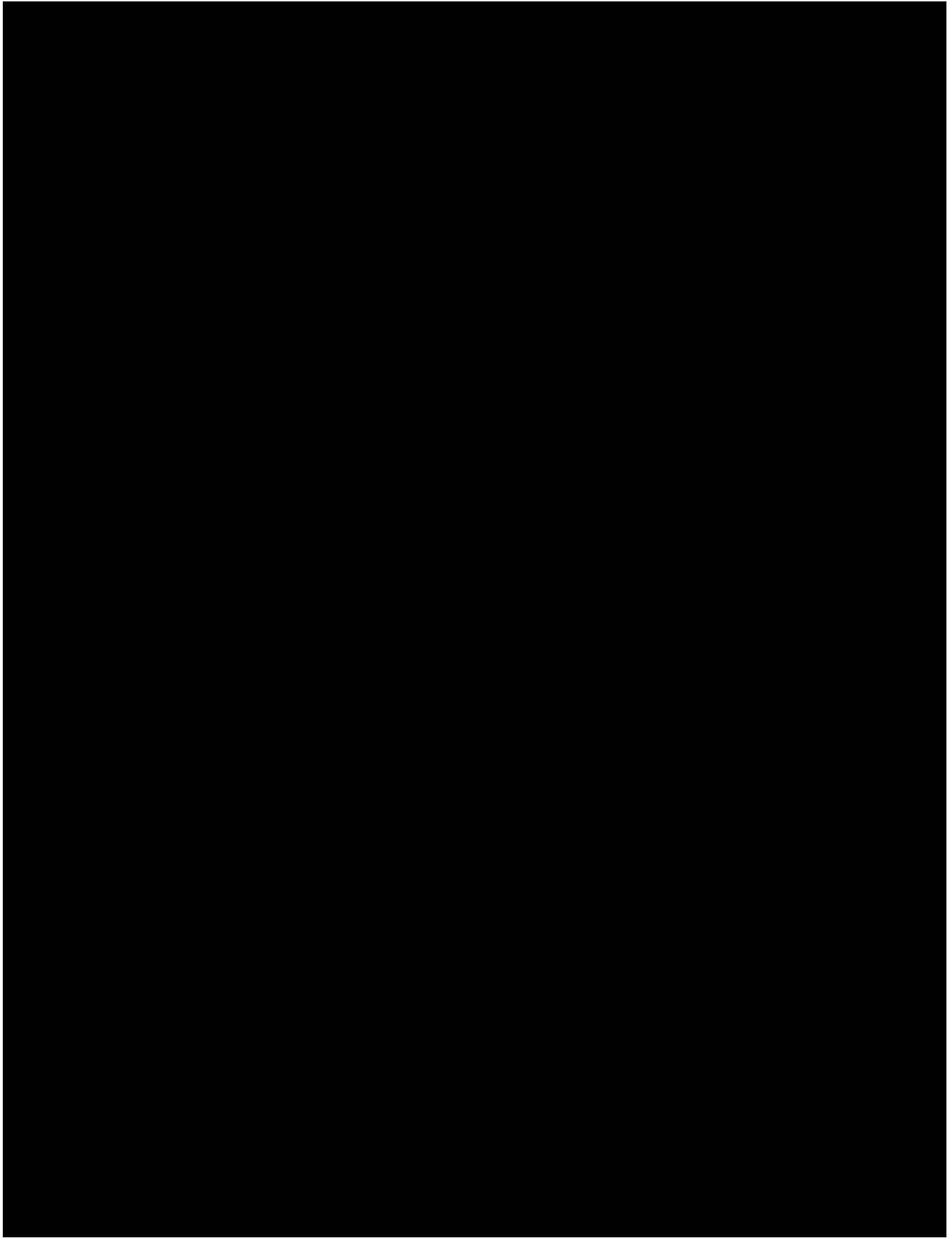
⁶³² *Saluka v. Czech Republic*, Partial Award, ¶ 498 (CL-0052).











3. The AAA Wrongfully Denied and Later Issued a Materially Defective Civil Works Authorization Permit in Violation of FET

321. Peru's measures with respect to the Project's civil works authorization also breached the FET standard under the TPA. This authorization was the last-remaining permit in the Project's critical path. Without it, the Project could not achieve Financial Close or begin its civil works. CHM applied for this permit on November 25, 2016 and reasonably expected its approval by, at the latest, end of January 2017, given that the applicable TUPA regulations prescribed a 20-business day review period and the permitting authority, AAA, was already familiar with the Project from other permitting efforts dating as far back as 2012.⁶⁴⁸

322. But a tragedy of errors ensued. First, AAA far exceeded its review deadlines by more than five (5) months. Then, on May 16, 2017, AAA denied the permit on unlawful grounds, prompting the supervising central authority, ANA, to order AAA to reverse its decision and issue the permit.⁶⁴⁹ On July 5, 2017, AAA issued the permit but with major defects, rendering it useless for the Project. Eventually, on December 20, 2017, ANA ordered AAA to fix the permit and re-issue it to CHM, which AAA finally did in January 2018.

323. Notably, MINEM failed to offer any assistance over the course of this ordeal, notwithstanding its contractual obligation to ensure permits are granted on time. Due to AAA's measures (which occurred over substantially the same period as the meritless RGA Lawsuit), and MINEM's complete inaction, this process delayed the Project by more than a year. These obstructive measures by AAA and MINEM breached several components of the FET standard.

⁶⁴⁸ See, *supra*, Section II.I.

⁶⁴⁹ Directorial Resolution No. 1480-2017-ANA/AAA I C-O, May 16, 2017 (C-0121).

324. **First**, these measures deprived Latam Hydro of its legitimate expectations. Latam Hydro reasonably expected that the AAA would adhere to its TUPA review periods, as such periods are fixed and binding as discussed further in Section V below. AAA’s failure to adhere to this review period further delayed CHM’s ability to close on its financing obligations, which were preconditioned on CHM having all necessary permits in hand. And because time was of the essence under the RER Contract due to the milestone deadlines, enforced by automatic termination and forfeiture of the performance bond, these delays by AAA were a material cause of the eventual impossibility and termination of the Mamacocha Project. Moreover, AAA’s issuance of a defective permit deprived Latam Hydro of its legitimate expectation from the applicable TUPA regulations that the permitting authorities would issue permits that were valid and free from defects.

325. Under similar circumstances in *Clayton/Bilcon v. Canada*, the tribunal found that the State had violated the investor’s legitimate expectations by taking an “unprecedented” approach to an environmental assessment that was inconsistent with the previously existing legal framework for the assessment.⁶⁵⁰ That tribunal concluded that Canada breached FET under the minimum standard of treatment when the government indirectly created the expectation that claimants would “obtain environmental permission” if the project comported with the laws of Canada and Nova Scotia, which “contributed to the Investors’ decision to not only proceed with their business plans, but to invest very substantive corporate resources” only for the government regulator to reject the investor’s permit on vague and unsubstantiated grounds.⁶⁵¹

⁶⁵⁰ *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 446-454 (CL-0020).

⁶⁵¹ *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 446-452 (CL-0020).

326. Similarly, in *Tethyan Copper v. Pakistan*, the tribunal concluded that a State’s denial of a mining permit breached the investor’s legitimate expectations because the investor had reasonably relied on the longstanding regulatory framework under that industry as well as the conduct of government officials who had reviewed claimant’s mining project; and, as a result, the investor diligently made investments to advance its project.⁶⁵² That tribunal found the State breached FET where, as here, it failed to grant a license when the investor had complied with straightforward government requirements.⁶⁵³

327. **Second**, these measures violated the transparency component of FET because the tragedy of errors outlined above put the Project in a “limbo” stage where it had no way of knowing *when* the permit would be granted, *what* defects it would have, or *if* MINEM would lend any assistance. Indeed, the record is replete with instances where Claimants, through no fault of their own, were unable to answer basic questions from prospective investors and lenders about this permit. This lack of transparency is underscored by the fact that every measure that AAA took was ultimately reversed by ANA, creating a situation where even the water authorities were not on the same page as to whether the permit should be granted.

328. As explained in *Metalclad*, the obligation of transparency in permitting procedures involves the State’s “duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.”⁶⁵⁴ In that case, the tribunal found a breach of FET under the minimum standard of treatment because the investor was entitled to rely on assurances by Mexico’s federal and state officials and that Mexico had “failed

⁶⁵² *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability, ¶ 958 (CL-0062).

⁶⁵³ *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability, ¶ 1264 (CL-0062).

⁶⁵⁴ *Metalclad v. Mexico*, Award, ¶ 76 (CL-0037).

to ensure a transparent and predictable framework for Metalclad's business planning and investment."⁶⁵⁵

329. The same is true here. Indeed, the complete lack of transparency by AAA and MINEM resulted in an *entire year* being lost due to the Project. When Claimants asked Peru to reinstate this lost time, Peru refused, notwithstanding its admissions (through ANA) that AAA's measures were meritless.

330. **Third**, these measures are also arbitrary in nature. The original denial on May 16, 2017 was predicated on the argument that CHM had failed to submit information that TUPA required. But, as ANA determined in a May 2017 meeting between CHM and AAA, CHM had complied with its requirements under the TUPA and had at all times acted diligently in obtaining this permit. The July 5, 2017 issuance of a defective permit was also unreasonable. It had the wrong term date, thus rendering it unusable by CHM. And it failed to authorize the construction of key structures that were necessary for the Project. ANA confirmed both of these defects when it ordered AAA to re-issue the permit through a court order on December 20, 2017.

331. This type of "roller-coaster" regulatory conduct is similar to the one that the tribunal found to be arbitrary in *Crystallex v. Venezuela*. As briefed above, this case arose from a mining project in which the investor had applied for a mining permit. Over many months, the State in that case engaged in a series of flip-flopping measures that culminated in the denial of the permit. This tribunal found that this constant changing of positions cannot be rooted on a rational basis and amounts to arbitrary conduct that is violative of FET.

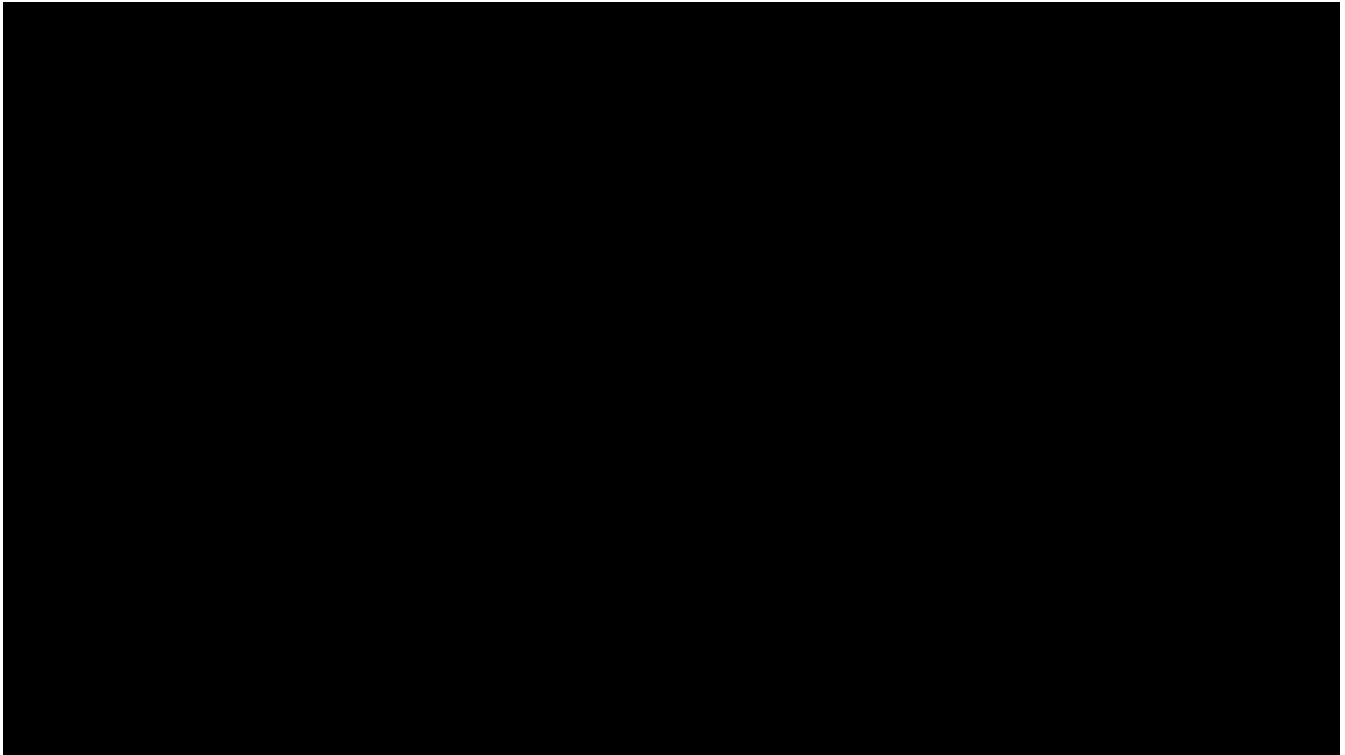
332. **Fourth**, the AAA measures were not undertaken in good faith but, rather, as part of a discriminatory effort to kill the Mamacocha Project. Indeed, in an in-person meeting in late

⁶⁵⁵ *Metalclad v. Mexico*, Award, ¶¶ 85-101 (CL-0037).

2017, AAA confessed to CHM that the reason for AAA’s intransigence with respect to this permit stemmed from the fact that the Mamacocha Project was being sued by the RGA. Given that AAA is a regional licensing body in Arequipa, its conduct and admission to CHM suggests the AAA targeted the Mamacocha Project and used its licensing authority to prevent the Project from moving forward.

333. As argued earlier, the tribunal in *Vivendi v. Argentina (II)* found that a State breaches the good-faith and discrimination components of FET when it enacts measures “improperly and without justification,” as part of an “illegitimate ‘campaign’ against” the project in question.⁶⁵⁶ For these reasons, Peru breached these FET components when AAA tried to block the Project for the illegitimate reason that the RGA wanted the Project to end.

4. Peru Commenced the Lima Arbitration in Violation of FET

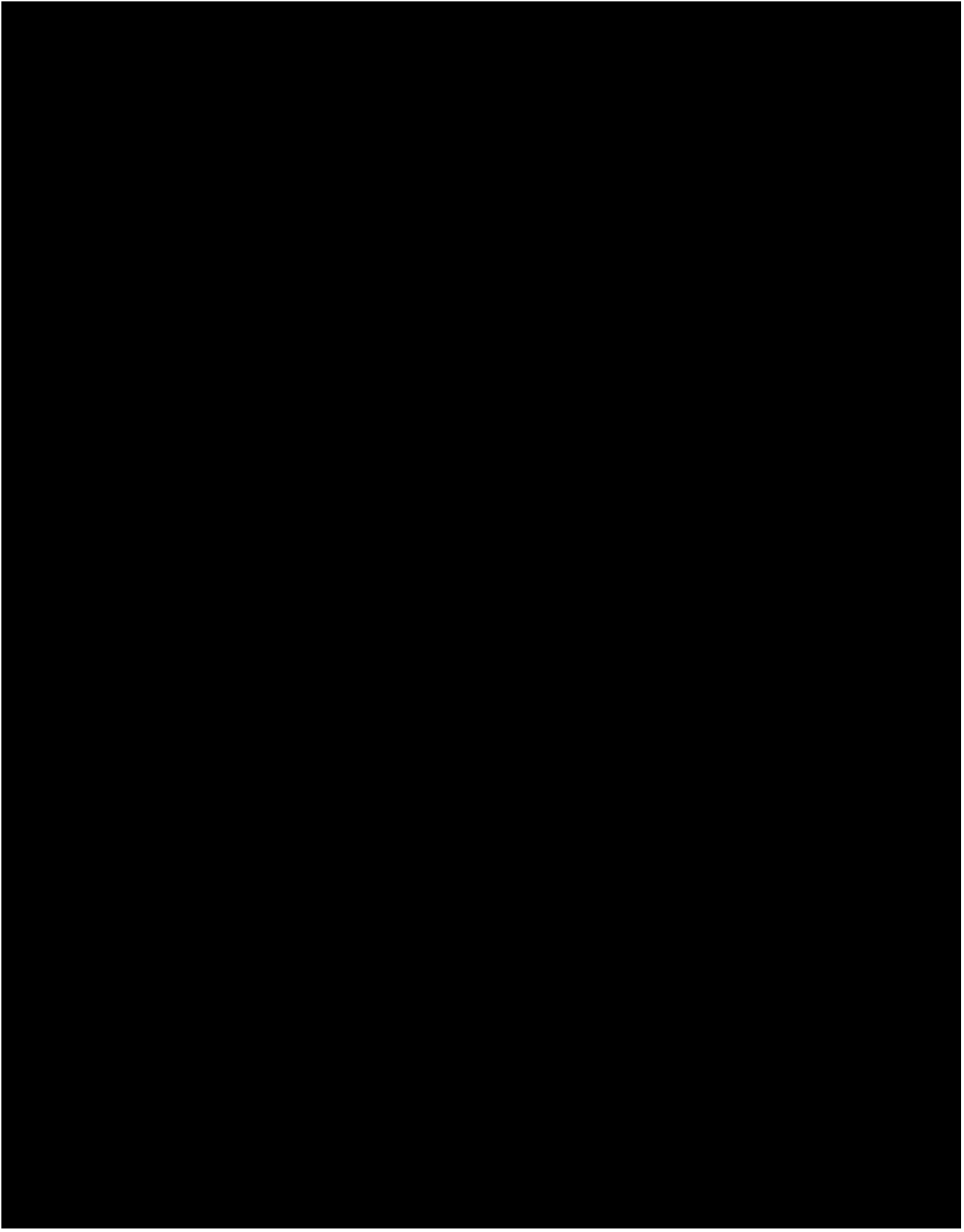


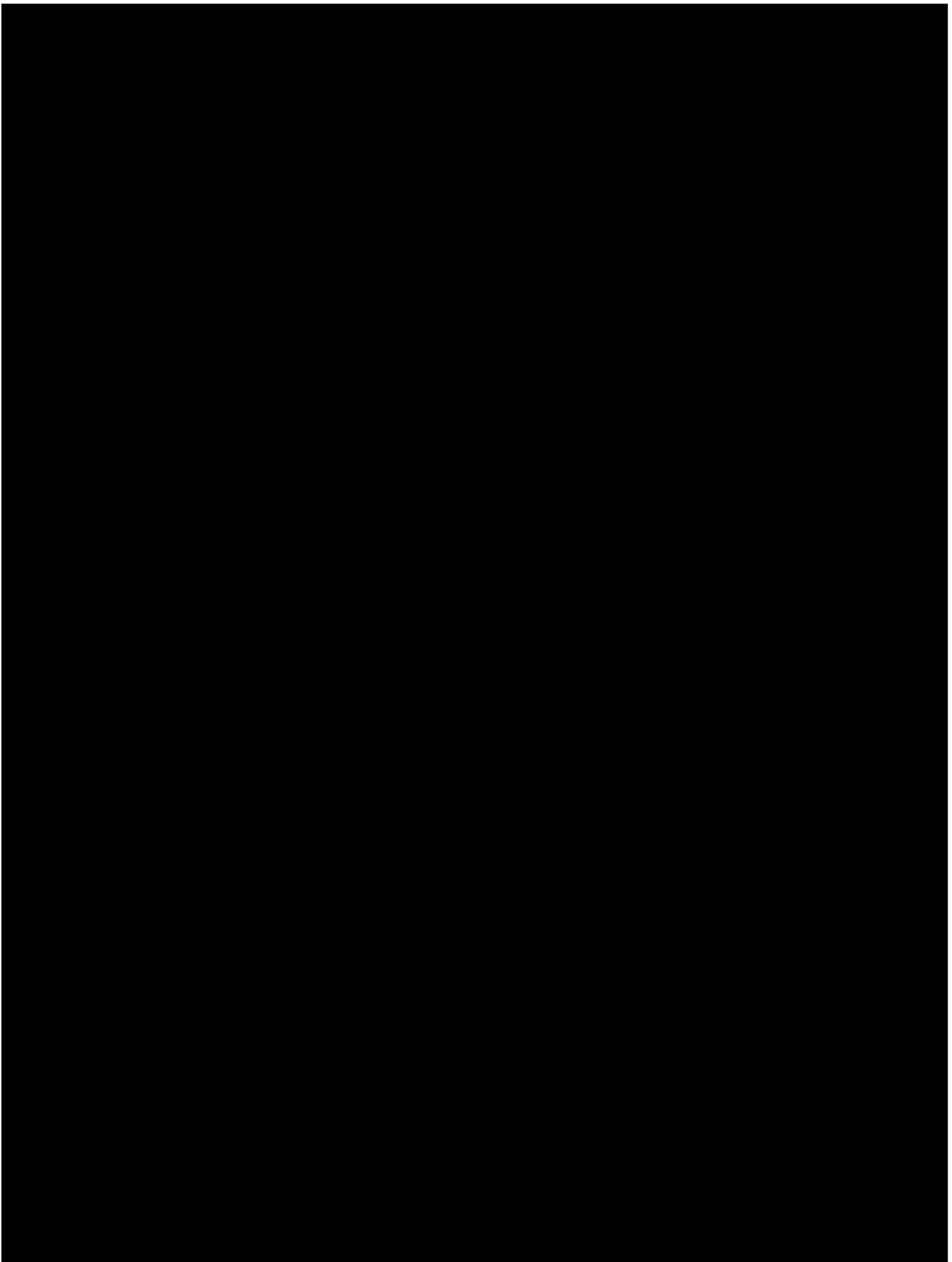
⁶⁵⁶ *Vivendi v. Argentina (II)*, Award, ¶ 7.4.19 (CL-0064).

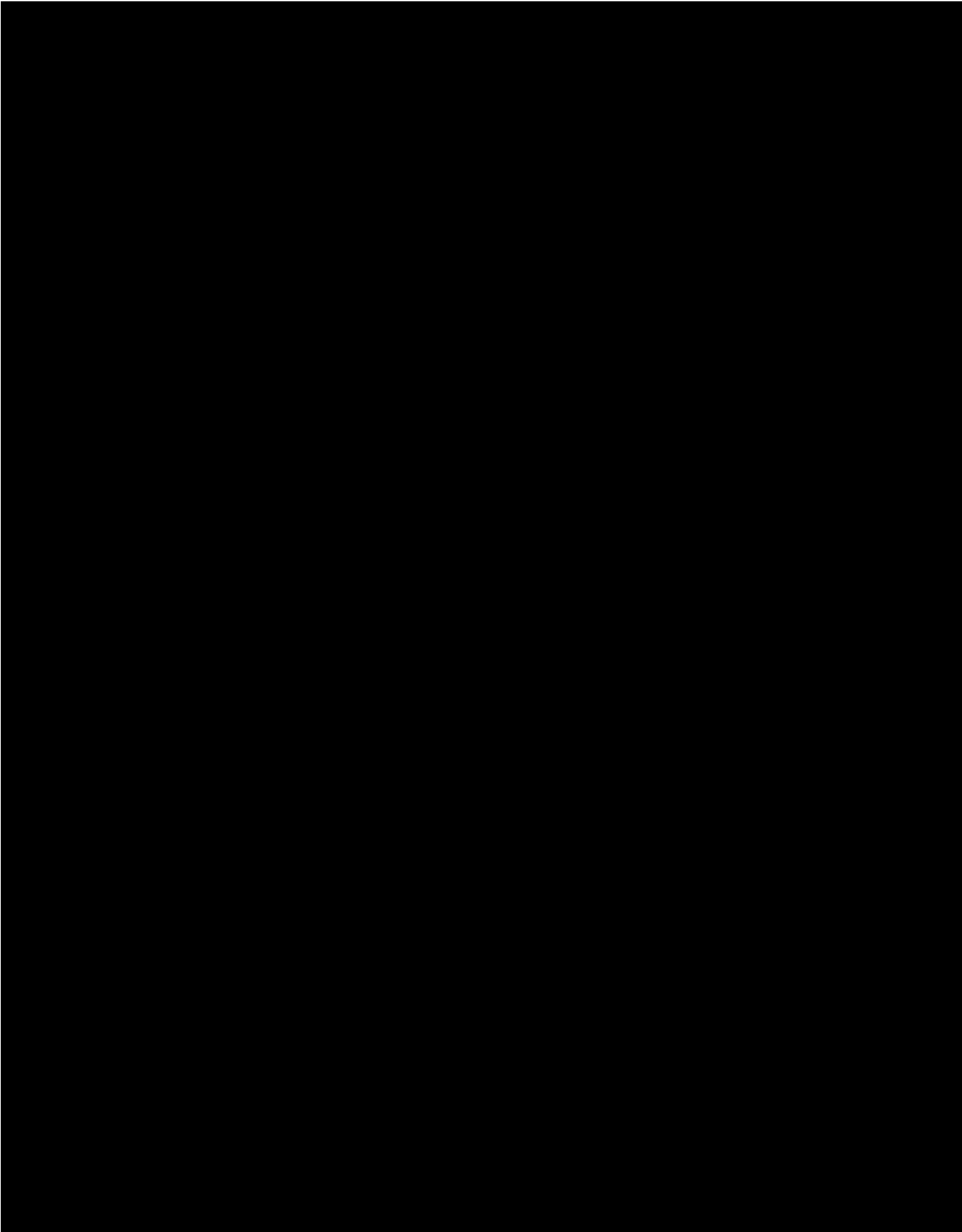
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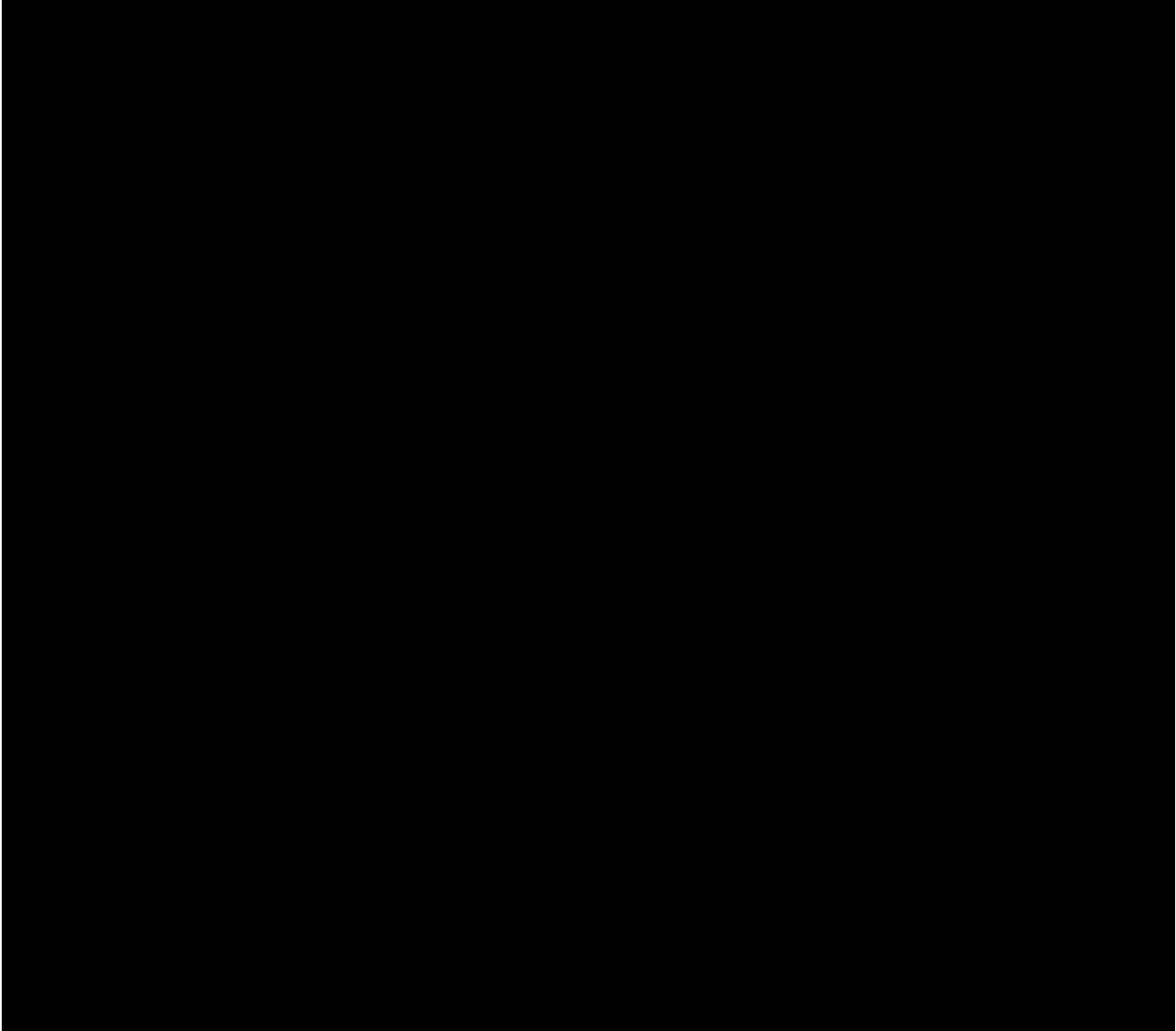
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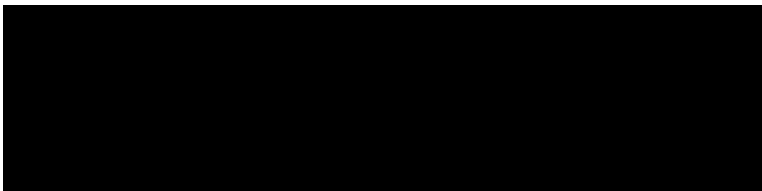






5. By Denying CHM’s Third Extension Request, Peru Also Breached FET

345. Last, but certainly not least, Peru breached its obligation to accord Latam Hydro and its investments FET when it published its report, dated December 31, 2018, rejecting CHM’s



Third Extension Request of February 1, 2018 in its entirety.⁶⁶⁷ This measure rendered the Project impossible to complete and breached the investor's FET protections.

346. Peru argued for the first time in this report that CHM could not obtain further extensions to the COS under the RER Contract, even for periods of time during which Peru, not the concessionaire, was solely responsible for delays and interferences to the Project. This conclusion completely reversed MINEM's prior position under Addenda 1-2, and the myriad resolutions, reports and authorities underlying those Addenda. In rejecting the Third Extension Request, Peru also denied extensions of the term date of the RER Contract to restore to the Project the nearly 17-month period lost while the Project was under a mutually agreed suspension to allow time for the Special Commission to overcome the differences between the RGA, MINEM, and AAA. MINEM's rejection directly contravened its prior positions under Addenda 3-6, which provided that CHM would be held harmless from the impact of the interferences during the suspension period. As shown below, the reversals and circumstances of this measure violated several FET components.

347. **First**, this measure deprived Latam Hydro of its legitimate expectations. MINEM had already established a clear precedent that extensions to the COS would be approved when the government itself was at fault for the delays. The Sosa Report and the various government reports, representations and authorities supporting Addenda 1-2 established an expectation and practice that Peru would hold the concessionaire harmless for interferences of its counter-party, Peru. Addenda 3-6 reaffirmed this expectation. Latam Hydro invested millions of dollars in reliance on these promises.

⁶⁶⁷ See, *supra*, Section II.O.3.

348. Peru’s denial of the Third Extension Request also deprived Latam Hydro of its legitimate expectation that it would benefit from the full 20-year Guaranteed Revenue Concession as long as it performed diligently in compliance with applicable laws. This expectation arose from the public-private nature of the RER Contract, under which CHM and MINEM were supposed to work together to ensure the Project advanced as quickly as possible. The only way MINEM could reduce or terminate this Concession was if CHM delayed the Project or a *force majeure* event occurred. Neither transpired here. But MINEM still concluded that CHM should not receive any extensions and, as a result, lose the entire Concession, thereby rendering the public-private partnership under the RER Contract and Peru’s “guaranteed” Concession entirely meaningless.

349. Tribunals regularly find that when a State upends the entire legal framework under which the investment was predicated, such reversal amounts to a deprivation of the investor’s legitimate expectations. For example, in *Alpha v. Ukraine*, the tribunal concluded that the legitimate expectations protection under FET provides that “governments must avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor.”⁶⁶⁸ Also, in *Clayton/Bilcon v. Canada*, the tribunal held that the State had violated the investor’s legitimate expectations, in breach of the minimum standard of treatment, by taking an “unprecedented” approach to an environmental assessment that was inconsistent with the previously existing legal framework for the assessment.⁶⁶⁹ In the same vein, Peru’s sudden and drastic reversals contained in its December 2018 denial of the Third Extension Request amounted to an improper deprivation of Latam Hydro’s legitimate expectations, in violation of FET.

⁶⁶⁸ *Alpha v. Ukraine*, Award, ¶ 420 (CL-0012).

⁶⁶⁹ *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 446-454 (CL-0020).

350. **Second**, Peru’s denial of the Third Extension Request also lacked transparency. The reasons contained in its denial were entirely new positions that had never been communicated to Claimants during their extensive dealings with MINEM. The timing was also peculiar since, just weeks earlier, MINEM published a “Statement of Reasons” for its proposed Supreme Decree that affirmed that Peru’s obligation under Peruvian and international law to grant extensions to projects to rectify government interferences. MINEM gave the investor no forewarning that it would execute a complete *volte face* on risk allocation under the RER Promotion.

351. Peru’s sudden and unexpected flip-flop on whether and when a RER project would be entitled to an extension of its works schedule placed the Project on the dreaded “roller-coaster” that tribunals regularly find to lack transparency.⁶⁷⁰ For example, in *PSEG v. Turkey*, the tribunal found the State breached FET by changing its official positions on several material aspects of a thermal power plant project, including on material issues relating to the project’s corporate status, concessions, and governing law.⁶⁷¹ The same conclusion applies with equal force here.

352. **Third**, denial of the Third Extension Request was also arbitrary. As explained more fully in Section V below, it is well-settled under Peruvian law that a party to a contract cannot use its own malfeasance to deny the contractual benefits of its counterparty. Yet, that is precisely what Peru did here. There is no reasonable dispute that CHM acted diligently and that all or nearly all delays were attributable solely to Peru. Peru itself admitted so, and this conclusion is reaffirmed by HKA’s expert report on the delays under the Mamacocha Project.

⁶⁷⁰ *Crystallex v. Venezuela*, Award, ¶¶ 598-600 (CL-0026).

⁶⁷¹ *PSEG Global Inc. and others v. Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, ¶¶ 246-251 (CL-0047).

Accordingly, there was no rational basis for Peru’s decision in December 2018 to hold these delays against the concessionaire. Indeed, MINEM’s punitive interpretation of the RER Contract would render meaningless the protections undergirding the entire legal framework of the RER Promotion because, rather than protect investors, this framework would expose them to the unknowable and unforeseeable risk that Peru could interfere with the RER project with impunity and without any recourse to the investor. If this were the legal framework supporting the RER Promotion, the projects would not be “bankable,” as they would present an unacceptable and unpredictable risk of government meddling – or in the words of Dr. Santivanez, “regulatory opportunism.”

353. As laid out by the tribunal in *LG&E v. Argentina*, the State conducts itself arbitrarily through measures without “a rational decision-making process” that fails to consider “the effect of a measure on foreign investments and a balance of the interests of the State with any burden on such investments.”⁶⁷² Accordingly, MINEM’s irrational decision to refuse to extend the Mamacocha Project despite admitted government interference amounts to arbitrary conduct that is violative of FET

354. **Fourth**, the denial of the Third Extension Request also lacked good faith. As Dr. Santiváñez explains, MINEM’s denial is not based on a good-faith interpretation of the RER Contract. Rather, this denial is a textbook example of “regulatory opportunism” under which MINEM believed it was politically advantageous to let the RER projects fail because saving them meant Peru would be facing an over-supply crisis in its energy sector. This over-supply had been caused due to lower-than-expected consumer demand and the rise of the natural gas industry. As Dr. Santiváñez put it, “it was a lot easier and less costly to pick a fight with a dozen

⁶⁷² *LG&E v. Argentina*, Award, ¶ 158 (CL-0034).

or so concessionaires of small hydroelectric projects accounting for 200 to 300 MW of renewable power capacity, than to confront a handful of transnational power utilities and companies that had already built about 3,500 MW of natural gas power generation in Peru.”⁶⁷³

355. Peru’s regulatory opportunism undermines the good-faith component. Indeed, tribunals have recognized that where there are significant political interferences to undermine a concession, a State breaches FET not only for those interferences but also for a failure to renegotiate the concession in good faith.⁶⁷⁴ Furthermore, tribunals have found that a State cannot rely on its own wrongful conduct or inconsistent acts to the detriment of the other party.⁶⁷⁵ For these reasons, Peru’s denial of the Third Extension Request breached FET under the TPA.

C. Peru’s Measures Have Indirectly Expropriated the Mamacocho Project by Substantially Depriving Latam Hydro of the Value of Its Investments in Violation of Article 10.7 of the TPA

356. Claimants’ expropriation claim is straightforward. In early 2017, the Mamacocho Project had all of its concessions, more than sufficient time to achieve commercial operation by the amended deadline of March 14, 2020, and a highly profitable and commercially viable RER project that was receiving bids from world-class hydropower companies and contractors as well as project-financing terms from some of the most highly regarded and reputable banks and lenders. But in March 2017 everything changed when Peru commenced the RGA Lawsuit – a meritless and specious attack on the Project’s environmental permits. The bad news only got worse when Peru commenced a criminal investigation against the Project and formally denied the last-remaining permit in the Project’s critical path. Claimants’ negotiations with interested investors, lenders, and contractors came to a screeching halt. The Project did not end there only

⁶⁷³ Santivnez I, ¶ 74.

⁶⁷⁴ *Vivendi v. Argentina (II)*, Award, ¶ 7.4.31 (CL-0064).

⁶⁷⁵ *CME v. Czech Republic*, Final Award, ¶ 488 (CL-0021).

because Claimants convinced Peru to suspend the RER Contract and dismiss the RGA Lawsuit. But the Project needed an extension to account for the year the Lawsuit had taken away.

357. Peru promised to extend its deadlines to account for this governmental interference. [REDACTED]

[REDACTED]

[REDACTED]. As of December 31, 2018, the Mamacocho Project and Upstream Projects were, for all intents and purposes, over.

358. Accordingly, over an eighteen-month period from March 2017 to December 2018, Peru's measures wiped Latam Hydro's covered investments of nearly all of their economic value. Peru has never compensated Latam Hydro for these losses nor provided a valid public purpose for these measures. Accordingly, as explained below, these measures, taken together, constitute an unlawful indirect expropriation under the TPA and international law.⁶⁷⁶

1. Indirect Expropriation Under Article 10.7 of the TPA and International Law

359. Article 10.7(1) of the TPA broadly prohibits Peru from taking wrongful actions that deprive a U.S. investor of the economic value of its covered investments without adequate compensation. Article 10.7(1) provides in full that:

Article 10.7: Expropriation and Compensation

⁶⁷⁶ Claimants hereby reserve their right to pursue a claim for direct expropriation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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 purpose⁶⁷⁷;
- (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 10.5.⁶⁷⁸

360. Annex 10-B of the TPA provides additional clarity as to what measures amount to an expropriation under Article 10.7(1). Annex 10-B provides in full that:

Annex 10-B Expropriation

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 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;

⁶⁷⁷ Footnote 5 to Article 10.7(1)(a) reads in full: “For greater certainty, for purposes of this article, the term ‘public purpose’ refers to a concept in customary international law. Domestic law may express this or a similar concept using different terms, such as ‘public necessity,’ ‘public interest,’ or ‘public use.’” TPA, Art. 10.7(1)(a), fn. 5 (C-0001).

⁶⁷⁸ TPA, Art. 10.7(1) (C-0001).

(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.⁶⁷⁹

361. Accordingly, the TPA expressly prohibits Peru from enacting a measure, or a series of measures, that amounts to an indirect expropriation of Latam Hydro's investments. The relevant questions under the TPA are how this measure, or series of measures, impacted the economic value of these investments, whether Peru interfered with Latam Hydro's legitimate expectations on which it made its investments, and if Peru's measures were for a *bona fide* public purpose that is non-discriminatory.

362. The second factor in Annex 10-B, interference with "distinct, reasonable investment-backed expectations," involves an analysis akin to legitimate expectations under FET, and thus Claimants refer the Tribunal to Section IV.A, *supra*. Moreover, the third factor under Annex 10-B of the TPA, which analyzes the "character" of the government measure and, specifically, whether it was discriminatory in nature, involves an analysis akin to the discriminatory and good-faith components under the FET standard. Hence, Claimants refer the Tribunal to Section IV.B, *supra*, which demonstrate that Peru's measures targeted the Mamacocha Project in an unlawful manner and without a good-faith reason.

363. The first factor under Annex 10-B, which looks to the economic impact of the measures in question, is the "decisive criterion" for an indirect expropriation assessment.⁶⁸⁰ Investment tribunals regularly hold that a measure constitutes an indirect expropriation when it

⁶⁷⁹ TPA, Annex 10-B (C-0001). (emphasis added)

⁶⁸⁰ *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007, ¶ 240 (CL-0079).

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leads to a “substantial” deprivation of the economic value of an investment.⁶⁸¹ Moreover, a substantial deprivation may be caused by a temporary measure, provided that the deprivation is permanent.⁶⁸² This occurs where there is no immediate prospect that the investment’s value can be recovered,⁶⁸³ such as, for example, where the investment’s success is tied to a fixed timeline that can no longer be met.⁶⁸⁴ Furthermore, it makes no difference whether the deprivation was caused by actions or inactions, as both modes of conduct can result in a *de facto* expropriation.⁶⁸⁵

364. Tribunals have held that an indirect expropriation occurred when a State takes steps to revoke or deny permits, concessions and, authorizations that were necessary or critical for the project to move forward. For example, in *Bear Creek v. Peru* – a case under the Canada-Peru BIT whose expropriation provisions are identical to those under the TPA – the tribunal found that Peru indirectly expropriated the investment when it reversed its prior approval of the investor’s mining concession for political reasons, “depriv[ing] Claimant of all the major legal rights it had obtained and needed for the realization of its mining Project.”⁶⁸⁶ Similarly, in *Metalclad v. Mexico*, the tribunal found that Mexico had indirectly expropriated an investment because it refused to issue the key permit that allowed the claimant to operate the landfill project in question.⁶⁸⁷ Also, in *Tethyan Copper v. Pakistan*, the tribunal found Pakistan liable for an indirect expropriation when its provincial government capriciously denied the investor’s joint

⁶⁸¹ See *Burlington Resources. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012 ¶¶ 396-398 (CL-0080); *Alpha v. Ukraine*, Award, ¶ 408 (CL-0012); *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, February 17, 2000, ¶ 77 (CL-0081); *Vivendi v. Argentina (II)*, Award, ¶ 7.5.11 (CL-0064).

⁶⁸² See *Quiborax S.A., Non-Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, fn. 224 (CL-0048) (“Generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment’s successful development depends on the realization of certain activities at specific moments that may not endure variations.”) (internal citation omitted).

⁶⁸³ See *CME v. Czech Republic*, Partial Award, ¶ 607 (CL-0022) (“[T]here is no immediate prospect at hand that CNTS will be reinstated in a position to enjoy an exclusive use of the licence as had been granted.”).

⁶⁸⁴ *Quiborax v. Bolivia*, Award, fn. 224 (CL-0048).

⁶⁸⁵ See *Metalclad v. Mexico*, Award, ¶¶ 102-112 (CL-0037).

⁶⁸⁶ *Bear Creek v. Peru*, Award, ¶ 375 (CL-0016).

⁶⁸⁷ *Metalclad v. Mexico*, Award, ¶ 104 (CL-0037).

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venture and subsidiary a critical license, which “rendered it impossible for Claimant to make use of the information and data it had collected and thereby also rendered Claimant’s interest in [its investments] useless.”⁶⁸⁸ Finally, in *Tecmed v. Mexico*, the tribunal concluded that a regulatory agency’s denial of a permit renewal constituted an indirect expropriation because the denial “irremediably destroyed . . . the economic or commercial value directly or indirectly associated with [the landfill’s] operations and activities and with the assets earmarked for such operations and activities.”⁶⁸⁹

365. An indirect expropriation can also occur when the State undertakes “a series of cumulative steps which, taken together,” have the effect of substantially depriving the covered investments of their economic value. Under this type of indirect expropriation, commonly referred to as a “creeping expropriation,”⁶⁹⁰ “the relevant focus of the inquiry for this purpose is the effect or result of the measure,” which is the same under an indirect expropriation inquiry.⁶⁹¹ Indeed, a “creeping expropriation is a particular type of indirect expropriation, which requires an inquiry into the particular facts” and the use of “creeping” used to “describe this type of expropriation indicates that the entirety of the measures should be reviewed in the aggregate to determine their effect on the investment rather than each individual measure on its own.”⁶⁹² Underscoring this fact-intensive inquiry into the host State’s conduct, eminent scholars have explained:

. . . A creeping expropriation therefore denotes, in the paradigmatic case, an expropriation accomplished by a *cumulative series of regulatory acts or omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event*

⁶⁸⁸ *Tethyan Copper v. Pakistan*, Decision on Jurisdiction and Liability, ¶¶ 1328-1329 (CL-0062).

⁶⁸⁹ *Tecmed v. Mexico*, Award, ¶ 117 (CL-0059).

⁶⁹⁰ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed. 2012), p. 125 (CL-0078).

⁶⁹¹ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina*, ICSID Case No. ARB/09/01, Award, July 21, 2017, ¶ 948 (CL-0082).

⁶⁹² *Teinver v. Argentina*, Award, ¶ 948 (CL-0082).

*that deprived the foreign national of the value of its investment. Moreover, they may be interspersed with entirely lawful state regulatory actions.*⁶⁹³

366. For example, in *Siemens v. Argentina*, Siemens' wholly owned Argentinean subsidiary won a tender and concluded a contract with the government to provide immigration and identification technology.⁶⁹⁴ But, over the course of two years, the government took a series of measures that postponed and suspended the subsidiary's operations, resulting in fruitless contractual renegotiations and cancellation of the project.⁶⁹⁵ The tribunal held Argentina liable for a creeping expropriation, explaining the concept in the following terms:

[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.⁶⁹⁶

367. As explained below, Peru engaged in numerous instances of expropriatory conduct that, whether viewed in isolation or as cumulative acts, had the effect of rendering Latam Hydro's interest in CHM meaningless.

2. Peru Has Indirectly Expropriated Latam Hydro's Rights in the Mamacocha Project

368. Peru's measures against the Mamacocha Project, taken together, amounted to an indirect expropriation, as described under the TPA and relevant jurisprudence, because they: (i) substantially deprived Latam Hydro's covered investments of their economic value; and (ii)

⁶⁹³ W.M. Reisman and R.D. Sloane, "Indirect Expropriation and its Valuation in the BIT Generation," 74 BYBIL 115 (2004), pp. 123-125, 128 (emphasis added).

⁶⁹⁴ *Siemens v. Argentina*, Award, ¶¶ 81-97 (CL-0057).

⁶⁹⁵ *Siemens v. Argentina*, Award, ¶¶ 81-97 (CL-0057).

⁶⁹⁶ *Siemens v. Argentina*, Award, ¶ 263 (CL-0057).

breached Latam Hydro's legitimate, investment-backed expectations. Regarding the second element, Claimants refer the Tribunal to Section IV.B, *supra*, in which they demonstrate that Peru's measures breached Latam Hydro's legitimate, investment-backed expectations.

369. As to the issue of economic value, it is beyond cavil that Latam Hydro's covered investments had considerable economic value prior to the government measures at issue in this arbitration. As of March 2017, the Mamacocha Project had a Guaranteed Revenue concession that was estimated to result in more than US \$160 million in gross revenue over the 20-year concession term, plus significant economic prospects for the balance of its anticipated lifespan.⁶⁹⁷ With one exception, the Project had obtained all concessions, permits, and authorizations that were necessary to construct and operate the contemplated hydroelectric plant and transmission line. Every expert that analyzed the Project concluded that its design was feasible from a technical, environmental, geological, hydrological, and social perspective. The neighboring village of Ayo supported the Project in overwhelming numbers. And, most importantly, the Project had just received extensions under Addendum 2 that gave it more than enough time to close on its project finance negotiations, finish construction, and achieve commercial operation. For these reasons, as of March 14, 2017, the Mamacocha Project was estimated to have had a fair market value of approximately US \$47,049,000.⁶⁹⁸

370. The Project's economic value was in many ways inextricably tied to the RER Contract's commercial operation date. Indeed, if the Project did not achieve commercial operation by the COS, the RER Contract, by its own terms, would terminate automatically. Without the RER Contract, there is no Guaranteed Revenue Concession. Without this Concession, there is no way to secure the project finance loan that is needed to build the

⁶⁹⁷ See, *supra*, Section VI.

⁶⁹⁸ See, *supra*, Section VI.

Mamacocha Project. And, without the Mamacocha Project, the investments Latam Hydro had made in furtherance of that Project and the related Upstream Projects would be rendered effectively worthless.

371. This position is not controversial. When the regional permitting agencies and MINEM interfered with the early phases of the permitting process, causing years-long delays, MINEM granted extensions to the commercial operation deadline for the stated reason that these extensions were necessary to keep the Project commercially viable. And, in November 2018, when MINEM proposed a supreme decree designed to extend the relevant dates under the RER Contract, it specifically noted that without such extensions the relevant projects would end. In short, for the Mamacocha Project, time was always of the essence.

372. It is for this reason that the RGA Lawsuit was so devastating and, on its own, substantially deprived the Mamacocha Project of its economic value. When the Lawsuit was filed on March 14, 2017, Claimants were on the precipice of obtaining a project finance loan from DEG and well on pace to build the Project and achieve commercial operation by the contractual deadline of March 14, 2020.⁶⁹⁹ But the Lawsuit froze all financial negotiations because it attacked the environmental permits for the Project. Without these permits, the Project's power-generation and transmission concessions would be voided and the Project would have to re-start its permitting efforts from scratch. Even though it was clear to everyone involved that the Lawsuit was meritless – a fact that Peru later acknowledged when it ordered its dismissal – no reasonable bank (including DEG) would have loaned the Project the US \$60 million it needed while a lawsuit of this magnitude was pending, particularly because all banks require the permitting phase to be complete before extending a non-recourse project finance loan.

⁶⁹⁹ *See, supra*, Section II.H.

373. The injurious effects of the RGA Lawsuit were compounded when AAA denied the civil works authorization – the last-remaining critical permit for the Project – in May 2017.⁷⁰⁰ This measure was a complete surprise given that AAA had all the necessary information and had previously approved all other water-related permits. This remaining authorization should have been a formality. But the regional governmental opposition to the Project infected this permitting process, as evidenced by the AAA’s statements to CHM that the permit was denied, at least in part, due to the RGA Lawsuit. When ANA ordered AAA to reverse its decision and grant the civil works authorization, AAA issued a materially defective permit that stripped the Project of more of its precious time.

374. In December 2017, Peru acknowledged that the RGA Lawsuit and AAA’s series of measures were arbitrary and discriminatory. That month, the RGA Governor ordered the Lawsuit’s dismissal on account that it lacked merit and subjected Peru to reputational harm and the ANA administrative court ruled that AAA had to fix its defective civil works authorization immediately.⁷⁰¹ These events were well-received by Claimants. But these events did not cure the injurious effects caused by Peru’s measures. For that to happen, CHM needed extensions to its commercial operation and term dates under the RER Contract to account for the time that these measures took away from the Project. Moreover, without an extension to COS beyond March 14, 2020, the timetable would have been impossible to meet. It is for this reason that CHM requested a third set of extensions on February 1, 2018. And, when Peru failed to respond to that request in a timely manner, Claimants served Peru with a Notice of Intent that identified that if Peru did not grant this set of extensions it would substantially deprive the Project of its economic value.

⁷⁰⁰ See, *supra*, Section II.H.

⁷⁰¹ See, *supra*, Section II.K.

375. Peru's measures in December 2018 confirmed the indirect expropriation of Latam Hydro's investments because they made it clear that Peru would not be restoring the time that the RGA Lawsuit and other related measures had taken away from the Project. [REDACTED]

[REDACTED] Because of these measures, time had officially run out on the Mamacocha Project and Upstream Projects and, as a result, Latam Hydro's investments under those Projects had been substantially deprived of the economic value they had just eighteen (18) months earlier, before the filing of the RGA Lawsuit.

3. Peru's Indirect Expropriation Was Unlawful and Does Not Fall Under Any Exception Under Article 10.7(1) of the TPA

376. Peru's indirect expropriation of Latam Hydro's covered investments is not "lawful" because it does not fall within the stated exceptions under Article 10.7.1 of the TPA. As explained above, Article 10.7(1) excuses expropriatory conduct when it is "(a) for a public purpose [in accordance with customary international law]; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 10.5."⁷⁰² Notably, every element in Article 10.7.1 must be met in order to be considered lawful. But, as set forth below, none of these elements apply here.

377. **First**, Peru's expropriation of Latam Hydro's covered investments was not undertaken for a valid public purpose. Investment tribunals that have analyzed this exception to an unlawful expropriation have found that where State actions "expropriate particular alien property interests, and are not merely the incidental consequences of an action or policy designed for an unrelated purpose, the conclusion that a taking has occurred is all the more evident."⁷⁰³

⁷⁰² TPA, Art. 10.7.1 (C-0001).

⁷⁰³ *Phillips Petroleum Co. Iran v. Iran & Nat'l Iranian Oil Co.*, Award No. 425-39-2, 21 Iran-U.S. Cl. Trib. Rep. 79, June 29, 1989, ¶ 97 (CL-0045).

Moreover, in assessing the character of the government's actions, tribunals have also considered "whether such actions . . . are proportional to the public interest presumably protected thereby and to the protection legally granted to investments."⁷⁰⁴

378. As set out above, the RGA Lawsuit and AAA's measures were the result of politically motivated, discriminatory attacks by regional governmental bodies aimed at destroying the Mamacocha Project. Peru acknowledged as much when it found both sets of measures to be entirely arbitrary and ordered their immediate dismissal or reversal.⁷⁰⁵ Hence, it cannot be disputed that these measures were not undertaken for a valid public purpose since they were enacted for the *only* reason of expropriating Latam Hydro's economic interests.

379. The same is true for Peru's measures in December 2018, which failed to restore the time that the earlier measures had taken away from the Project. Just weeks before those measures took place, Peru publicly announced that the public interest would be served if Peru were to extend the relevant deadlines under the RER Contracts and keep the RER Promotion projects alive. Its decision to do a complete about-face and abandon this stated public interest was not done for a public policy reason incidental to expropriating Latam Hydro's investments. To the contrary, Peru explained in its report denying CHM's third extension request that its decision was made, in part, so that it *could collect the performance bond money* that Latam Hydro invested under the RER Contract. Moreover, as Dr. Santiváñez explains, Peru's sudden reversal on its obligation to extend RER projects was not made for a valid reason but, rather, amounts to regulatory opportunism resulting from an over-supply crisis in the energy sector.

380. **Second**, Peru's measures were discriminatory on their face. Claimants hereby incorporate the arguments in Section IV.B, which set forth that the measures that robbed the

⁷⁰⁴ *Tecmed v. Mexico*, Award, ¶ 122 (CL-0059).

⁷⁰⁵ *See, supra*, Section II.K.

Mamacocha Project of its time in 2017 – *i.e.*, the RGA Lawsuit, measures by AAA, and criminal proceedings by the AEP – were enacted in a discriminatory manner.

381. **Third**, it is indisputable that Peru has not offered Latam Hydro any compensation for this expropriation. The failure to accompany an expropriation with a provision for the payment of just compensation is unlawful *per se* under the TPA.

382. **Fourth**, as demonstrated in Section IV.B, *supra*, Peru’s measures against the Project entirely lacked transparency and violated Claimants’ due process rights.

D. Peru Has Treated Latam Hydro and Its Investments Less Favorably Than It Treats Investors and Investments from Other States in Violation of Article 10.4 of the Treaty

383. Peru has also breached the TPA by treating Latam Hydro and its investments less favorably than it treats investments from other States. Articles 10.4(1) and 10.4(2) of the TPA require Peru to accord U.S. investments and investors the ability to import more favorable treatment that Peru has granted to investors of other States. Articles 10.4(1) and 10.4(2) read:

Article 10.4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.⁷⁰⁶

384. Claimants observe that the most-favored-nation (“MFN”) provisions as contained in Articles 10.4(1) and 10.4(2) expressly apply to both investors and investments. In addition,

⁷⁰⁶ TPA, February 1, 2009, Arts. 10.4.1-10.4.2 (C-0001).

the MFN provisions allow U.S. investors to invoke more preferential treatment that Peru has conferred to third-party investors and investments with respect to *inter alia* the establishment, management, conduct, and operation of foreign investments in Peru.

385. Indeed, the International Law Commission’s definition of most-favored-nation treatment in its *Draft Articles on Most-Favoured-Nation Clauses* (“**ILC Articles on MFN Clauses**”) is particularly instructive:

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.⁷⁰⁷

386. The ILC Articles on MFN Clauses also highlight that the beneficiary of the MFN clause acquires “rights which fall within the limits of the subject matter of the clause.”⁷⁰⁸ The MFN clauses in the TPA thus require Peru to accord Latam Hydro and its investments treatment no less favorable than third-party investors in the establishment, acquisition, expansion, management, conduct, operation, and sale of the Mamacocha Project.

387. As explained in Section V, *infra*, Peru’s acts and omissions breached the RER Contract and—relevant to this section—arbitrarily denied, thwarted, and delayed CHM’s necessary permits in order to secure financing and otherwise construct and operate the Mamacocha Project. In that context, Peru’s conduct results in redressable internationally wrongful acts through the MFN’s importation of: (i) an express positive obligation for Peru to issue permits as contained in the Peru-Paraguay BIT (1994); and (ii) umbrella clauses contained in other investment treaties concluded by Peru.

⁷⁰⁷ International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses*, in *Report of the International Law Commission on its Thirtieth Session*, (1978) 2 YBILC 8, (pt. 2) (U.N. Doc. A/33/10), Art. 5 (CL-0073).

⁷⁰⁸ ILC Draft MFN Articles, Art. 9 (CL-0073).

1. Peru's Conduct with Respect to the Project's Permits Constitutes a Breach of the TPA

388. In light of the principles highlighted above, Claimants may also rely on other BIT provisions in which Peru confers more favorable treatment to third party investors. Claimants reiterate that the scope of the TPA's MFN provisions are exceedingly broad and apply to both investments and investors. In particular, Articles 10.4(1) and 10.4(2) of the TPA relate to, *inter alia*, the establishment, management, conduct, and operation of foreign investments in Peru.⁷⁰⁹

389. In this context, Peru has accorded more favorable treatment to investors of Paraguay in Article 3(2) of the Paraguay-Peru BIT (1994), which requires Peru to authorize the necessary permits for foreign investments within its territory:

*A Contracting Party which has admitted an investment in its territory shall grant the permits necessary in relation to such investment, including the performance of licensing agreements and technical, commercial or administrative assistance. . . .*⁷¹⁰

390. Latam Hydro is thus entitled to rely on this provision through the proper application of Articles 10.4(1) and 10.4(2) of the TPA. As such, the following measures that negatively affected the Mamacocha Project's permits constitute independent breaches of the MFN clause under the TPA:

391. **First**, Peru breached its obligation to grant the necessary permits for the Mamacocha Project when it imposed the meritless RGA Lawsuit, which sought to revoke the Project's environmental permits.

⁷⁰⁹ TPA, February 1, 2009, Arts. 10.4(1)-10.4(2) (C-0001)

⁷¹⁰ Agreement between the Republic of Peru and the Republic of Paraguay for the Promotion and Reciprocal Protection of Investments (1994), Art. 3(2) (CL-0068) (emphasis added).

392. **Second**, Peru breached its obligation to grant the necessary permits for the Mamacocha Project when it commenced a criminal proceeding that attempted to cast doubt as to the validity of the Project’s environmental permits.

393. **Third**, Peru breached its obligation to grant the necessary permits for the Mamacocha Project when it denied the Project’s civil works authorization.

394. **Fourth**, Peru breached its obligation to grant the necessary permits for the Mamacocha Project when it issued a materially defective civil works authorization.

2. Peru’s Breaches of the RER Contract Trigger Liability Under the TPA as a Result of the Umbrella Clauses Contained in Other Treaties Concluded by Peru

395. As will be detailed in Section V, *infra*, Peru breached the RER Contract under Peruvian law on numerous occasions. Those enumerated breaches likewise constitute internationally wrongful acts in violation of the TPA because Claimants are entitled to import an umbrella clause through the operation of the MFN provisions in Article 10.4 of the TPA.

396. In at least three bilateral investment treaties with other countries, Peru has agreed to an “umbrella clause” commitment to “observe any obligation . . . into which it has entered concerning investments of nationals” from those countries, in particular, the Thailand-Peru BIT (1991), Netherlands-Peru BIT (1994), and United Kingdom-Peru BIT (1993).⁷¹¹ Accordingly, Peru has treated U.S. investors and investments less favorably than investors from Thailand, the

⁷¹¹ Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Peru for the Promotion of Investments (1991), Art. 4(2) (CL-0069) (“Each Contracting Party shall observe any obligation, additional to those specified in this Agreement, into which it may have entered with regard to investments of nationals or companies of the other Contracting Party.”); Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Republic of Peru (1994), Art. 3(4) (CL-0096) (“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.”); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru for the Promotion and Protection of Investments (1993), Art. 2(2) (CL-0097) (“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”).

Netherlands, and the United Kingdom by not conferring to U.S. investors, such as Latam Hydro, the protections afforded from an umbrella clause.

397. Under similar circumstances, investment tribunals have permitted investors to import umbrella clauses, finding that such practice properly gives effect to the MFN clause and converts breaches of the State's domestic obligations (falling under the umbrella clause) to a substantive treaty breach. For example, in *EDF v. Argentina*, the State was found to have breached its contractual obligations to the investor through an imported umbrella clause. In so holding, that tribunal said “[t]o ignore the MFN clause in this case would permit more favorable treatment to investors protected under third countries, which is exactly what the MFN Clause is intended to prevent” and to “interpret the BIT otherwise would effectively read the MFN language out of the treaty.”⁷¹² The tribunal concluded that Argentina breached the umbrella clause through “regulatory changes implemented by the Republic of Argentina and the Province of Mendoza include the freeze of tariff rates, change in operative exchange rates, and regulation of the distribution of electricity” that contravened the concession agreement.⁷¹³

398. As a result, through the proper operation of the MFN clauses of the TPA, Claimants are entitled to rely on the umbrella clauses of the BITs enumerated above to hold Peru liable for its breaches of the RER Contract. Accordingly, Peru's breaches of its obligations under the RER Contract amount to substantive violations under the TPA and Peru is liable for the amount that these breaches harmed Latam Hydro's covered investments.

⁷¹² *EDF v. Argentina*, ICSID Case No ARB/03/23, Award, June 11, 2012, ¶¶ 932-933 (CL-0027).

⁷¹³ *EDF v. Argentina*, Award, ¶ 941 (CL-0027).

V. PERU BREACHED ITS OBLIGATIONS UNDER THE RER CONTRACT AND PERUVIAN LAW

A. Legal Principles that Apply to Interpretation of the RER Contract

399. The RER Contract is a public-private partnership agreement between CHM and Peru. CHM is the “Concessionaire Company” that won the bid to develop, construct, and operate the Mamacocha Project.⁷¹⁴ Peru, acting through MINEM, is the “Grantor”⁷¹⁵ that grants the Concessionaire Company with the necessary rights to bring the Mamacocha Project to fruition:

This Concession Contract for the Supply of Renewable Energy (the “Contract”) is made and entered into by and between the Peruvian State, herein represented by the Ministry of Energy and Mines (the “Grantor”), and the Concessionaire Company, subject to the following terms and conditions:⁷¹⁶

400. Although it is “represented by” MINEM, the “Peruvian State” is ultimately responsible for granting the rights to the Mamacocha Project. As Dr. Quiñones explains, this distinction is relevant to the scope of the Grantor’s obligations because it ensures Peru is responsible for any action or inaction of a “Government Authority”⁷¹⁷ concerning the Project:

As a party, the Government of Peru assumed obligations under the RER Concession Contract, **thus binding all entities which are an integral part of the State** to comply with the terms and conditions set forth in the contract. As specified in the RER Regulations and the RER Concession Contract, the MINEM acts merely as a representative of the State of the Republic of Peru in such contract. In this regard, Article 43 of the Political Constitution reads as follows: “*The State is one and indivisible. Its form of government is unitary*”.

⁷¹⁴ RER Contract, February 18, 2014, Clause 1.4.44 (C-0002).

⁷¹⁵ RER Contract, February 18, 2014, Preamble (C-0002).

⁷¹⁶ RER Contract, February 18, 2014, Preamble (C-0002).

⁷¹⁷ RER Contract, February 18, 2014, Clause 1.4.2 (C-0002). Clause 1.4.2 defines a “Government Authority” as “any judicial, legislative, political or administrative authority in Peru authorized by the Applicable Laws to issue or interpret rules or decisions, whether general or special in nature, with binding effects upon any person under their scope. Any reference to a specific Government Authority shall be deemed a reference to such Government Authority or its successor or any other authority appointed by such Government Authority to perform the acts referred to in this Contract or the Applicable Laws.”

Thus, any delay, obstructions or nonperformance incurred by any Government Authority, whether it is an agency of the local, regional or national government level, is fully attributable to the Peruvian State, that is, Mamacocha's counterparty in the RER Concession Contract.⁷¹⁸

401. This distinction is also relevant to understanding the “public-private” nature of the RER Contract. The “public” component concerns the public service of supplying renewable energy to Peru, which Legislative Decree No. 1002 identifies as a “national interest and public necessity.”⁷¹⁹ The “private” component concerns Peru's decision to grant a concession to a private company to make this public service possible.⁷²⁰ As Dr. Quiñones explains, Peru is the only governmental entity that can issue this concession:

Article 58 of the Political Constitution of Peru vests upon the Peruvian Government the power, as part of the duties regarding economic matters, to take action “*primarily*” with regard to public services and infrastructure. Consistently with such constitutional mandate, the Government becomes the guarantor in the provision of public services and infrastructure for public use that the population needs.⁷²¹

402. Under this framework, CHM and Peru are “partners” with the shared goal of providing a public service through the fulfillment of the Mamacocha Project.⁷²² As with any public-private partnership, the risks are allocated in accordance with what each party can “assess, control and manage.”⁷²³ For example, the RER Contract only requires CHM “to manage and comply with all the requirements for obtaining” the necessary permits, concessions, and authorizations to construct the Project.⁷²⁴ The RER Contract does not require that CHM actually obtain them, since their obtainment depends in large part on the diligence of the governmental permitting authorities for which Peru, not CHM, is responsible, as confirmed by Dr. Quiñones:

⁷¹⁸ Quiñones Report I, ¶¶ 49-50. (Emphasis in original).

⁷¹⁹ Legislative Decree No. 1002, May 1, 2008, Art. 2 (C-0007).

⁷²⁰ Quiñones Report I, ¶ 54-59.

⁷²¹ Quiñones Report I, ¶ 51.

⁷²² Quiñones Report I, ¶ 55.

⁷²³ Quiñones Report I, ¶ 55.

⁷²⁴ RER Contract, February 18, 2014, Clause 3.2 (C-0002).

It is worth noting that the foregoing provision does not make the Concessionaire responsible for obtaining the permits and operating permits, but rather for the processing of and compliance with the requirements in place to have them issued. In other words, **the Concessionaire’s obligation is limited to carrying out any actions under its control.** However, the responsibility for a timely grant of permits falls on the Peruvian Government, through the competent Government Authority.⁷²⁵

403. This allocation of risks is also evident in Clause 4.3 of the RER Contract, which anticipates a scenario where a “Government Authority”⁷²⁶ unduly delays the issuance of a permit, notwithstanding CHM’s diligent compliance with the applicable laws.⁷²⁷ In that case, this Clause provides that Peru, through MINEM, will ensure the issuance of the permit:⁷²⁸

Clause 4.3 - ENG	Clause 4.3 - SPA
<p>The Ministry shall create any such easements as may be required in accordance with the Applicable Laws but shall not bear any costs incurred in obtaining them.</p> <p>Furthermore, the Ministry shall, upon request of the Concessionaire Company, use its best endeavors in order to allow the latter to access third- party facilities, and shall assist it in obtaining permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right, in the event of these not being timely granted by the relevant Government Authority despite all requirements and procedures required under the Applicable Laws having been met.</p>	<p>El Ministerio impondrá las servidumbres que sean requeridas de acuerdo a lo establecido en las Leyes Aplicables, pero no asumirá los costos incurridos para obtener dichas servidumbres.</p> <p>Asimismo, de ser requerido por la Sociedad Concesionaria, el Ministerio hará sus mejores esfuerzos para que aquella acceda a instalaciones de terceros, y coadyuvará en la obtención de permisos, licencias, autorizaciones, concesiones, servidumbres, derechos de uso y similares, en case éstos no fueran otorgados por la Autoridad Gubernamental competente en el tiempo debido, a pesar de haberse cumplido los requisitos y trámites exigidos para las Leyes Aplicables.</p>

404. To be clear, the Spanish version uses the verb “coadyuvará” while the English translation uses the verb “shall assist.” As explained more fully below in Section V.B.2, the

⁷²⁵ Quiñones Report I, ¶ 109. (Emphasis in original).

⁷²⁶ RER Contract, February 18, 2014, Clause 1.4.2 (C-0002).

⁷²⁷ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

⁷²⁸ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

original Spanish version incorporates a stronger obligation than mere assistance. It requires that Peru, through MINEM, would “cooperate” and step in CHM’s shoes without delay to obtain “the permits, licenses, authorizations, concessions, easement, rights of use, and any other similar right” whenever the “relevant Government Authority” failed to approve them in a “timely” manner.⁷²⁹ As Dr. Benavides explains:

This obligation is not an obligation of means, but of results, because the important thing is that the State is a “party” to the Contract and the State is responsible for granting the necessary permits. If the State does not grant the permits or delays in their granting, the State is not fulfilling its obligations as Grantor and is frustrating the fulfillment of the obligations of CHM. If the State delays the granting of Permits, the Concessionaire is not responsible for the consequences of said delays on the Project and on the fulfillment of its obligations.⁷³⁰

405. Accordingly, under the public-private partnership set out under the RER Contract, CHM assumes the risks of complying with the applicable laws in a diligent manner.⁷³¹ CHM also assumed the risks of *force majeure* events, as evident in the language under Clauses 1.4.22 and 8.4 of the RER Contract that provides that the Commercial Operation Start-Up (“COS”) and Termination Date will not be modified “for any reason.”⁷³² As explained in Section V.B below, this language *does not* mean that the COS date and Termination Date are immutable if the delays to the Project are attributable to Peru. CHM does not bear the risk of Peru’s negligent or willful misconduct or inaction. Rather, under the public-private partnership framework, each “partner” is responsible for its own actions.⁷³³ Hence, delays attributable to Peru would constitute material breaches that Peru can cure either by extending the COS date and Termination Date or indemnifying CHM.

⁷²⁹ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

⁷³⁰ Benavides Report I, ¶ 13.

⁷³¹ Benavides Report I, ¶ 13.

⁷³² RER Contract, February 18, 2014, Clauses 1.4.22, 8.4 (C-0002).

⁷³³ Quiñones Report I, ¶ 55.

REDACTED VERSION

406. The allocation of risk with respect to delays is critical because, under the RER Contract, “time” was literally “of the essence.” If CHM failed to achieve commercial operation by the reference COS date under the RER Contract, for reasons under its control or *force majeure* events, Peru could reduce the term of the Guaranteed Revenue Concession by as many as two (2) years.⁷³⁴ If such delays exceeded two (2) years, the RER Contract, per its own terms, would automatically terminate and CHM would forfeit the performance bond.⁷³⁵ Accordingly, *every day mattered*. And, in particular, the *source* of the delays mattered to assess the economic rights that Peru owed to CHM under the RER Contract.

407. Another important feature of the public-private nature of the RER Contract is that, in addition to the contract being a commercial agreement, it is also an administrative contract because it concerns the provision of a public service. As Dr. Benavides confirms, this hybrid nature means that the RER Contract is governed by the Civil Code and all Peruvian administrative laws and regulations, including the GLAP and the TUPA.⁷³⁶ This conclusion is also evident from Clauses 1.2 and 1.4.30, which provide that the RER Contract is “governed” by “the domestic law of Peru” including “all binding legal laws and Court precedents that comprise the Internal Laws of Peru[.]”⁷³⁷ Accordingly, the plain-language of the RER Contract must be interpreted in accordance with the relevant principles under the Civil Code and Peru’s administrative laws.

408. Articles 168-70 of the Civil Code set forth certain canons that govern how to interpret the RER Contract. Article 168 provides that the parties should interpret the plain

⁷³⁴ RER Contract, February 18, 2014, Clause 1.4.23 (C-0002).

⁷³⁵ RER Contract, February 18, 2014, Clause 8.4 (C-0002).

⁷³⁶ Benavides Report I, ¶¶ 74-84.

⁷³⁷ RER Contract, February 18, 2014, Clauses 1.2, 1.430 (C-0002).

language of the RER Contract in accordance with the principle of good faith.⁷³⁸ If doubt still persists, Article 169 provides that the parties should adopt the interpretation that would be consistent with the other provisions of the contract, *i.e.*, the “systematic” interpretation.⁷³⁹ As a final resort, Article 170 provides that the parties should adopt the interpretation that best comports with the contract’s purpose.⁷⁴⁰

409. Further, the Civil Code contains other legal principles that govern the interpretation of this RER Contract, such as principles that: (i) a contract must be interpreted and executed in good faith (Article 1362);⁷⁴¹ (ii) a contract cannot be interpreted in a manner that would immunize a party’s breach (Article 1328);⁷⁴² (iii) a party who acts with the required ordinary diligence is not responsible for the non-performance of his contractual obligations (Articles 1314 and 1317);⁷⁴³ and (iv) if a party makes it impossible for his counterparty to perform, the contract terminates as a matter of law and the impeded party may seek damages (Article 1432).⁷⁴⁴

410. In the same vein, the principles under Peru’s administrative laws also apply, such as the procedural requirements under the GLAP and TUPA that require Peru to issue permits and respond to extension requests in a timely manner.⁷⁴⁵ Also applicable are the administrative principles that Peru cannot renege on its “*actos propios*,”⁷⁴⁶ *i.e.*, its prior administrative acts, and

⁷³⁸ Benavides Report I, ¶¶ 123-133.

⁷³⁹ Benavides Report I, ¶¶ 134-135.

⁷⁴⁰ Benavides Report I, ¶¶ 136-137.

⁷⁴¹ Benavides Report I, ¶¶ 236-241.

⁷⁴² Benavides Report I, ¶¶ 194-196.

⁷⁴³ Benavides Report I, ¶¶ 182-183, 204.

⁷⁴⁴ Benavides Report I, ¶¶ 210-212.

⁷⁴⁵ Quiñones Report I, ¶¶ 6, 115.

⁷⁴⁶ Quiñones Report I, ¶ 141.

that it is responsible for honoring and protecting the “*confianza legitima*,”⁷⁴⁷ *i.e.*, the legitimate expectation on which a concessionaire reasonably relies when performing his obligations.

411. As set forth below, Peru’s measures against the Project violated certain of Peru’s direct obligations under the public-private partnership agreement set forth under the RER Contract. These measures also breached certain of the key civil and administrative principles that expressly govern the fulfillment of this partnership. These breaches were willful in nature and cumulatively made it impossible for CHM to fulfill its obligations under the RER Contract. Accordingly, the RER Contract has been terminated as a matter of law, releasing CHM of all its obligations, and Peru must pay all economic damages available under the RER Contract.

B. Peru Breached Its Direct Obligations under the RER Contract

1. Peru Breached Its Promise that CHM Would Receive Guaranteed Revenue for a 20-Year Term

a. Contractual Terms

412. In the RER Contract, Peru promised that, if CHM were diligent, CHM would receive a “Guaranteed Revenue” concession defined under Clause 1.4.26:

1.4.26. “Guaranteed Revenue” means the annual revenue that the Concessionaire Company shall receive for the net injections of energy up to the limit of the Awarded Energy paid at the Award Tariff. It will only apply during the Term of Validity.⁷⁴⁸

413. The “Guaranteed Revenue” is, thus, a sovereign guarantee that the “Awarded Energy”⁷⁴⁹ (the annual energy output that CHM committed to generating, *i.e.*, 130,000 megawatt hours) will be remunerated at a price equal to the “Award Tariff” (CHM’s monomic price bid, *i.e.*, US \$62 per megawatt hour).⁷⁵⁰ Accordingly, if the price paid to CHM for the electricity

⁷⁴⁷ Quiñones Report I, ¶ 142.

⁷⁴⁸ RER Contract, February 18, 2014, Clause 1.4.26 (C-0002).

⁷⁴⁹ RER Contract, February 18, 2014, Clause 1.4.17 (C-0002).

⁷⁵⁰ RER Contract, February 18, 2014, Clause 1.4.45 (C-0002). The monomic price consists of a price for energy plus a price for capacity.

injected into the “spot” market is lower than the Award Tariff, Peru promised to pay CHM a “Premium”⁷⁵¹ to cover the balance between the spot market price and the Award Tariff.⁷⁵²

Under the payment mechanisms of the RER Contract, CHM would be paid this “premium” in monthly installments during the 12-month period immediately following the end of the “Tariff Period,” which begins in May of each year.⁷⁵³ Thus, as long as CHM fulfilled its supply obligation, it expected to receive Guaranteed Revenue over monthly installments during the “Term of Validity.” In the aggregate, this Guaranteed Revenue stream was expected to total US \$161,200,000 (130,000 x US \$62.00 x 20 years), not including the various uplifts to the price and Guaranteed Revenue to be provided to account for inflation and other factors.⁷⁵⁴

414. Clause 1.4.37 of the RER Contract defines the “Term of Validity” for the Guaranteed Revenue Concession:

1.4.37. “Term of Validity of the Award Tariff (Term of Validity)” means the period between the Actual Date of Commercial Operation Start-up and the Termination Date of the Contract (December 31, 2036). During the Term of Validity, the Concessionaire Company undertakes to supply electricity to the system using RER technology, and is guaranteed the payment of the Award Tariff for the Net Energy Injections produced by its RER generation plant, up to the limit of the corresponding Awarded Energy.⁷⁵⁵

415. As this Clause expressly provides, the Term of Validity spans “the period between” the date on which the Project enters into COS and the termination date under the RER Contract.⁷⁵⁶ The Term of Validity was promised to be as long as twenty (20) years. To benefit from the full 20-year term, CHM had to achieve commercial operation by the “Reference Date of

⁷⁵¹ RER Contract, February 18, 2014, Clause 1.4.39 (C-0002).

⁷⁵² RER Contract, February 18, 2014, Clause 6.3 (C-0002).

⁷⁵³ RER Contract, February 18, 2014, Clause 1.4.36 (C-0002).

⁷⁵⁴ RER Contract, February 18, 2014, Clause 6.3.4 (C-0002).

⁷⁵⁵ RER Contract, February 18, 2014, Clause 1.4.37 (C-0002).

⁷⁵⁶ RER Contract, February 18, 2014, Clause 1.4.37 (C-0002).

Commercial Operation Start-Up,” identified in the RER Contract as being December 31, 2016,⁷⁵⁷ *i.e.*, exactly twenty (20) years before the Termination Date of December 31, 2036.⁷⁵⁸ As Dr. Quiñones explains, the Reference Date of Commercial Operation Start-Up is a “general estimation about the time when the [COS] is likely to occur.”⁷⁵⁹

416. The RER Contract provides that Peru could reduce the Term of Validity to as low as eighteen (18) years, depending on the “Actual Date of Commercial Operation Start-Up”⁷⁶⁰ for the Project. Accordingly, if CHM, the concessionaire, did not achieve COS until two years after the Reference Date of Commercial Operation Start-Up, it would benefit only from an 18-year Term of Validity. Clause 1.4.23 of the RER Contract provides that if the Project were delayed by more than two (2) years, “the Agreement will be automatically terminated, and the [performance bond] will be executed.”⁷⁶¹ Thus, to maximize the benefit of this 20-year concession agreement, CHM did everything in its power to arrange for COS on or before December 31, 2016.

417. Clause 8.4 of the RER Contract confirms that this COS deadline was initially December 31, 2018, *i.e.*, exactly two (2) years after the “Reference Date of Commercial Operation Start-Up.”⁷⁶² Further, Clause 8.4 states that the COS deadline cannot be modified “for any reason whatsoever” and that failure to meet this deadline would result in the automatic termination of the RER Contract and execution of the performance bond.⁷⁶³

⁷⁵⁷ RER Contract, February 18, 2014, Clause 1.4.24 (C-0002).

⁷⁵⁸ RER Contract, February 18, 2014, Clause 1.4.22 (C-0002).

⁷⁵⁹ Quiñones Report I, ¶ 67.

⁷⁶⁰ RER Contract, February 18, 2014, Clause 1.4.23 (C-0002).

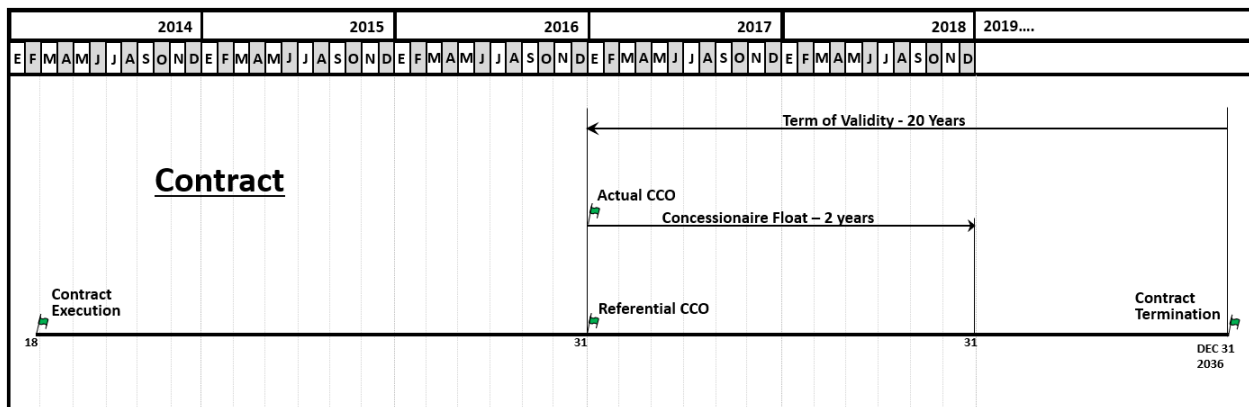
⁷⁶¹ RER Contract, February 18, 2014, Clause 1.4.23 (C-0002).

⁷⁶² RER Contract, February 18, 2014, Clause 8.4 (C-0002).

⁷⁶³ RER Contract, February 18, 2014, Clause 8.4 (C-0002).

418. The RER Contract contains similar language with respect to the Termination Date. Specifically, Clause 1.4.22 of the RER Contract provides that the Termination Date (December 31, 2036) “cannot be modified for any reason.”⁷⁶⁴

419. Accordingly, as depicted below,⁷⁶⁵ the RER Contract, as originally executed, provided a two-year float period between the Reference Date of Commercial Operation Start-Up (December 31, 2016) and COS deadline (December 31, 2018) during which the Guaranteed Revenue Concession period could be reduced by as many as two years.⁷⁶⁶ Because the Termination Date could not be modified “for any reason,” the maximum Term of Validity was twenty (20) years and the minimum Term of Validity was eighteen (18) years.⁷⁶⁷ If the Project were delayed beyond the float period, the RER Contract would terminate and CHM would receive none of the Guaranteed Revenue Concession.⁷⁶⁸



b. The Time Periods for Achieving COS and Term of Validity Were Not Inviolable

⁷⁶⁴ RER Contract, February 18, 2014, Clause 1.4.22 (C-0002).

⁷⁶⁵ HKA Report I, ¶ 85 (HKA’s use of the term “Commercial Operation Date” or “COD” refers to the “Commercial Operation Start-Up,” which is defined in this Memorial as “COS”).

⁷⁶⁶ RER Contract, February 18, 2014, Clause 1.4.37 (C-0002).

⁷⁶⁷ RER Contract, February 18, 2014, Clause 1.4.22 (C-0002).

⁷⁶⁸ RER Contract, February 18, 2014, Clause 1.4.23 (C-0002).

420. One of the key contractual issues put before this Tribunal is whether the COS and Termination Date deadlines specified in the RER Contract at the time of execution were unmovable even if delays to the development and construction of the Project *were attributed solely to misconduct or interferences by State entities*, and not the concessionaire.

421. Peru and CHM had the same understanding of the contract language at the outset. Peru determined on several occasions that these deadlines were not inviolable, and in fact, extended the COS date past the original outer limit set forth in Clause 8.4 of the RER Contract in Addendum 2.⁷⁶⁹ Neither Peru nor CHM understood the phrase “for any reason” in Clauses 8.4 or 1.4.22⁷⁷⁰ to encompass delays that were attributable to Peru. This interpretation is the only common-sense reading of the clauses when read in good faith, in the context of the RER Contract, TPA, RER Promotion, the Civil Code, and Peruvian administrative law. Otherwise, Peru could act with impunity and any and all benefits that CHM and its investors hoped to achieve in executing the RER Contract and making substantial investments in reliance on Peru’s commitments would be illusory.

422. This common-sense interpretation of the RER Contract is consistent with how contractual provisions should be interpreted under Article 168 of the Civil Code, which requires the language to be interpreted in accordance with the principle of good faith.⁷⁷¹ As Dr. Quiñones explains, any interpretation where Peru can unilaterally reduce or terminate the Guaranteed Revenue Concession due to its own misconduct is directly contrary to the principle of good faith under Peruvian contract law:

An interpretation that the [COS] date cannot be extended beyond the Deadline cannot be made, either, if the delay is due to reasons attributable to the Grantor, that is, to the non-performance by the counterparty; as such

⁷⁶⁹ Addendum 2 to the RER Contract, January 3, 2017 (C-0009).

⁷⁷⁰ RER Contract, February 18, 2014, Clauses 1.4.22, 8.4 (C-0002).

⁷⁷¹ Benavides Report I, ¶¶ 123-125.

interpretation would be contrary to the provisions of Article 1362 of the Peruvian Civil Code, this rule requiring contracts to be interpreted and performed in good faith. Such mandate would be violated by the interpretation that one of the parties is allowed to defer or prevent compliance with the [COS] and, as a result of its own non-performance, to terminate the Concession Contract and enforce the Performance Bond. Such a construction would enable an opportunistic behaviour by the Grantor. This is all the more unacceptable in a concession contract, where the principle of cooperation is to apply, thus binding the Government to use any reasonable efforts to achieve the public purpose sought by the execution of the contract.⁷⁷² (Emphasis added).

423. An interpretation to the contrary would result in a contract where CHM is exposed to the unknowable, unforeseeable, and unfair risk that Peru could, “for any reason,” sabotage the Mamacocha Project without any recourse to CHM. As confirmed by Mr. Jacobson, CHM would have never participated in the third public auction or signed the RER Contract if this were the case because it would strip the contract of its bankability and economic appeal:

I would not have invested in Peru if I had any reason to believe that Peru would adopt this interpretation. Nor, in my view, would any financial institution have loaned money on a non-recourse basis to a project that could be stopped without recompense through unilateral action or inaction of the host government.⁷⁷³

424. Claimants’ interpretation is also consistent with the “systematic” canon of interpretation under Article 169 of the Civil Code.⁷⁷⁴ As Dr. Benavides explains, this canon requires the interpreter to ensure that the meaning of a provision is consistent with the other provisions and legal principles embodied under the contract.⁷⁷⁵ Hence, the provisions concerning the “for any reason” language in Clauses 1.4.22 and 8.4 of the RER Contract⁷⁷⁶ must be interpreted in a manner that is consistent with the plain-language of the RER Contract *as well*

⁷⁷² Quiñones Report I, ¶ 81.

⁷⁷³ Jacobson I, ¶ 18.

⁷⁷⁴ Benavides Report I, ¶¶ 134-135.

⁷⁷⁵ Benavides Report I, ¶ 135.

⁷⁷⁶ RER Contract, February 18, 2014, Clauses 1.4.22, 8.4 (C-0002).

as the legal principles from the Civil Code, which are expressly incorporated under Clauses 1.2 and 1.4.30.⁷⁷⁷

425. One such principle, enshrined under Article 1328 of the Civil Code, is that a contract cannot be interpreted in a manner that would immunize a contract party of its own breaches, as such an interpretation would be unconscionable and deemed null and void:

Article 1328.- Nullity of the pact of exoneration and limitation of liability

Any stipulation that excludes or limits the liability for fraud or inexcusable fault of the debtor or of the third parties of whom it avails itself is null.

Any pact of exoneration or limitation of liability for cases in which the debtor or said third parties violate obligations derived from public order rules is also void.⁷⁷⁸

426. Accordingly, under this principle, it would be unconscionable to arrive at the interpretation that “for any reason” includes instances where Peru has interfered with CHM’s performance under the RER Contract. Otherwise, Peru would be rewarded for its interference and obstruction, rather than be punished for it. Hence, to be consistent with the systematic canon of interpretation set out in Article 169 of the Civil Code, “for any reason” only includes delays by the concessionaire or a third-party (*i.e.*, a *force majeure* delay).

427. Similarly, Articles 1314 and 1317 of the Civil Code ensure that CHM cannot be penalized under the RER Contract – *i.e.*, through a reduction of the Term of Validity or termination of the Guaranteed Revenue Concession – when it has acted diligently and is otherwise not responsible for the events that led to its non-performance of a contractual agreement.⁷⁷⁹ As stated by Dr. Benavides, “[o]ne of the principles of Contract Law, applicable

⁷⁷⁷ RER Contract, February 18, 2014, Clauses 1.2, 1.4.30 (C-0002).

⁷⁷⁸ Benavides Report I, ¶¶ 194-196.

⁷⁷⁹ Benavides Report I, ¶¶ 182-183, 204.

in both the private and administrative spheres, is that no party to a contract can invoke rights, based on its own breach.”⁷⁸⁰

Article 1314 - Unaccountability for ordinary diligence

[The contract party] [w]ho acts with the required ordinary diligence, is not imputable for the non-performance of the obligation or for its partial, late or defective fulfilment.⁷⁸¹

Article 1317 - Damages due to non-imputable non-performance

[The contract party] is not liable for damages resulting from the non-performance of the obligation, or its partial, late or defective performance, for non-attributable causes, unless otherwise expressly provided by law or by the title of the obligation.⁷⁸²

Therefore, Peru cannot interpret the RER Contract in any manner that punishes CHM (*e.g.*, by reducing or terminating the Term of Validity) when CHM is not the responsible party for the events that delayed the Project, as such an interpretation would turn the legal principles under Articles 1314 and 1317 on their head.

428. Moreover, any interpretation that Peru could unilaterally reduce or terminate the Guaranteed Revenue Concession through its own negligence or malfeasance is also directly controverted by Legislative Decree No. 1002,⁷⁸³ which is expressly incorporated into the RER Contract.⁷⁸⁴ Notably, Legislative Decree No. 1002 provides that the RER Promotion must be executed in accordance with the protections set out under the TPA.⁷⁸⁵ As explained in Section IV, *supra*, the TPA protects U.S. investments in Peru from, *inter alia*, government conduct that is arbitrary, discriminatory, unfair, inequitable, lacking in good faith, inconsistent, or

⁷⁸⁰ Benavides Report I, ¶ 194.

⁷⁸¹ Benavides Report I, ¶¶ 182-183.

⁷⁸² Benavides Report ¶ 204.

⁷⁸³ Legislative Decree No. 1002, May 1, 2008 (C-0007).

⁷⁸⁴ RER Contract, February 18, 2014, Clause 1.4.28 (C-0002).

⁷⁸⁵ Legislative Decree No. 1002, May 1, 2008, Preamble (C-0007).

expropriatory in nature.⁷⁸⁶ Accordingly, the RER Contract cannot be interpreted in any manner that would render these protections meaningless.

429. Claimants' interpretation is also consistent with the RER Contract's purpose, as required under Article 170 of the Civil Code.⁷⁸⁷ The provisions in the RER Contract that create the two-year float period and impose the COS deadline were added to the RER Contracts in response to the substantial delays by the concessionaires to the winning projects from the first two public auctions.⁷⁸⁸ Those delays primarily arose from outright negligence by the winning concessionaires as well as abuses of alleged *force majeure* events that resulted in numerous extensions to the projects' COS date and Termination Date.⁷⁸⁹ In response to these abuses, Peru promulgated Supreme Decree No. 024-2013-EM, which provided that the COS date could not be delayed for more than two years, even if *force majeure* events occurred, or else the contract would terminate, and the performance bond would be forfeited.⁷⁹⁰ This supreme decree further provided that the contract termination date was not modifiable for any reason.

430. Importantly, Peru's "Exposición de Motivos" – *i.e.*, the "Statement of Reasons" that explains this Supreme Decree's purpose – confirms that the changes to the RER Contracts should be read in conjunction with the concessionaire delays that plagued the first two rounds of RER projects.⁷⁹¹ As Dr. Santiváñez observes, the Statement of Reasons expressly provides that the temporal restrictions in this Supreme Decree were created to respond to concessionaire delays and abuses of *force majeure*-related extensions from those projects, not delays caused by Peru:

⁷⁸⁶ TPA, February 1, 2009, Arts. 10.4, 10.5, 10.7 (C-0001).

⁷⁸⁷ Benavides Report I, ¶¶ 136-137.

⁷⁸⁸ Santiváñez I, ¶¶ 43-45.

⁷⁸⁹ Santiváñez I, ¶¶ 43-45.

⁷⁹⁰ Santiváñez I, ¶¶ 43-45.

⁷⁹¹ Santiváñez I, ¶ 44.

The objective of this legal change was to create a disincentive for the concessionaires to rely on endless extensions, including those due to *force majeure*, to postpone the [COS] and Termination Date of the projects. Neither the language nor stated purpose of the changes introduced to the RER regulation by SD 024-2013 reflect a shift in the risk allocation structure of the RER Contract such that the concessionaire would bear the risk of non-performance, obstruction, and delay by Peru. Certainly, there was no notice to investors or potential investors that they would be accepting the risk of Peru's default of its obligations under the RER Contracts.⁷⁹²

431. Based upon the provenance of this Supreme Decree, MINEM's restrictions on time extensions were designed to protect the government from concessionaire delays, not delays caused by the government's own negligence, misconduct, or inaction. The Supreme Decree did not expressly state, nor could it be reasonably implied, that these restrictions immunized Peru from accountability for delays for which it was responsible or that Peru could unilaterally reduce or terminate the Guaranteed Revenue Concession by interfering with the Project.

432. But that is precisely the position that Peru self-servingly adopted on December 31, 2018, when it denied CHM's Third Extension Request that sought extensions to the COS and Termination Date.⁷⁹³ The request for the extension of the COS date was necessitated by the years-long interferences to the Mamacocha Project that made it impossible for CHM to achieve COS. And the request to extend the Termination Date sought to ensure that CHM would still receive its bargained-for benefit of a Guaranteed Revenue Concession with a Term of Validity of twenty (20) years from the start of commercial operation.

433. Peru had an obligation to grant these extension requests under the RER Contract because, by Peru's own public admissions, each of the delays to the Mamacocha Project was solely attributable to Peru, and CHM at all times acted diligently.⁷⁹⁴ For example, in Addendum

⁷⁹² Santivnez I, ¶ 45.

⁷⁹³ MINEM's Official Letter No. 2312-2018-MEM/DGE, December 31, 2018 (C-0030).

⁷⁹⁴ Benavides Report I, ¶¶ 15-17.

1, Peru, through MINEM, acknowledged the all of the delays to the Project from its inception and through July 5, 2015 were solely attributable to Peru:⁷⁹⁵

The delays in the approval of the administrative procedures mentioned by the Concessionaire were caused by the Regional Environmental Authority of the Regional Government of Arequipa, in the evaluation of the requests for classification of the preliminary environmental study and the subsequent approval of the Declaration of Environmental Impact (DEI), both for the Laguna Azul Hydroelectric Plant as well as the Transmission Line; by the Ministry of Culture with the approval of the execution of the archaeological evaluation project with excavation, as well as the approval of the Final Report; by the Local Water Authority of Camaná - Majes, with the approval of the water use studies; and by the COES with the approval of the Preoperational Study of the project;

434. Peru also acknowledged in Addendum 1 that (i) these delays made it impossible for CHM to advance the Project; (ii) CHM at all times acted diligently and (iii) thus, under the RER Contract and Article 1314 of the Civil Code, CHM cannot be penalized for these delays:⁷⁹⁶

SIXTH.- Inasmuch as the aforementioned delays in the administrative procedures made it impossible to achieve Financial Closing for the project, entailing the failure to comply with the terms of the Milestones of the Works Execution Schedule of the Concession Agreement—having failed to conclude with the process of financing the project—the conclusion must be reached that said events of non-compliance do not fall within the scope of the Concessionaire’s liability, applying article 1314 of the Civil Code which establishes that a party acting in ordinary due diligence cannot be held responsible for failure to execute its obligations or for the partial, late, or defective compliance with said obligations. In this sense, via Official Document No. 504-2015-MEM/DGE, the General Directorate of Electricity approved the extension of the term requested due to delays that could be attributed to the State, pursuant to the provisions of Legal Report No. 005-2015-EM-DGE.

435. After Addendum 1 was executed, the Project continued to suffer from government interferences that resulted in significant delays that were not attributable, in any respect, to CHM. Upon application by CHM for a second extension request, Peru, through MINEM, noted that the delays at issue were once again entirely attributable to Peru and CHM had acted diligently.⁷⁹⁷ MINEM memorialized this conclusion in the Sosa report, which provides that Peru has an obligation under the RER Contract, Peruvian law, and international law to hold CHM

⁷⁹⁵ Addendum 1 to the RER Contract, July 22, 2015, p. 8 (C-0008).

⁷⁹⁶ Addendum 1 to the RER Contract, July 22, 2015, p. 5 (C-0008).

⁷⁹⁷ Addendum 2 to the RER Contract, January 3, 2017, p. 5 (C-0009).

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harmless from government delays.⁷⁹⁸ Based on the conclusions of the Sosa Report, MINEM issued Ministerial Resolution No. 559-2016-MEM/DM on December 29, 2016, which approved CHM's extension requests and once again confirmed that the delays at issue were "directly caused by acts of the contracting Public Administration" and were "not attributable to the Concessionaire."⁷⁹⁹ Peru then issued Addendum 2 on January 3, 2017, which formalized these extensions under the RER Contract.⁸⁰⁰

436. After Addendum 2 was issued, the Project continued to suffer from arbitrary government interferences, including the filing of the meritless RGA Lawsuit, the commencement of a bad-faith criminal proceeding by the AEP, and the discriminatory and frivolous measures undertaken by AAA with respect to CHM's civil works authorization. Peru acknowledged that these measures were arbitrary and meritless, as evidenced by the Regional Executive Resolution (which found that the RGA Lawsuit lacked merit)⁸⁰¹ and the ANA administrative court's order of December 20, 2017 (which found that AAA's measures with respect to the civil works authorization lacked merit).⁸⁰²

437. On February 5, 2018, CHM again requested extensions to the COS date to account for these government-caused delays.⁸⁰³ CHM also requested extensions to the Termination Date to account for all historical government interferences to the Project.⁸⁰⁴ Peru had failed to extend the Termination Date in the past notwithstanding its findings that CHM had at all times acted diligently and all delays to date were attributable only to Peru.

⁷⁹⁸ Report No. 166-2016-EM-DGE, October 6, 2016, Sections 2.2.3-2.2.5 (C-0012).

⁷⁹⁹ Addendum 2 to the RER Contract, January 3, 2017, p. 9 (C-0009).

⁸⁰⁰ Addendum 2 to the RER Contract, January 3, 2017 (C-0009).

⁸⁰¹ Reg. Gov. of Arequipa Resolution, December 27, 2017 (C-0010).

⁸⁰² Bartrina I, ¶ 70.

⁸⁰³ Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).

⁸⁰⁴ Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).

438. However, for the same reasons, Peru had an obligation under the RER Contract to grant corresponding extensions to the Termination Date in order to preserve the 20-year Term of Validity of the Guaranteed Revenue Concession. Or, alternatively, Peru had an obligation to compensate CHM for the time that Peru unjustifiably took away from the Guaranteed Revenue Concession under the RER Contract, as explained by Dr. Quiñones:

Nevertheless, even if we were to admit an interpretation according to which, as regards the Contract Termination Date, the expression “*for no reason*” includes the delays arising from the nonperformance by the Grantor, such situation would not release the Peruvian Government from the obligation to redress any damages caused as a result of the nonperformance, including those resulting from the reduction of the Term of Validity of the Award Tariff.⁸⁰⁵

439. On December 31, 2018, however, Peru abandoned its commitment to ensure a 20-year Guaranteed Revenue Concession for diligent concessionaires when it denied CHM’s requests for extension in their entirety without due compensation. This abandonment constitutes a material breach under Article 1361 of the Civil Code, which provides that contract parties are in breach when they fail to comply with their obligations under the contract.⁸⁰⁶

440. This measure effectively ended the Mamacocha Project. Accordingly, CHM is owed damages sufficient to redress Peru’s material breach of this essential commitment under the RER Contract.

2. Peru Breached Its Obligation under Clause 4.3 to Assist CHM in the Permitting Phase of the Project

441. Peru breached its obligation under Clause 4.3 of the RER Contract to assist CHM in obtaining all necessary permits from the relevant government authorities in a timely manner. Although Peru is ultimately responsible for this obligation, the Contract delegates this obligation

⁸⁰⁵ Quiñones Report I, ¶ 105.

⁸⁰⁶ Benavides Report I, ¶ 15.

directly to MINEM, as the party responsible for implementing the RER projects. Clause 4.3 of the RER Contract provides, in full:

4.3 The Ministry shall create any such easements as may be required in accordance with the Applicable Laws but shall not bear any costs incurred in obtaining them.

Furthermore, the Ministry shall, upon request of the Concessionaire Company, use its best endeavors in order to allow the latter to access third-party facilities, and shall assist it in obtaining permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right, in the event of these not being timely granted by the relevant Government Authority despite all requirements and procedures required under the Applicable Laws having been met.⁸⁰⁷

442. Under the literal canon of interpretation set out in Article 168 of the Civil Code,⁸⁰⁸ it should be noted that the “shall assist” or “coadyuvará” obligation is separate from the other obligations in Clause 4.3, including the obligation that Peru, through MINEM, use its “best endeavors” to ensure CHM gets access to third-party facilities.⁸⁰⁹ The use of different verbs for the first and second obligations and the use of the conjunction “and” demonstrates that the parties intended these two obligations to be separate.⁸¹⁰ As Dr. Benavides explains:

Applying the literal interpretation to clause 4.3 of the Contract, we observe . . . [that] the second paragraph in the clause refers to two different situations: (a) access to “*third-party facilities*”, and (b) obtaining “*permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right...*”⁸¹¹

443. To understand the scope of this obligation, it should be noted that, while the English-language translation of the RER Contract uses the verb “shall assist” the original Spanish-language version uses “coadyuvará,” which does not have a perfect corollary under the

⁸⁰⁷ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

⁸⁰⁸ Benavides Report I, ¶¶ 123-125.

⁸⁰⁹ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

⁸¹⁰ Benavides Report I, ¶ 130.

⁸¹¹ Benavides Report I, ¶¶ 126-127.

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English language.⁸¹² The term “coadyuvará” is a conjugation of the verb “coadyuvar” that, according to Dr. Benavides, has a more nuanced meaning than merely providing assistance:

Continuing with the literal interpretation according to the Cabanellas Dictionary, “*coadyuvar*” (“assist”) means “*to contribute, assist, or help to achieve something.*” Similarly, the definition of the term “*coadyuvar*” in the Dictionary of the Royal Spanish Language Academy is: “*Contribute or help something to be done or to take place.*”

The word “*coadyuvar*” comes from the Latin “*coadiuvare*” and means “contribute to achieve something”, that is, contribute to achieve a result. Contributing, in turn, means helping and concurring with others to achieve some goal.⁸¹³

444. Accordingly, under the literal canon of contract interpretation, it is clear that Peru does not satisfy this obligation if MINEM only uses its “best endeavors” or provides mere “assist[ance].” Rather, as Dr. Benavides confirms, this obligation must require MINEM to “contribute to achieve a result.”⁸¹⁴

445. This interpretation is confirmed under the “systematic” canon of interpretation under Article 169 of the Civil Code.⁸¹⁵ It makes sense for MINEM to be relegated to using its “best efforts” when the obligation concerns the use of facilities owned by third-parties, which neither Peru nor MINEM control. But when the subject matter concerns a property right issued by a government authority, which Peru does control, the “coadyuvará” obligation takes on a new meaning and must be interpreted to mean that MINEM must actually help CHM obtain those rights, rather than just offer assistance. As Dr. Benavides puts it, “[t]his obligation is not an obligation of means, but of results, because the relevant point is that the State is a ‘party’ to the Contract and the State is responsible for granting the necessary permits.”⁸¹⁶

⁸¹² RER Contract, February 18, 2014, Clause 4.3 (C-0002).

⁸¹³ Benavides Report I, ¶¶ 131-132.

⁸¹⁴ Benavides Report I, ¶ 133.

⁸¹⁵ Benavides Report I, ¶¶ 134-135.

⁸¹⁶ Benavides Report I, ¶ 13.

446. The interpretation is also consistent with the “purpose” canon of interpretation under Article 170 of the Civil Code.⁸¹⁷ Specifically, the interpretation that MINEM must help CHM obtain the permit to comply with the “coadyuvará” obligation is consistent with the public-private nature of the RER Contract. CHM’s obligation is to comply with all the necessary permitting requirements and Peru, as the “Grantor” under the RER Contract, is responsible for granting the permits. As Dr. Benavides explains:

In the same vein, given the purpose of the RER Contract, in its role as a PPP and a collaboration agreement, and on account of its economic and social role, the risk involved in the obtention of Permits cannot be borne by the Concessionaire, because the counterparty to the Concession Contract is the Government, and the Government is responsible for granting such Permits. To the extent the Permits are required to commence with engineering, construction and the start of Project operations and comply with the Contract milestones, the obtention of the Permits is absolutely relevant for contract performance. If the Permits were the exclusive responsibility of the Concessionaire, it would have no warranty whatsoever regarding its investment and the State could easily revoke the Concession without following the contract mechanisms, simply by denying the Permits.⁸¹⁸

447. Accordingly, more than mere assistance, the “coadyuvará” obligation means that MINEM must “contribute to, and, in fact, ensure, that CHM will obtain the permits if the appropriate public authority has failed to act ‘in due time.’”⁸¹⁹ Otherwise, “it would be easy for the State to ignore its obligations and frustrate a Contract, without any responsibility, going against the legal principle that you cannot allege your own clumsiness to claim a right.”⁸²⁰

448. Finally, per the plain language of Clause 4.3, this obligation can arise if the following two conditions are present: (i) the relevant governmental authorities have not acted in a “timely” manner; and (iii) the concessionaire has met “all requirements and procedures

⁸¹⁷ Benavides Report I, ¶¶ 136-137.

⁸¹⁸ Benavides Report I, ¶ 142.

⁸¹⁹ Benavides Report I, ¶ 145.

⁸²⁰ Benavides Report I, ¶ 145.

required under the Applicable Laws[.]”⁸²¹ Both conditions existed in the present case. Notably, Clause 4.3 does not require CHM to formally request MINEM’s assistance for this obligation to trigger. According to Dr. Quiñones, this duty can arise “*sua sponte*”:

[W]ithout the need for the Private Party to allege any delay or to demand that the Government comply with a certain time period . . .

⁸²²

Thus, even if Mamacocha had not requested MINEM’s collaboration to help expedite the proceedings conducted by other entities, it is undeniable that the Government of Peru, in its capacity as Grantor, is liable for all the delays incurred by its government entities, as well as for the acts of obstruction by the RGA, seeking to question the validity of the environmental certifications in contentious-administrative proceedings.”⁸²³

449. Nevertheless, on several occasions, CHM sent detailed letters to MINEM that expressly invoked Peru’s obligation, under Clause 4.3 and as “Grantor” under the RER Contract, to assist in these efforts and ensure the completion of the permitting process.⁸²⁴ MINEM never responded to any of these letters, much less offered any assistance.

450. As set forth below, Peru breached its obligation to “coadyuvar[.]” in the permitting process by failing to act when the relevant government authorities unjustifiably delayed the permitting process or took unlawful measures to deny or revoke permits that were critical to the Mamacocha Project.

451. **First**, Peru breached this obligation when the RGA commenced the RGA Lawsuit, a meritless strike suit to challenge the Mamacocha Project’s environmental permits on March 14, 2017, for the purpose of obstructing, not aiding development of the Project.⁸²⁵

⁸²¹ RER Contract, February 18, 2014, Clause 4.3 (C-0002).

⁸²² Quiñones Report I, ¶ 119.

⁸²³ Quiñones Report I, ¶ 121.

⁸²⁴ Letter from C.H. Mamacocha to Ministry of Energy and Mines, March 28, 2017 (C-0091); Letter from C.H. Mamacocha to G. Tamayo, Minister of Energy and Mines, April 26, 2017 (C-0139); Letter from CH Mamacocha to A. Vasquez, Vice Minister of Energy, July 17, 2017 (C-0142).

⁸²⁵ Regional Government of Arequipa's (RGA) Contentious Administrative Complaint, March 14, 2017 (C-0087).

452. **Second**, Peru further breached this obligation when MINEM failed immediately to provide assistance to CHM to dismiss this spurious Lawsuit before it wreaked havoc on the works schedule. CHM had diligently obtained these permits three years earlier in compliance with the applicable laws and depended on their validity in order to achieve Financial Close and commence civil works. On March 28, 2017, April 21, 2017, April 26, 2017, and July 17, 2017, CHM sent MINEM detailed letters expressly invoking MINEM's obligation under Clause 4.3 of the RER Contract to protect these permits from the RGA's unlawful attack so that CHM could advance the Project.⁸²⁶ MINEM refused to give CHM any assistance with respect to the RGA Lawsuit.

453. **Third**, Peru breached this obligation when MINEM failed to provide assistance to CHM after the AEP commenced a criminal investigation into how CHM obtained the Project's environmental permits. This criminal investigation, which is ongoing, is based on the same debunked allegations set forth in the now-dismissed RGA Lawsuit.⁸²⁷ As a result of this investigation, CHM's legal counsel is currently facing criminal charges and a potential three-year prison term for the simple act of signing a permit-related application for reconsideration on CHM's behalf.⁸²⁸ MINEM has never provided any assistance with this matter.

454. **Fourth**, Peru breached this obligation when MINEM failed to provide assistance on CHM's efforts to obtain the Project's civil works authorization. CHM applied to AAA for this permit in November 2016 and, hence, per the TUPA, AAA had to issue its determination by January 2017.⁸²⁹ However, AAA did not issue a valid permit until January 2018, resulting in a

⁸²⁶ Letter from C.H. Mamacocha to Ministry of Energy and Mines, March 28, 2017 (C-0091); Letter from C.H. Mamacocha to G. Tamayo, Minister of Energy and Mines, April 26, 2017 (C-0139); Letter from CH Mamacocha to A. Vasquez, Vice Minister of Energy, July 17, 2017 (C-0142).

⁸²⁷ Santiv  nez I, ¶ 56.

⁸²⁸ Santiv  nez I, ¶ 55.

⁸²⁹ Bartrina I, ¶ 63.

year-long delay to the Project.⁸³⁰ This delay was not justified. Indeed, AAA caused these delays by arbitrarily and unlawfully rejecting the permit application in May 2017.⁸³¹ Then, after ANA forced AAA to reconsider its denial of this permit, AAA issued a materially defective permit in July 2017.⁸³² AAA refused to fix this permit until an ANA administrative court ordered AAA in December 2017 to re-issue the permit without the glaring defects.⁸³³ At no point in this timeline did MINEM give any assistance to CHM, notwithstanding that CHM had complied with all of the applicable laws and AAA had failed in its administrative duty to issue the civil works authorization in a timely manner, as later confirmed by ANA.

3. Peru Breached Its Obligation under Clause 11.3 to Submit to ICSID Non-Technical Disputes Valued at More than US \$20 Million

455. Peru also breached Clause 11.3(a) of the RER Contract when it commenced the Lima Arbitration. Clause 11.3(a) provides in relevant part:

11.3 Non-Technical Disputes shall be settled through national or international arbitration of law, as follows:

a) Disputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency shall be settled through international arbitration of law by means of a procedure carried out in accordance with the Rules for Conciliation and Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID) established in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States approved by Peru through Legislative Resolution No. 26210, to whose standards the Parties submit unconditionally. Where the Concessionaire Company does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rules referred to in subparagraph b) below.⁸³⁴

⁸³⁰ Resolution No. 053-2018-ANA/TNRCH, January 24, 2018 (C-0199).

⁸³¹ Directorial Resolution No. 1292-2017-ANA/AAA I C-O, May 2, 2017 (C-0118).

⁸³² Directorial Resolution No. 1928-2017-ANA/AAA I C-O, July 5, 2017 (C-0122).

⁸³³ Bartrina I, ¶ 70.

⁸³⁴ RER Contract, Clause 11.3(a) (C-0002).

456. Clause 11.1 of the RER Contract defines “Non-Technical Disputes” as those
“disputes other than those of a technical nature.” [REDACTED]

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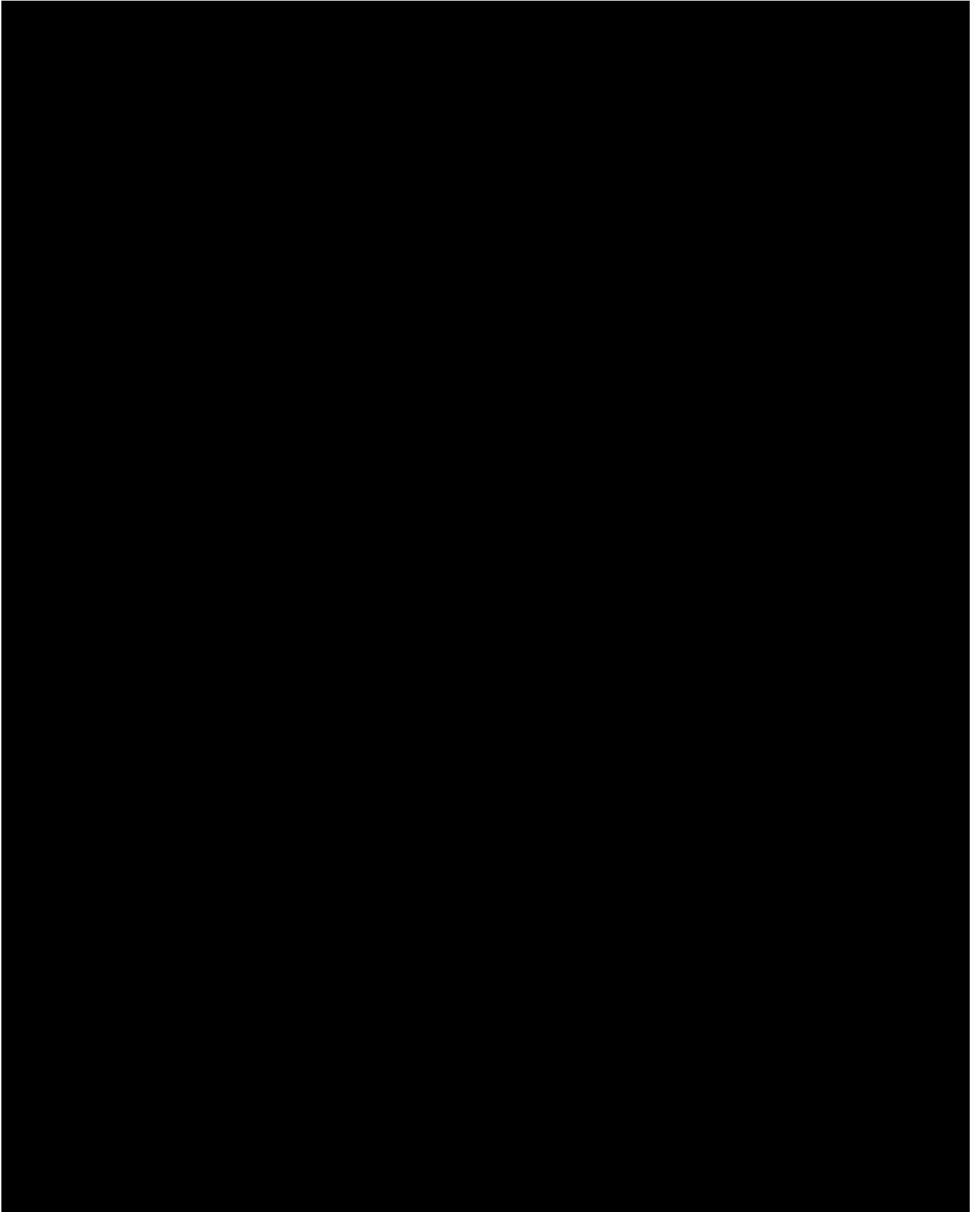
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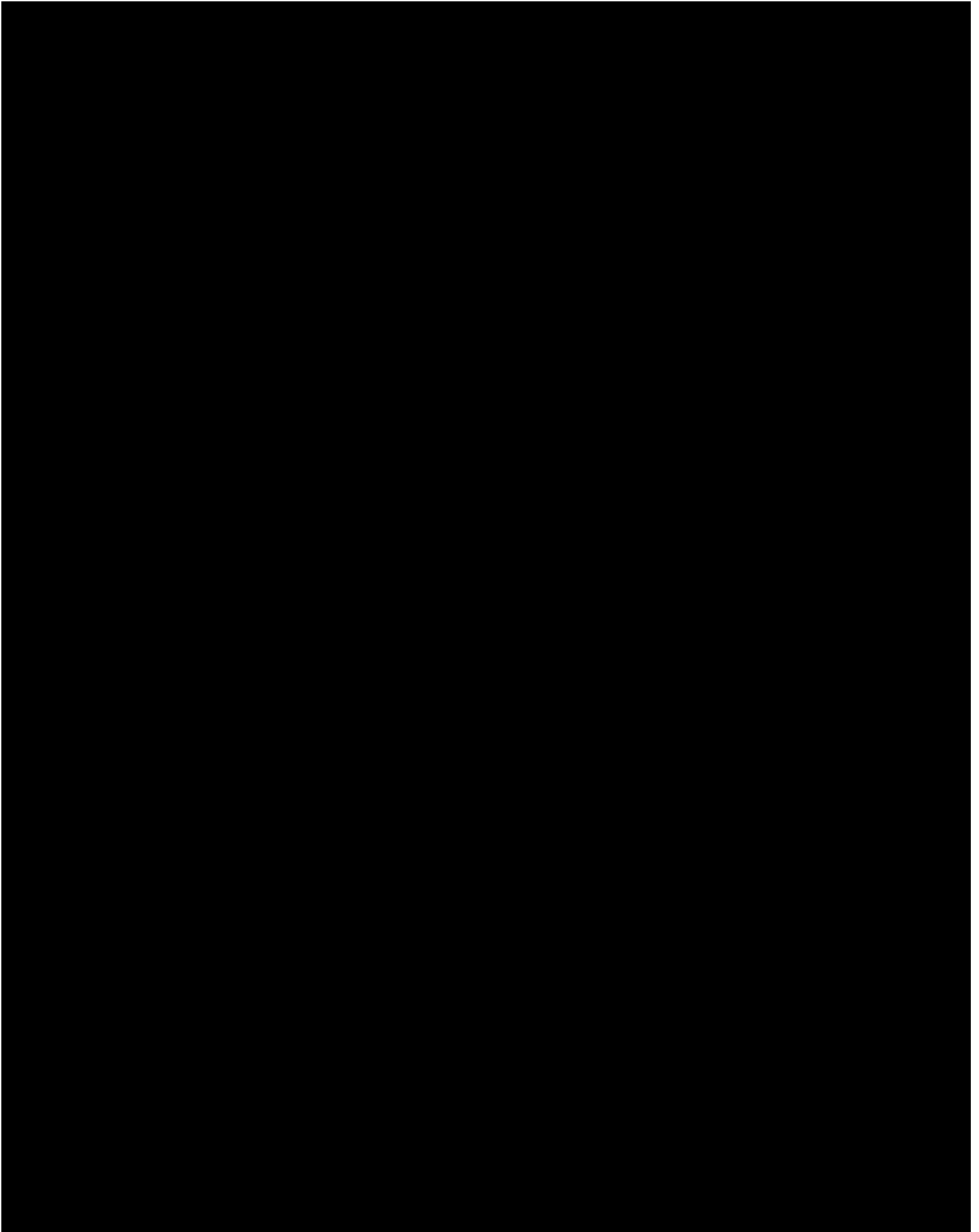
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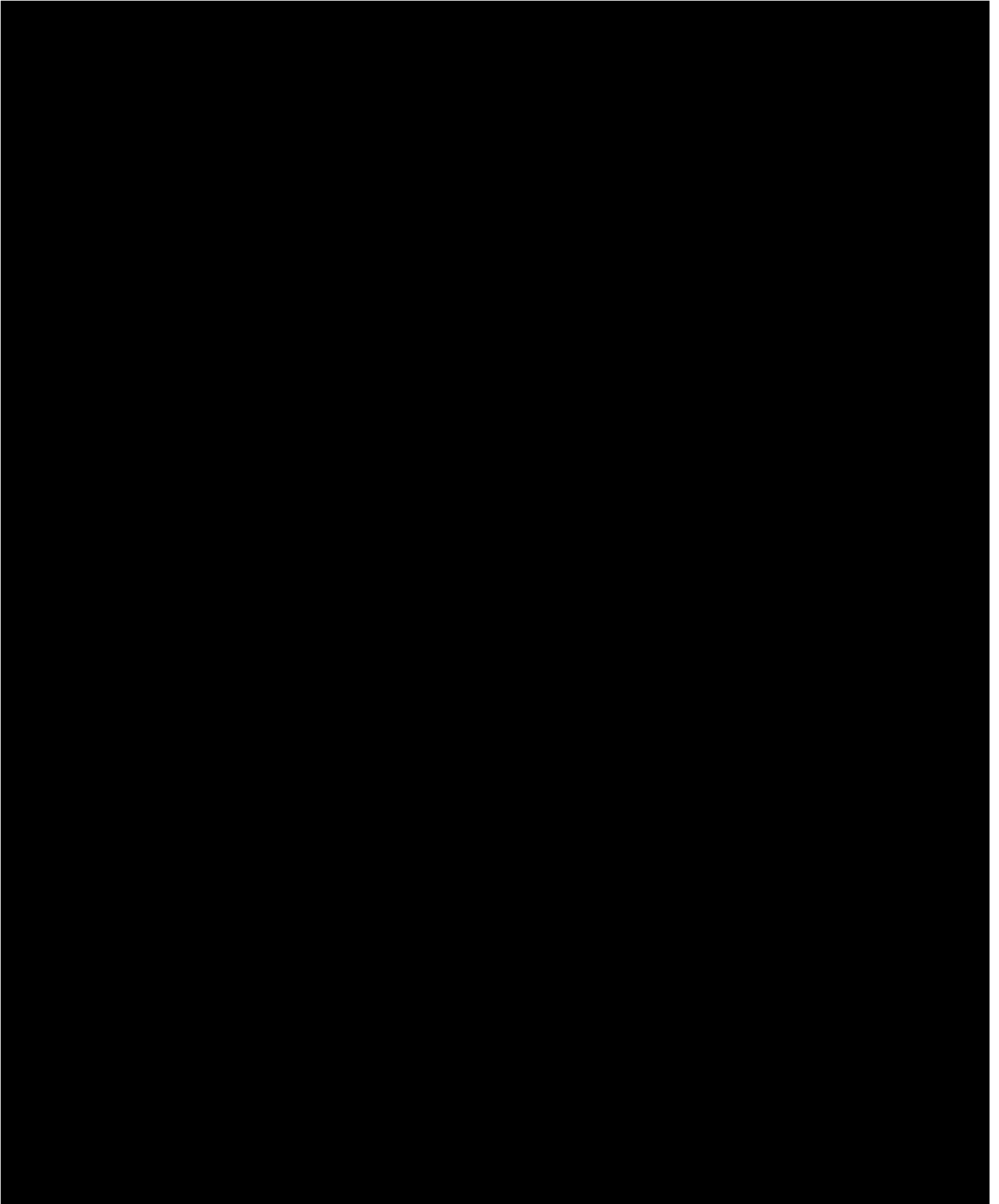
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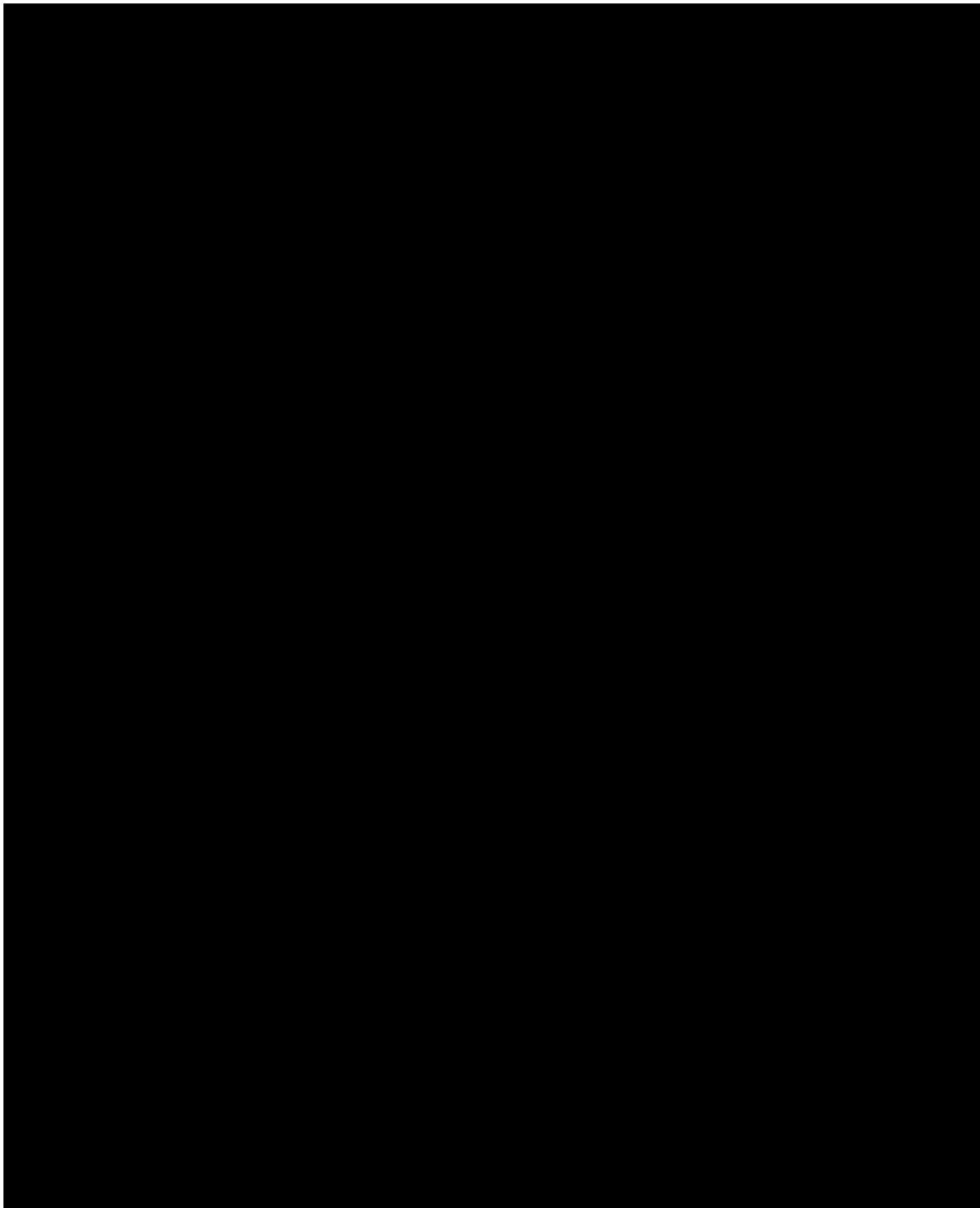
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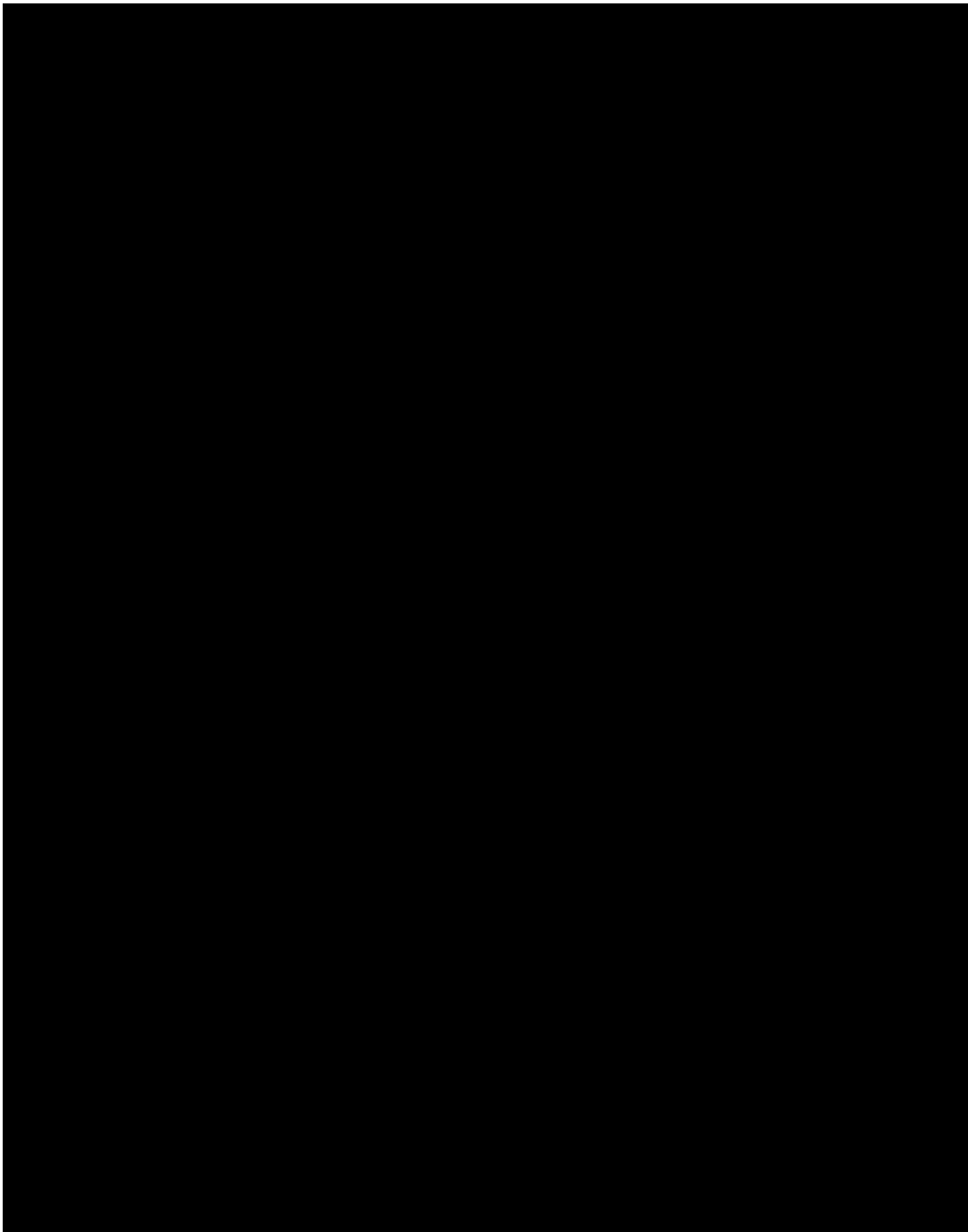
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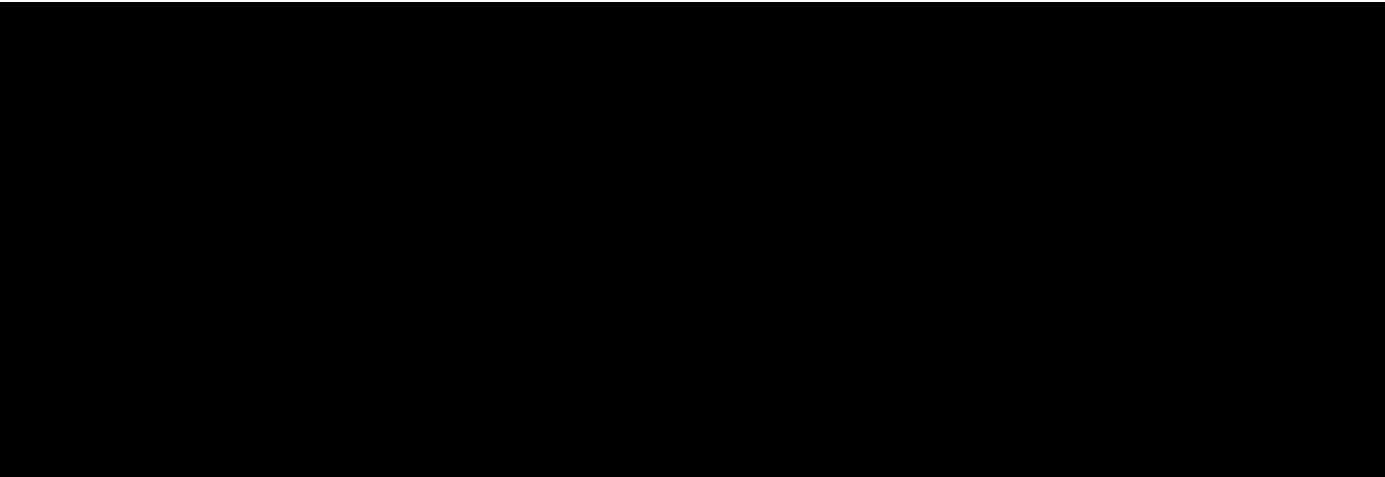












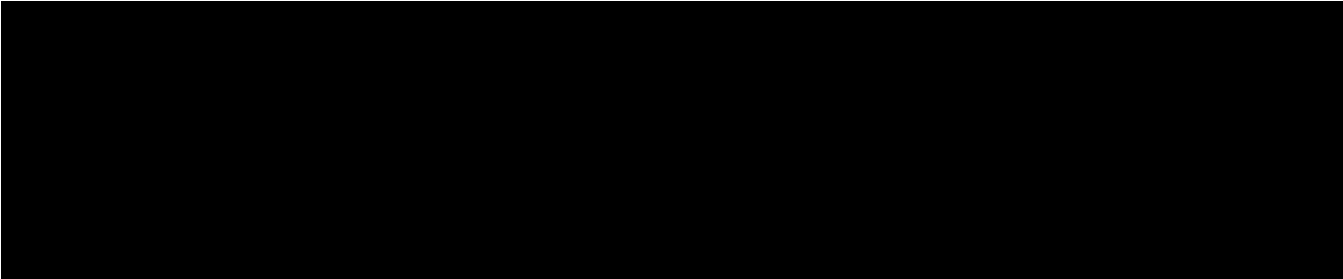
4. Peru Breached Its Guarantee under Clause 2.2.1 that Its Execution of Addenda 1 and 2 and Other Actions Taken in “Fulfillment” of the RER Contract Were in Accordance with Law and “Duly Authorized” by Peru

467. Clause 2.2.1 provides:

2.2 The Ministry ensures the Concessionaire Company, on the Closing Date, that the following representations are true and accurate:

2.2.1 The Ministry is duly authorized under the Applicable Laws to act as Grantor of this Contract. The execution, delivery and performance hereof by the Ministry fall within its powers, are consistent with the Applicable Laws and have been duly authorized by the Government Authority.⁸⁵⁶

468. Clause 2.2.1 of the RER Contract provides a sovereign guarantee that its “execution, delivery, and performance” of the RER Contract, and its modifications, “fall within its powers, are consistent with the Applicable Laws and have been duly authorized by the Government Authority.”⁸⁵⁷



■ [REDACTED]
■ [REDACTED]

⁸⁵⁶ RER Contract, February 18, 2014, Clause 2.2.1 (C-0002).

⁸⁵⁷ RER Contract, February 18, 2014, Clause 2.2.1 (C-0002).

C. Respondent Breached Its Obligations Under the Peruvian Civil and Administrative Laws Incorporated in the RER Contract

470. As explained above, the RER Contract incorporates by reference and imposes on Peru “all binding and legal norms” under Peru’s domestic laws, which include the Civil Code, the GLAP, and the TUPA.⁸⁵⁸ Peru breached certain of these norms.

1. Peru Breached Its Obligation of Good Faith Under the Civil Code of Peru and Peruvian Administrative Law

471. Peru failed to carry out its obligations under the RER Contract in accordance with the principle of good faith under Peruvian Law. This principle is codified under Article 1362 of the Civil Code, which provides that “[c]ontracts must be negotiated, executed and fulfilled according to the rules of good faith and common intention of the parties.”⁸⁵⁹ Dr. Benavides explains that good faith, in accordance with the Civil Code, “is one of the guiding principles of contracts” and “imposes on the parties to a contract a standard of conduct with diligence, honesty, prudence and responsibility, throughout all the stages of the contract, typical of a diligent businessman.”⁸⁶⁰

472. The obligation of good faith is also enshrined in the GLAP, under which the content of good faith is substantially the same.⁸⁶¹ As explained by Dr. Quiñones, there are cogent policy reasons as to why good faith was incorporated into the GLAP, namely because it serves as a requirement for the Government to protect the legitimate trust of the Private Party and ensure consistent actions by the Government.⁸⁶²

⁸⁵⁸ RER Contract, February 18, 2014, Clauses 1.2 and 1.4.30 (C-0002).

⁸⁵⁹ Benavides Report I, ¶ 238.

⁸⁶⁰ Benavides Report I, ¶¶ 236, 239.

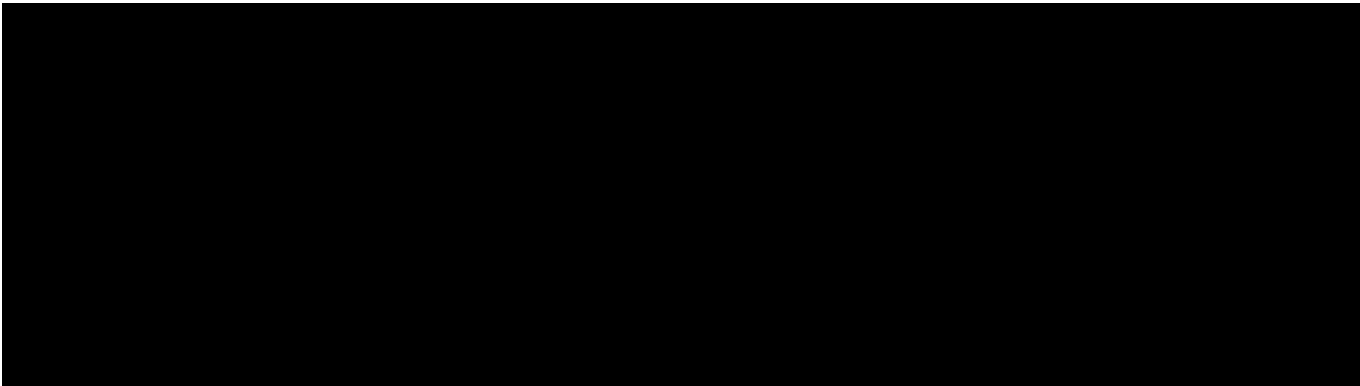
⁸⁶¹ Quiñones Report I, ¶ 141.

⁸⁶² Quiñones Report I, ¶ 142.

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473. Far from the requisite diligence, honesty, prudence and responsibility Peru owed to CHM as a counterparty with reciprocal obligations under the RER Contract, Peru thwarted the Mamacocha Project at every turn in violation of Peru's civil and administrative laws. Peru's acts and omissions were contrary to the principle of good faith under Peruvian Law in many instances, including as follows:

474. **First**, Peru's commencement of the RGA Lawsuit was entirely unreasonable and lacking in good faith. The Tribunal need look no further than the Regional AG's Report, which confirms that the RGA had known all along that the RGA Lawsuit was meritless but went ahead with it anyway because the RGA Council wanted to block the Project.⁸⁶³ When the Special Commission threatened the RGA with civil and criminal penalties for bringing this meritless Lawsuit,⁸⁶⁴ the Regional AG's Report recommended the immediate withdrawal of the Lawsuit as well as an investigation into the RGA Council for its "EVASIVE" conduct.⁸⁶⁵



476. **Third**, Peru's measures with respect to the Project's civil works authorization also lacked good faith. Indeed, Peru, through AAA, took obstructive actions to deny or delay

⁸⁶³ Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

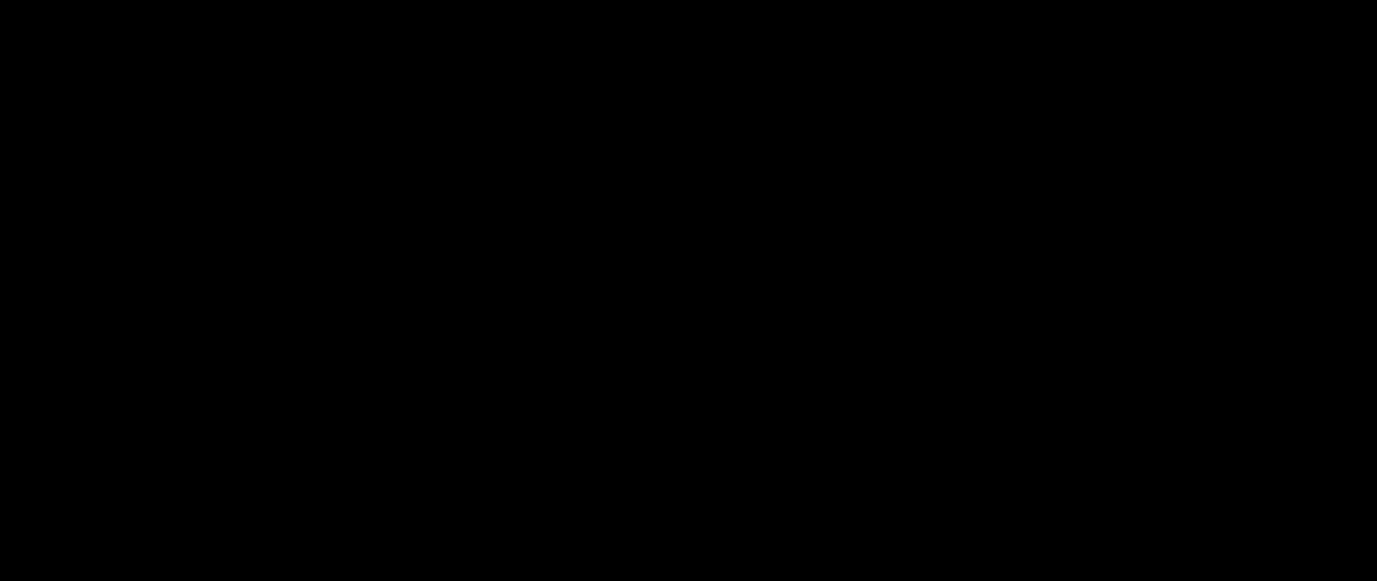
⁸⁶⁴ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-0010); Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017 (C-0011).

⁸⁶⁵ Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, December 21, 2017 (C-0095).

⁸⁶⁶ Regional Council of Arequipa's Ordinary Session Minute, October 21, 2016 (C-0049).

⁸⁶⁷ Arequipa Environmental Prosecutor Order No. 04-2018-O-FPEMA-MP-AR, February 2, 2018 (C-0193)

this permit that were later reversed and rectified upon intervention of its supervisory body (ANA) and an administrative court,⁸⁶⁸ but not before these unreasonable actions had contributed to the destruction of the Project. As the AAA admitted to Claimants, its measures against the Project were due to political pressure from the RGA.⁸⁶⁹



478. **Fifth**, Peru's denial of CHM's Third Extension Request also lacks good faith. As explained by Dr. Santiváñez, MINEM's complete reversal of its position that the Project should be extended when there are government interferences is due to regulatory opportunism. In short, the natural gas and renewable energy sectors caused an oversupply of energy that resulted in a precipitous price drop in the spot market. MINEM believed it was less costly and a lot easier to let the RER projects fail than pick a fight with the much more substantial natural gas industry players.⁸⁷¹

2. Peru Violated the Principle of *Actos Propios*

⁸⁶⁸ Bartrina I, ¶¶ 63-70.

⁸⁶⁹ Bartrina I, ¶ 67.

⁸⁷¹ Santiváñez I, ¶¶ 65-78.

479. Peruvian Law likewise recognizes that Peru cannot arbitrarily contradict its prior official acts. Dr. Benavides explains that this principle, known as “*actos propios*,” is rooted in the concept of good faith and prevents a party from taking inconsistent positions.⁸⁷²

480. Peru’s administrative laws also prohibit a government from adopting contradictory decisions, pursuant to the principle of *actos propios*. Article IV, paragraph 1.8 of the Preliminary Title of TUPA, titled “principles of administrative procedure” expressly provides that an “administrative authority may not contradict its own acts.”⁸⁷³ Dr. Quiñones explains that the principle of *actos propios* ensures “predictability” and “legitimate trust of private parties” that are subject to administrative proceedings, and to those ends, the government “may not unilaterally change the meaning of its decisions unless clearly and specifically justified.”⁸⁷⁴

481. In this case, CHM had the legitimate expectation that Peru would interpret the direct obligations and principles contained in the RER Contract consistently. But, on numerous occasions, Peru reversed or modified its interpretation of key legal principles. These abrupt and unjustified reversals or modifications violates the doctrine of *actos propios* and damaged CHM.

482. **First**, as explained previously, the RGA Lawsuit marked an abrupt reversal in legal position, as Peru attempted to annul its prior approval of the environmental permits for the Mamacocha Project more than three years after they were issued.

⁸⁷² Benavides Report I, ¶¶ 246-252.

⁸⁷³ Quiñones Report I, ¶ 141.

⁸⁷⁴ Quiñones Report I, ¶ 142.

484. **Third**, Peru's denial of CHM's Third Extension Request amounted to a complete reversal by Peru of the standard for granting extensions to the COS under the RER Contract. Notably, MINEM's reversal was contained in an official report that was signed by the *same* MINEM official who, two years earlier, had drafted the official report explaining why such extensions were necessary and proper under Peruvian and international law.

485. **Fourth**, Peru reversed its prior acts when it agreed to suspend the RER Contract for seventeen (17) months, but later denied CHM an extension of the contract milestone schedule to accommodate the suspension period.

3. Peru Violated the Principle of *Confianza Legitima*

486. Peru violated the principle of *confianza legitima*, or legitimate expectations, through its arbitrary conduct. Legitimate expectations – a fundamental component of FET, as explained above – is analogous to *confianza legitima* under Peruvian Law. The principle of *confianza legitima* is enshrined in paragraph 1.15 of Article IV of the Preliminary Title of the General Administrative Law:

1.15. Principle of predictability or legitimate trust. The administrative authority shall provide private parties or their representatives with true, complete and reliable information regarding each proceeding under its responsibility, so that private parties accurately understand at all times the relevant requirements, procedures, estimated duration and possible results.

The actions by the administrative authority shall be in line with the private party's legitimate expectations reasonably created by practice and administrative precedents, unless it decides to depart therefrom and explains the relevant reasons in writing.

The administrative authority shall comply with the applicable legal system and may not act arbitrarily. Therefore, the administrative authority may not vary its interpretation of the applicable rules in an unreasonable and unjustified way.⁸⁷⁵

⁸⁷⁵ Quiñones Report I, ¶ 142.

487. As explained by Dr. Quiñones, the concept of *confianza legitima* (i.e., legitimate expectations) ensures legal certainty (similar to legitimate expectations under FET) because “administrative precedents in similar cases create reasonable expectations in private parties.”⁸⁷⁶ This doctrine applies where the State has adopted conduct “that is revealing or unequivocal in affirming or maintaining a certain interpretation” thereby forming in the private party the legitimate expectation “that the Government is acting appropriately, that its conduct in relation to the authority is lawful, or that its expectations as an interested party are reasonable.”⁸⁷⁷

488. As established in Section IV above addressing breaches of Claimants’ reasonable expectations protected under the TPA and international law, Peru’s arbitrary and capricious administrative acts and omissions had a “roller-coaster” effect on the Mamacocha Project and breached Claimants’ *confianza legítima* protected under the RER Contract and Peruvian law.

4. Peru Breached Its Obligation under Peru’s Administrative Laws to Timely Decide Upon CHM’s Third Extension Request and Civil Works Authorization Permit Application

489. Peru breached its obligations under the GLAP by failing to render timely decisions on applications by CHM that were material to the RER Contract. The RER Contract is silent on the review periods within which Peru must issue a determination on such requests. Without clear contractual guidance, the review periods set forth under the GLAP and TUPA are dispositive.

490. The review periods set out under these laws and regulations are neither advisory nor aspirational. Rather, as provided by Article 142 of the GLAP, these review periods are mandatory and binding on Peru.⁸⁷⁸ Similarly, Articles 55(7) and 131 of the GLAP provides that

⁸⁷⁶ Quiñones Report I, ¶ 142.

⁸⁷⁷ Quiñones Report I, ¶ 149.

⁸⁷⁸ Quiñones Report I, ¶ 107.

the TUPA review periods are binding on Peru, and private parties are entitled to demand that the authorities comply with the time periods prescribed for each service or action.

Article 55. Rights of private parties

Private parties shall have the following rights with respect to administrative proceedings: . . .

7. Observance of the time periods prescribed for each service or action and the possibility to demand its compliance by authorities. . . .

Article 131. Binding nature of time periods and terms

131.1 Time periods and terms shall be understood as maximum time limits, computed independently of any formality, and they shall be *equally binding upon the government and private parties, without compulsion, to the extent applicable to each of them*. In administrative proceedings, the time periods for a decision by an entity shall start on the day following submission of the request by the private party, unless a correction is required, in which case they shall start following any such correction.

131.2 Each authority shall comply and cause those under its control to comply with its respective terms and time periods for each of their levels.

131.3 Any private party shall be entitled to demand compliance with the time periods and terms prescribed for each action or service.⁸⁷⁹

491. In other words, Peru has an obligation to perform its duties in favor of private parties and observe the deadlines established under its administrative law for the limited periods of review. As Dr. Quiñones concluded:

Accordingly, the Concessionaire has the legitimate right to expect and demand that the Grantor should fulfill its duty to cooperate and perform the obligations under the contract, including the issuance of the Relevant Permits to perform the RER Projects, within the legally-prescribed timeframes.⁸⁸⁰

⁸⁷⁹ Quiñones Report I, ¶ 116.

⁸⁸⁰ Quiñones Report I, ¶ 115.

492. Peru's failure to comply with these review periods gives rise to civil liability, as confirmed by Article 143 of the GLAP:

Article 143. Liability for non-compliance with time periods

143.1 If any authority unreasonably fails to comply with the prescribed time periods for its proceedings, it shall incur disciplinary liability, notwithstanding any civil liability incurred for the damage caused . . .⁸⁸¹

493. This conclusion is also supported by paragraph 1.18 of Article IV of the Preliminary Title and Article 238 of the GLAP:

1.18. Principle of liability. Any administrative authority shall be liable for any damage caused to a private party as a result of improper conduct of its administrative proceedings, as set forth herein. Any entity and its officials or servants shall assume the consequences of their actions in accordance with the legal system.⁸⁸²

[. . .]

Liability of public authorities

Article 238. General Provisions

238.1 Notwithstanding any liability under ordinary and special laws, entities shall be financially liable to private parties for direct and immediate damage caused by any administrative act or any public service directly provided by such entities.⁸⁸³

494. In this context, Peru's failure to adhere to the time periods governing its review and decision of CHM's applications for permits, approvals and contract extensions gives rise to civil liability. As set forth below, Peru breached these obligations on at least two occasions:

495. **First**, Peru, through MINEM, breached this obligation when it failed to rule on CHM's Third Extension Request within the relevant time period. The TUPA does not provide a specific review period under which MINEM must issue a determination for this application.

⁸⁸¹ Quiñones Report I, ¶ 122.

⁸⁸² Quiñones Report I, ¶ 122.

⁸⁸³ Quiñones Report I, ¶ 122.

Thus, as confirmed by Dr. Quiñones, the default maximum review period of thirty (30) days provided under Articles 106 and 142 of the GLAP applies.⁸⁸⁴

496. Peru exceeded this review period by approximately ten (10) months. On February 5, 2018, CHM formally requested that MINEM extend the COS date and Termination Date under the RER Contract to account for myriad government interferences, such as the RGA Lawsuit and AAA's arbitrary measures with respect to the civil works authorization.⁸⁸⁵ This application was critical to the Project because, without these extensions, the Project had insufficient time to achieve commercial operation by the contractual deadlines. In March 2018, after MINEM failed to respond within the prescribed time, Claimants had no choice but to submit their second notice of intent to submit claims under the TPA and commence another Trato Directo period in order to resolve the dispute arising from MINEM's failure to respond to CHM's Third Extension Request.⁸⁸⁶ MINEM's failure to respond also forced the parties to renew the suspension period under the RER Contract on two separate occasions, through Addenda 5 and 6.⁸⁸⁷ MINEM finally issued its determination on December 31, 2018, nearly eleven (11) months after CHM had submitted its request.⁸⁸⁸

497. Putting aside the arbitrariness of the merits of this determination, which denied CHM's application in its entirety, MINEM's failure to resolve CHM's request within the required 30-business day period resulted in a material breach of Article 143 because it put the Mamacocha Project in a contractual limbo under which CHM could not perform any of its obligations or advance the Project in any material way. Moreover, CHM was forced to expend

⁸⁸⁴ Quiñones Report I, ¶ 107.

⁸⁸⁵ Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, February 1, 2018 (C-0127).

⁸⁸⁶ Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, March 8, 2018 (C-0170)

⁸⁸⁷ Addendum 5 to the RER Contract, March 26, 2018 (C-0016); Addendum 6 to the RER Contract, July 23, 2018 (C-0017).

⁸⁸⁸ MINEM Official Letter No. 2312-2018-MEM/DGE, December 31, 2018 (C-0030).

significant time, money, and resources in protracted and, ultimately, fruitless negotiations while it waited for MINEM's tardy determination.

498. **Second**, Peru, through AAA, breached this obligation when it failed to issue the civil works authorization in a timely manner. The TUPA provides a 20-business day review period for this application.⁸⁸⁹ But AAA delayed the granting of this permit by more than one year. Indeed, CHM applied for the civil works authorization permit on November 25, 2016 but did not receive a determination from AAA until May 19, 2017.⁸⁹⁰ This determination, however, was completely unlawful and caused CHM to take unnecessary steps to seek its reconsideration. In July 2017, AAA reversed its unlawful declaration but failed to cure its harm when it issued a materially defective civil works authorization.⁸⁹¹ AAA then compounded this error when it refused to correct the materially defective permit for six months until ordered to do so by an ANA administrative court.⁸⁹² The civil works authorization was finally granted in January 2018, amounting to a completely unjustified one-year delay and a breach of the 20-business day requirement under the TUPA.⁸⁹³ This breach harmed CHM because this permit was the last-remaining permit on the Project's critical path and, without it, CHM could neither close on its financial obligations nor construct structures adjacent to the Lagoon and other nearby waterways.

D. The RER Contract Terminated as a Matter of Law in December 2018, When Peru Made It Impossible for CHM to Perform

499. Peru's measures had the effect of terminating the RER Contract as a matter of law because they made it impossible for CHM to perform its contractual obligations. Article 1432 of the Civil Code provides that when a contract party's actions or inactions make it impossible for

⁸⁸⁹ Sillen I, ¶ 115.

⁸⁹⁰ Directorial Resolution No. 1480-2017-ANA/AAA I C-O, May 16, 2017 (C-0121).

⁸⁹¹ Directorial Resolution No. 1928-2017-ANA/AAA I C-O, July 5, 2017 (C-0122).

⁸⁹² Bartrina I, ¶ 70.

⁸⁹³ Resolution No. 053-2018-ANA/TNRCH, January 24, 2018 (C-0199).

its counterparty to perform, the contract terminates as a matter of law. Specifically, this Article provides:

Article 1432 - Resolution by Fault of the Parties

If the provision is impossible due to the fault of the debtor, the contract is fully terminated and the latter cannot demand the consideration and is subject to compensation for damages.

When the impossibility is attributable to the creditor, the contract is fully terminated. However, said creditor must satisfy the consideration, corresponding to him the rights and actions that have remained related to the provision.⁸⁹⁴

500. Dr. Benavides confirms that, for the purposes of the RER Contract, Peru is the “creditor” and CHM is the “debtor.”⁸⁹⁵ Thus, under the second paragraph of Article 1432, the RER Contract will be “fully terminated” if Peru made it impossible for CHM to perform.⁸⁹⁶ As Dr. Benavides explains, the phrase “fully terminated” indicates that this termination happens automatically by operation of law, making it unnecessary for CHM to take any “action before the courts” to have it terminated.⁸⁹⁷ Put differently, if Peru made CHM’s performance impossible, CHM would be immediately and permanently freed from its contractual obligations to develop, construct, and operate the Mamacocha Project.

501. CHM’s remedies under Article 1432 go beyond the termination of the RER Contract. This Article also allows CHM to recover the “consideration” it would have received had Peru not made it impossible for CHM to perform.⁸⁹⁸ As Dr. Benavides confirms, this means that Peru would owe CHM all compensation that it was promised under the RER Contract upon full performance, including the “Guaranteed Revenue.”⁸⁹⁹

⁸⁹⁴ Benavides Report I, ¶ 210.

⁸⁹⁵ Benavides Report I, ¶¶ 210, 213.

⁸⁹⁶ Benavides Report I, ¶ 210.

⁸⁹⁷ Benavides Report I, ¶ 211.

⁸⁹⁸ Benavides Report I, ¶ 210.

⁸⁹⁹ Benavides Report I, ¶¶ 206-07 and 213.

502. This result is merited here because Peru made it impossible for CHM to perform through its two-pronged attack on the Mamacocha Project in December 2018. First, on December 27, 2018, Peru commenced the frivolous Lima Arbitration that, among other things, seeks to restore the original COS deadline of December 31, 2018.⁹⁰⁰ Second, on December 31, 2018, Peru denied the Third Extension Request and in so doing confirmed that no further extensions would be given to CHM under the RER Contract.⁹⁰¹

503. The denial of the Third Extension Request left CHM with approximately fifteen (15) months to achieve COS by the deadline set forth under Addendum 2, *i.e.*, March 14, 2020. As Claimants' delay expert, HKA, confirms, this period of time would have made this deadline completely "unachievable" given the amount of time that CHM needed to complete the works schedule under the RER Contract.⁹⁰² Further, it was not CHM's fault that it ran out of time under the timetable set forth under Addendum 2. To the contrary, HKA found that *the entire 575-day delay* to the Project after the issuance of Addendum 2 is attributable to Peru's interference with the Project, which included the meritless RGA Lawsuit, the AEP's bad-faith criminal investigation, the AAA's arbitrary measures, and MINEM's tardy response to the Third Extension Request.⁹⁰³ HKA also concluded that, over the life of the RER Project, Peru delayed the Project a total of *1742 calendar days, i.e.*, approximately five (5) years.⁹⁰⁴

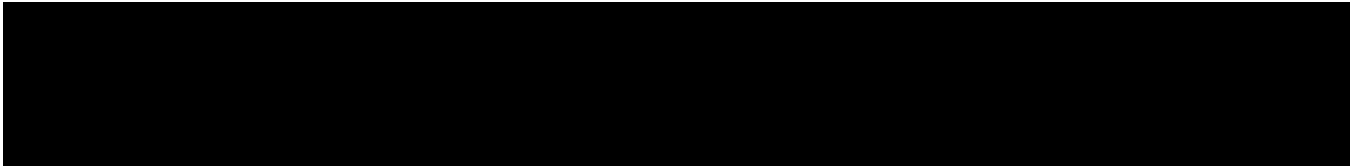
⁹⁰⁰ MINEM's Official Letter No. 2300-2018-MEM/DGE, December 31, 2018 (C-0096).

⁹⁰¹ Official Letter No. 2312-2018-MEM/DGE, December 31, 2018 (C-0030).

⁹⁰² HKA Report I, ¶ 185.

⁹⁰³ HKA Report I, ¶ 186.

⁹⁰⁴ HKA Report I, ¶ 182.



505. CHM respectfully requests the Tribunal declare the RER Contract, and CHM's legal obligations thereunder,⁹⁰⁵ terminated as a matter of law as of December 31, 2018. CHM also requests that it receive from Peru the full compensation that CHM would have received had Peru not made it impossible for CHM to perform under the RER Contract, including the full twenty (20) years of Guaranteed Revenue.

⁹⁰⁵ Including its obligation to maintain a performance bond. RER Contract, February 18, 2014, Clause 8.1 (C-0002).

VI. CLAIMANTS ARE ENTITLED TO COMPENSATION AND DAMAGES

A. Claimants Are Entitled to an Award of Damages in an Amount Sufficient to Wipe Out the Financial Consequences of Peru's Breaches of its TPA, International Law, Peruvian Law and Contractual Obligations

506. Claimants demonstrate in the Sections above that Peru's actions and omissions, singularly and cumulatively, breached its obligations under the TPA, international law, Peruvian Law, and the RER Contract. The question to be decided, therefore, is what quantum of damages Claimants are entitled to receive to wipe out the consequences of Peru's breaches and put them in the same position they would have been *but for* Peru's breaches.

507. To provide an independent assessment of this question, Claimants retained Messrs. Santiago Dellepiane and Andrea Cardani, Managing Director and Director of BRG "to quantify the damages suffered by Claimants, if any, resulting from Peru's frustration of Claimants' investments in Peru."⁹⁰⁶ BRG is a recognized global leader in the field of economics and valuation. Together, Messrs. Dellepiane and Cardani have provided written and oral testimony or expert advice in more than fifty matters involving valuation, regulatory, and damages-related issues before ICSID, ICC, UNCITRAL and ICDR tribunals, as well as before national courts.⁹⁰⁷ Mr. Dellepiane has written extensively on the subject of damages in investor-state arbitration, and, in 2014, his research on damages in contractual and treaty breaches was published in Oxford University Press's *Damages in International Arbitration Under Complex*

⁹⁰⁶ See BRG Report I, ¶ 5.

Long-Term Contracts. A full listing of Messrs. Dellepiane and Cardani’s credentials is included in the BRG Report.⁹⁰⁸

508. In its eighty-nine (89) page report, BRG describes in detail its conclusions that Claimants’ total damages up to the date of its report (September 14, 2020), using the applicable Fair Market Value (“**FMV**”) standard amount to US \$47.049 million, inclusive of pre-award interest and additional costs and expenses, as reflected in Table 1 of its report as follows:

Table 2 Summary of Damages Using FMV Standard, Including Additional Costs and Expenses Incurred by Claimants as of September 14, 2020 (USD Millions)⁹⁰⁹

But-For Value of the Mamacocha Project as of March 14, 2017	<i>a</i>	35.310
Pre-Award Interest at 7.06% up to September 14, 2020	<i>b</i>	9.719
Additional Costs and Expenses Incurred by the Claimants Including Pre-Award Interest at 7.06% up to September 14, 2020	<i>c</i>	2.019
Total Damages Using FMV Standard as of September 14, 2020	<i>d = a + b + c</i>	47.049

509. In this Section, Claimants will demonstrate that FMV is the established standard of compensation to wipe out the effects of a material breach and frustration of a large-scale investment like the Mamacocha Project, whether reviewed under the TPA, international law, Peruvian law, or the RER Contract. Claimants will also show that the proper methodology for calculating FMV is Discounted Cash Flow (“**DCF**”), as described below and extensively treated in the BRG Report. [REDACTED]

[REDACTED]

[REDACTED]

⁹⁰⁸ BRG Report I, § II; Curriculum Vitae of Santiago Dellepiane (BRG-0001); Curriculum Vitae of Andrea Cardani (BRG-0002).

⁹⁰⁹ BRG Report I, ¶ 15.

[REDACTED]

[REDACTED]

[REDACTED]

1. Legal Standard for Compensation for Breaches of the TPA and International Law

510. The TPA is silent on the remedies for breaches of FET, unlawful expropriation, and the most-favored nation clause. In the absence of *lex specialis*, Tribunals have looked to the applicable rules of customary international law. Well-established precedent guides this Tribunal to the standard set forth in the *Chorzów Factory* case, “widely regarded as the most authoritative exposition of principles applicable in this field,”⁹¹¹ which provides:

The essential principle contained in the actual notion of an illegal act . . . is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it. . . .⁹¹²

511. *Chorzów Factory* has been adopted by myriad tribunals⁹¹³ and was codified in the ILC Articles setting forth customary international law on State responsibility.⁹¹⁴ Article 31 of the ILC Articles incorporates the reasoning of *Chorzów Factory* providing that “[t]he responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act. . . . Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”⁹¹⁵ Article 36 of the ILC Articles further elucidates:

terms, a tool widely used in the valuation of companies and projects, and is adequate for the purpose proposed by BRG.”).

⁹¹¹ *Amoco International Finance Corp. v. Islamic Republic of Iran*, Iran-U.S. Claims Trib., Case No. 56, Partial Award, July 14, 1987, ¶ 191 (CL-0085).

⁹¹² *Chorzów Factory (Ger. v. Pol.)*, Judgment No. 13 (Merits), P.C.I.J. (1928), September 13, 1928, p. 47 (CL-0086). (emphasis added)

⁹¹³ See, e.g., *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013 (CL-0087); *Rusoro Mining Ltd. v. The Bolivarian Republic of Venezuela*, Award, August 22, 2016 (CL-0088); *CME v. Czech Republic*, Partial Award (CL-0022); *National Grid P.L.C. v. Argentina*, UNCITRAL, Award, November 3, 2008 (CL-0041); *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014 (CL-0029).

⁹¹⁴ ILC Articles, Arts. 31, 36 (CL-0072).

⁹¹⁵ ILC Articles, Art. 31(1)-(2) (CL-0072).

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage *including loss of profits* insofar as it is established.⁹¹⁶

Finally, ILC Article 34 provides that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.”⁹¹⁷

512. While *Chorzów Factory* discusses the standard for unlawful expropriation, the principles set forth in that decision have been consistently applied and extended by tribunals for other treaty breaches that damage or destroy the value of an investment.⁹¹⁸ For example, in *Azurix v. Argentina*, the tribunal noted that NAFTA “does not provide for a measure of compensation” when a standard of protection was breached but no expropriation had occurred, and cited *S.D. Myers v. Canada* (a NAFTA case) for the proposition that,

[T]he lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to tribunals to determine it in light of the circumstances of the case taking into account the principles of both international law and the provisions of NAFTA.⁹¹⁹

In such cases (*i.e.*, breaches of minimum standards of treatment), “the standard of compensation formulated in *Chorzów [Factory]*” is appropriate.⁹²⁰ Similarly, in *Metalclad v. Mexico*, the tribunal held that “the damages arising under NAFTA Article 1105 [denial of minimum standard of treatment] and the compensation due under NAFTA Article 1110 [expropriation] would be the

⁹¹⁶ ILC Articles, Art. 36(1)-(2) (CL-0072). (emphasis added)

⁹¹⁷ ILC Articles, Art. 34 (CL-0072).

⁹¹⁸ *National Grid v. Argentina*, Award, ¶ 72 (CL-0041) (citing principles of international law set out in *Chorzów Factory* to award full compensation regardless of the nature of the treaty breach); *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 681 (CL-0031) (finding fair market value approach to treaty violations provided appropriate means to “wipe out” the consequences of the host country’s treaty breaches, including FET violations).

⁹¹⁹ *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶¶ 421-422 (CL-0014).

⁹²⁰ *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶ 423 (CL-0014).

same since both situations involve the *complete frustration of the [investment]* and negate the possibility of any meaningful return on Metalclad's investment. In other words, Metalclad has completely lost its investment."⁹²¹ Likewise, in a DR-CAFTA case, the *RDC v. Guatemala* tribunal found a breach of FET under the minimum standard of treatment and determined that the appropriate standard for damages was found under customary international law, in particular, under the *Chorzów Factory* principle.⁹²²

513. Notably, in the unlikely event that the Tribunal determines that Peru is not liable for all breaches of the TPA enumerated above, the Tribunal need only find one breach of the TPA in order for Claimants to be awarded their full amount of alleged damages, in light of the principles laid out in *Chorzów Factory*, which apply equally to breaches of Articles 10.4, 10.5, and 10.7 of the TPA.⁹²³

514. The *Siemens v. Argentina* case reflects customary international law regarding the appropriate standard and measure of damages for investment treaty breaches like Peru's. In *Siemens*, the tribunal found that Argentina had indirectly expropriated Siemens's investment and had breached its obligation to provide fair and equitable treatment, among other treaty breaches. The tribunal determined that "[t]he Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty" and, therefore, "the law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law."⁹²⁴ The *Siemens* tribunal also clarified that the scope of the *Chorzów Factory* principle broadly covers the value of the investment and consequential damages:

⁹²¹ *Metalclad v. Mexico*, Award, ¶ 113 (CL-0037). (emphasis added)

⁹²² *RDC v. Guatemala*, Award, ¶ 260 (CL-0049).

⁹²³ *Azurix v. Argentina*, Award, ¶ 417 (CL-0014) (holding that damages based on fair market value was appropriate for Argentina's breaches of the fair equitable treatment, full protection and security, and arbitrary measures provisions).

⁹²⁴ *Siemens v. Argentina*, Award, ¶ 349 (CL-0057).

The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and . . . the Treaty is that, under the former, compensation must take into account “all financially assessable damages” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of . . . the date of expropriation . . . *plus any consequential damages*. . . . 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 be compensated in full. Otherwise compensation would not cover all the consequences of the illegal act.⁹²⁵

515. Echoing the same principle, the tribunal in *Vivendi v. Argentina (II)* observed that, “regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party in full and to eliminate the consequences of the state’s action.”⁹²⁶ Following the *Vivendi (II)* decision, the tribunal in *Murphy v. Ecuador (II)*, a case brought under the U.S.-Ecuador BIT, also found that a “violation of an obligation under international law by a State entails the State’s international responsibility. The Tribunal is satisfied that the above principle of full reparation applies to breaches of investment treaties unrelated to expropriations. . . . The full reparation standard aims at ‘full reparation’ of the concrete and actual damage incurred.”⁹²⁷

516. Furthermore, in circumstances where, as here, a host State unlawfully deprives an investor of the entirety of its investment, tribunals have consistently granted an award of compensation equal to the FMV of the investment, and any damages incurred in connection with the unlawful acts leading up to the unlawful taking.⁹²⁸ In the context of various State measures

⁹²⁵ *Siemens v. Argentina*, Award, ¶ 352 (CL-0057).

⁹²⁶ *Vivendi v. Argentina (II)*, Award, ¶ 8.2.7 (CL-0064).

⁹²⁷ *Murphy v. Ecuador (II)*, Partial Final Award, ¶ 425 (CL-0040).

⁹²⁸ *See, e.g., Flughafen Zürich v. Venezuela*, Award, ¶¶ 747-748 (CL-0029) (“In an expropriation, full restitution equals the market value of the expropriated asset, which is the value the owner could have obtained if it had been sold right before the date the State took possession. . . . Market value must be understood as the price in money that a hypothetical buyer would be willing to pay to a hypothetical seller, [i] both being interested in carrying out the

that constituted cumulative treaty breaches, including FET, the tribunal in *CMS v. Argentina* was “persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.”⁹²⁹ The *Gold Reserve v. Venezuela* tribunal likewise found that the fair market value approach to treaty violations provided the appropriate means to “wipe out” the consequences of the host State’s treaty breach that “deprive[d] the investor totally of its investment.”⁹³⁰

517. Customary international law, in accordance with the *Chorzów Factory* principles, thus provides that Claimants are entitled to full compensation, under a FMV methodology, for Peru’s violations of Articles 10.4, 10.5, and 10.7 of the TPA.

2. Legal Standard for Compensation for Breaches of the RER Contract and Peruvian Law

518. As explained in Section V, *supra*, the RER Contract was effectively terminated as of December 31, 2018 when MINEM arbitrarily rejected CHM’s Third Extension Request and thereby made it impossible for CHM to perform. Under the terms of Articles 1432 of the Civil Code,⁹³¹ CHM’s performance under the RER Contract became impossible due to Peru’s material

transaction, but without obligation to do so, [ii] acting in good faith and according to market practice, [iii] in an open, unrestricted market, and [iv] both having a reasonable knowledge of the purpose of the contract and market conditions.”); ILC Articles, Commentary to Art. 36, ¶¶ 21-22 (CL-0072) (“The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses. . . Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost. . .”).

⁹²⁹ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 410 (CL-0023).

⁹³⁰ *Gold Reserve v. Venezuela*, Award, ¶ 681 (CL-0031).

⁹³¹ Benavides Report I, ¶ 210.

failure to meet its contractual obligations. Damages in this context are defined in Article 1321 of the Peruvian Civil Code, which provides:

The person who does not execute his obligations due to fraud, gross negligence or negligence is subject to pay compensation for damages.

The compensation for the non-performance of the obligation or for its partial, late or defective compliance, **includes both consequential damages and lost profits**, inasmuch as they are an immediate and direct consequence of such non-execution/non-performance.

If the non-performance or partial, late or defective fulfillment of the obligation, is due to negligence, the compensation is limited to the damage that could be foreseen at the time of the breach⁹³²

519. Article 1432 of the Peruvian Civil Code also provides that compensation is fully due when the counter-party renders performance impossible:

If performance is impossible due to the fault of the debtor, the contract is fully terminated and the latter cannot demand the consideration and is subject to compensation for damages.

When the impossibility is attributable to the creditor, the contract is fully terminated. However, said creditor must pay the consideration, corresponding to the rights and actions that have remained relative to the provision⁹³³

520. In addition, under Article 1322 of the Peruvian Civil Code, “non-pecuniary harm, when it has been incurred, is also subject to compensation.”⁹³⁴ Accordingly, under Articles 1432, 1321 and 1322 of the Civil Code, CHM is entitled to full redress for any economic and non-pecuniary harm incurred, provided that it is able to demonstrate the existence of such harm, evidence of breach of contract, and a causal nexus between the acts and omissions of Peru and the harm incurred.

⁹³² Benavides Report I, ¶ 231.

⁹³³ Benavides Report I, ¶ 210.

⁹³⁴ Benavides Report I, ¶ 233.

521. Peru’s multiple breaches of the RER Contract and its duty of good faith prevented CHM from completing development and construction of the Mamacocha Project. As set forth earlier, these breaches singularly and cumulatively rendered the project impossible to be completed. And Claimants suffered harm as a direct result of Peru’s breaches.

522. Accordingly, the Tribunal should award CHM damages for Peru’s breaches of the RER Agreement in an amount equal to the FMV of the Mamacocha Project as set forth in the BRG Report and described below. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. The Appropriate Valuation Date Is March 14, 2017

523. The appropriate valuation date to be applied in this case is a question of fact for the Tribunal to determine with respect to the specific circumstances present here.⁹³⁶ Claimant respectfully submits that the appropriate valuation date is March 14, 2017 (the “**Valuation Date**”), the date on which Peru filed the RGA Lawsuit. As detailed above, even though this Lawsuit was later dismissed when Peru admitted it was groundless, this measure definitively destroyed the economic value of the Mamacocha Project because Peru never cured the year-long delays that the RGA Lawsuit caused the Project.

524. As of the Valuation Date, as detailed above, Latam Hydro was on the verge of securing both an equity investor and financing—both of which fell away once notice of the RGA

[REDACTED]

⁹³⁶ See *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 788 (CL-0050).

Lawsuit was received as of March 17, 2017.⁹³⁷ Indeed, Latam Hydro’s transactions with a potential majority investor, lead bank and experienced EPC contractor were just weeks from closing when the RGA filed its Lawsuit.⁹³⁸ While the wind down of the Mamacocha Project was not complete until March 2019, as of the commencement of the RGA Lawsuit on March 14, 2017, the Mamacocha Project became unviable.⁹³⁹

C. Quantum of Damages

525. As set forth above, under customary international law, Claimants are entitled to full compensation to “wipe out” the consequences of Peru’s treaty breaches through compensation equal to the FMV of the Mamacocha Project as of March 14, 2020, as quantified by Claimants’ economic experts in the amount of no less than US \$47.049 million, plus post-award interest on that amount as of the date of award.⁹⁴⁰

526. A detailed quantification of the losses claimed by Claimants under the fair market value approach—as calculated using a discounted cash flow analysis (“DCF”)—and the investment value approach, is provided in the BRG Report.⁹⁴¹

527. In addition to “fair market value,” inclusive of Additional Costs and pre-award interest, Claimants also seek (a) reimbursement of the costs of this arbitration, including Latam

⁹³⁷ See, *supra*, Section II.H-II.I; see also Sillen I, ¶¶ 116-117.

⁹³⁸ See, *supra*, Section II.H-II.I.

⁹³⁹ See, *supra*, Section II.I.

⁹⁴⁰ Compensation under a FMV methodology is the only remedy that would truly “wipe out” the consequences of Peru’s acts and omissions and hence, is required under customary international law. Should the Tribunal be unwilling to adopt the Claimants’ FMV-based valuation of the Mamacocha Project, however, Claimants provide a secondary, alternative remedy based on the investment value approach. This alternative remedy does not provide full reparation for Claimants’ losses, nor is it “an estimate of value under the FMV standard.” BRG Report I, § IV.5. The investment value approach calculates Claimants’ investments in the Mamacocha Project, plus an expected return based on the cost of equity capital of a project with similar risks to the Mamacocha Project, the value of the performance bonds, plus additional consequential damages. The investment value alternative remedy results in damages of US \$35.777 million as of September 14, 2020 (to be updated accordingly). To be clear, the investment value approach does not “wipe out” the full consequences of Peru’s delicts and hence, is only being proffered on an alternative basis.

⁹⁴¹ See BRG Report I, §§ IV.3, IV.5.

Hydro's legal and expert fees, translation costs, Tribunal costs and fees, and other related fees and expenses relating to this proceeding, the quantum of which will be determined by the Tribunal at the conclusion of these proceedings; (b) additional non-investment related costs and expenses incurred as the result of Peru's acts and omissions; and (c) compound post-award interest to be paid until Peru makes payment in full of any outstanding Award.

1. Compensation for the Frustration of the Mamacocha Project

528. BRG calculates the FMV of the Mamacocha Project as of the Valuation Date plus additional consequential damages incurred by Claimants as the result of Peru's acts and omissions.⁹⁴²

a. FMV Valuation Using the DCF Method

529. Legal Entitlement. Where an investment had been rendered effectively worthless by illegal State conduct, tribunals have routinely applied the DCF method to determine the fair market value the investment would have had "but for" the illegal act. Tribunals have found the DCF method to be an appropriate methodology where projected cash flows are capable of determination and are not speculative.⁹⁴³ Relevant to the case here, tribunals have found it proper to award lost profits calculated on a DCF basis where there is sufficient data to determine lost profits within a reasonable degree of certainty. Tribunals have used the DCF method where income streams were reasonably certain due to, for example: (i) the existence of a long-term contract or concession in place that guarantees a certain level of profits;⁹⁴⁴ (ii) the presence of a

⁹⁴² Although Latam Hydro was contemplating a sale of a 70% equity stake to Innergex, that sale was never consummated. Accordingly, CHM was, and remains, wholly-owned by Latam Hydro.

⁹⁴³ *Occidental Petroleum v. Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, ¶¶ 690, 708 (CL-0042); *EDF International S.A. and others v. Argentina*, ICSID Case No. ARB/03/23, Award, June 11, 2012, ¶ 1188 (CL-0027); *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, January 31, 2014, ¶¶ 453, 604 (CL-0032); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶¶ 711-712 (CL-0028).

⁹⁴⁴ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶ 1010 (CL-0089).

predictable revenue stream;⁹⁴⁵ (iii) sufficient evidence that the project would more likely than not have become operational had it not been prevented from doing so by the illegal act;⁹⁴⁶ or (iv) recognition by the state of the project's potential profitability.⁹⁴⁷

530. Notably, in circumstances where the State committed an indirect expropriation and breached FET for wrongfully denying a critical license for claimants' mining operation that was not yet operational, the claimant in *Tethyan Copper v. Pakistan* was awarded lost profits because it was "appropriate to assume that Claimant's investment would have become profitable" but for Pakistan's wrongful denial of the mining license "and to determine these future profits by using a DCF method."⁹⁴⁸ The *Tethyan Copper* case is particularly instructive because that tribunal applied a DCF model even where there was less certainty of the investment's profitability than here. In the instant case, by sharp contrast to *Tethyan Copper* or other cases such as *Bear Creek*,⁹⁴⁹ the RER Contract provided a sovereign guarantee of a 20-year stream of income, virtually eliminating any uncertainty associated with the otherwise volatile spot market for energy.

531. Methodology. To calculate the quantum of damages necessary to wipe out the consequences of Peru's acts and omissions, BRG computed the difference between the (i) the value of the Mamacocha Project assuming that Peru did not interfere with the development and operation of the project (the "But-For Value"), and (ii) the value of the Mamacocha Project as a

⁹⁴⁵ *EDF v. Argentina*, Award, ¶ 1188 (CL-0027).

⁹⁴⁶ *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, (35 ILR (1967) 136), Award, March 15, 1963, p. 189 (CL-0053).

⁹⁴⁷ *Sapphire v. National Iranian Oil Company*, Award, p. 189 (CL-0053).

⁹⁴⁸ *Tethyan Copper v. Pakistan*, Award, ¶¶ 330-335 (CL-0061).

⁹⁴⁹ See, e.g., *Bear Creek v. Peru*, Award, ¶ 604 (CL-0016). The *Bear Creek* case involved a silver mining concession that was not yet a going concern and, given the substantial risks involved with a nascent mining operation, future profitability was wholly uncertain—particularly since silver prices were highly volatile and the prices for that commodity were not contractually guaranteed. By contrast to Claimants' investment here, the claimant in *Bear Creek* did not have a customer committed to a long-term purchase obligation involving set prices, volumes and revenue streams.

result of Peru's actions and omissions (the "Actual Value"), which was assumed to be zero⁹⁵⁰ given the total frustration of the Mamacocha Project resulting from Peru's breaches of the TPA.⁹⁵¹

532. BRG reviewed extensive materials prepared by several companies with various degrees of financial interest in the project while it was still viable, thus giving these materials a high degree of credibility. In the course of developing the Mamacocha Project, CHM commissioned multiple feasibility studies and engineering studies. In particular, Pöyry and GCZ, in addition to being highly reputable engineering companies, have been utilized as engineering experts in several other Peruvian engineering projects in the renewable energy sector.⁹⁵² In addition, CHM received multiple bids from contractors to perform the engineering, procurement and construction contract for the development of the Mamacocha Project. Several potential investors also prepared due diligence analyses for the project. BRG closely reviewed and analyzed the information contained in these materials in order to implement its damages calculations.⁹⁵³

533. All of the third-party studies relied upon by BRG were prepared by well-respected, independent companies with no interest in overvaluing the Mamacocha Project. Indeed, some of these entities, such as Innergex, a prospective equity investor, and DEG, a prospective lender, had every commercial incentive to *undervalue* the Project. These studies provided a uniquely timely and reliable data set upon which BRG constructed its own valuation model. Combined with the predictable income streams guaranteed under the RER Contract and

⁹⁵⁰ While there may be a residual value associated with certain easements and other rights retained by CHM that are technically transferable, the absence of any viable market for the sale of those rights renders them worthless.

Jacobson I, ¶ 91.

⁹⁵¹ BRG Report I, ¶ 7.

⁹⁵² Sillen I, ¶¶ 31, 88.

⁹⁵³ Sillen I, ¶ 7.

a commissioned expert's estimates of contemporaneous spot-price forecasts,⁹⁵⁴ BRG had abundant concrete data to value the Mamacocho Project using the DCF method.⁹⁵⁵

534. Given the extensive revenue and cost information available, BRG adopted the DCF method in order to assess the But-For Value of the Mamacocho Project pursuant to the FMV standard. The DCF approach is particularly well suited to assess damages in this case because it allowed BRG to value the Mamacocho Project by incorporating the myriad third-party analyses prepared during the course of the project's development. [REDACTED]

[REDACTED] By using the DCF method, BRG was able to determine value by computing the income streams that the Mamacocho Project would have received from energy sales under the RER Contract and spot market rates.⁹⁵⁷ BRG was also able to include the investments required to advance the project, and the costs the project would have incurred if it had proceeded to operation.⁹⁵⁸

⁹⁵⁴ In order to forecast changes in the price of electricity in Peru as of the Valuation Date, BRG relied on a report commissioned from BA Energy Solutions S.A.C. ("BAES"), recognized industry experts in the Peruvian electricity market (the "BAES Report"). BRG Report I, fn. 24.

⁹⁵⁵ For extensive case comparison and discussion of the application of the DCF method for valuation before a project becomes operational, see *Tethyan Copper v. Pakistan*, Award, ¶¶ 290-330 (CL-0061). The Tribunal in *Tethyan* confirmed that the question whether a DCF method (or a similar income-based valuation methodology) can be applied to value a project which had not yet become operational depends strongly on the circumstances of the individual case, setting forth factors to consider. *Id.* at ¶¶ 330-335 (CL-0061) ("the Tribunal is convinced that in the particular circumstances of this case, it is appropriate to assume that Claimant's investment would have become profitable and to determine these future profits by using a DCF method."). See also *Greentech Energy Systems A/S and others v. Italy*, SCC Case No. V (2015/095), Final Award, December 23, 2018, ¶ 562 (CL-0090) (finding DCF method appropriate for use in damages assessment of a pre-operational investment given, among other things, that claimants' investments had relatively predictable performance, involved foreseeable costs, and benefited from incentive tariffs that were all set in advance).

⁹⁵⁷ BRG Report I, ¶ 9

⁹⁵⁸ BRG Report I, ¶ 9.

535. To determine the But-For Value of the cash flows stemming from the Mamacocha Project as of the Valuation Date, BRG computed a discount rate that reflects the risk of operating a hydroelectric project, including the additional risks of operating in Peru, as compared to other markets like the United States. BRG's discount rate is based on standard and best practices—BRG computed the levered cost of equity capital based on the international capital asset pricing model (“CAPM”).⁹⁵⁹ Assuming that Claimants would borrow 63.93% of the capital with project financing to construct the Mamacocha Project, the cost of equity would be 8.63%.⁹⁶⁰

536. BRG also calculated pre-award interest using a commercially reasonable rate from the valuation date to the date of the BRG Report.⁹⁶¹ That interest rate is equal to 7.06% compounded semi-annually, and is derived from the proposed financing terms with DEG, which, in turn, correspond to the pre-tax cost of debt for the project financing during operations.⁹⁶² This

⁹⁵⁹ BRG Report I, ¶ 13.

⁹⁶⁰ BRG Report I, ¶ 13. In the BRG Report, the use of the term “cost of equity” as the discount rate for the Mamacocha Project, refers to levered cost of equity, which accounts for the effect of leverage on the beta and the cost of equity. Since the project financing debt was to be repaid over a 15-year period, the levered cost of equity capital of the Mamacocha Project varied during the 40-year life of the Project between 5.79% and 8.63%, depending on the effective level of debt of the Mamacocha Project between 0% and 63.93%. BRG Report I, fn. 31 and Appendix B; *see also* BRG FMV Damages Calculations (BRG-0003).

⁹⁶¹ BRG Report I, ¶ 14.

⁹⁶² BRG Report I, ¶¶ 155, 157. It is well-established that pre-award interest is properly determined in accordance with Claimants' cost of borrowing. Investment tribunals have confirmed that a claimant's borrowing rate is both a realistic and reasonable method for determining pre-award interest. For example, the tribunal in *National Grid v. Argentina* found that “the appropriate interest rate to be applied from [the breach] forward to the date of the Award should be an average interest rate which Claimant would have paid to borrow from that [breach] date to the present.” *National Grid v. Argentina*, UNCITRAL, Award, November 3, 2008, ¶ 294 (CL-0041) (reasoning that “it is appropriate and realistic to assume that Claimant would have applied the sums received either to eliminate existing debt or avoid incurring additional debt” and holding further it will “utilize a widely recognized conservative measure, which has been adopted in the awards of previous international arbitration tribunals, namely LIBOR plus 2%”); *see also Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Award, February 25, 2016, ¶ 292 (CL-0038); ILC Articles on State Responsibility, Art. 38, which establish a basis for both pre- and post- award interest (CL-0072) (“1. Interest on any principal sum . . . shall be payable when necessary in order to ensure full reparation. The interest rate and the mode of calculation shall be set so as to achieve that result. 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”).

is an appropriate measure for pre-award interest because it provides a reasonable proxy for CHM's borrowing costs.⁹⁶³

537. Finally, consistent with the principles set forth in *Chorzów Factory*, BRG calculated the additional consequential costs and expenses incurred by Claimants as the result of Peru's acts and omissions, which would not otherwise have been captured by the DCF methodology. These would include, for example, costs, fees and expenses associated with the Lima Arbitration, the RGA Lawsuit, the AEP's criminal investigation, and other legal and regulatory proceedings, and any other costs, fees, and expenses that are not specifically attributable to the development, construction, and projected operation of the Mamacocha Project. To date, these costs, fees and expenses total US \$2.019 million inclusive of pre-Award interest calculated at 7.06% compounded semi-annually up to September 14, 2020 (the "Additional Costs and Expenses"). Claimants will provide updates to the Tribunal as part of its post-hearing submissions or as otherwise appropriate or directed by the Tribunal.

538. Table 11 from the conclusion of the BRG Report summarizes Claimants' damages⁹⁶⁴ based on the FMV legal standard and using the DCF valuation method as of the

⁹⁶³ By contrast, as set forth below, post-Award interest is more logically tied to Respondent's cost of borrowing since as of the date of the Award, Claimants become a *de facto* lender to Respondent.

⁹⁶⁴ BRG's damages calculations were assessed based on expected future cash flows after all taxes and contributions applicable as of the Valuation Date. Therefore, any Award that seeks to provide full compensation based on this damages assessment should not be subject to further taxes in Peru.

Valuation Date, inclusive of pre-award interest and additional costs and expenses as of September 14, 2020.⁹⁶⁵

Table 3 Summary of Damages Using FMV Standard, Including Additional Costs and Expenses Incurred by Claimants as of September 14, 2020 (USD Millions)⁹⁶⁶

But-For Value of the Mamacocha Project as of March 14, 2017	<i>a</i>	35.310
Pre-Award Interest at 7.06% up to September 14, 2020	<i>b</i>	9.719
Additional Costs and Expenses Incurred by the Claimants Including Pre-Award Interest at 7.06% up to September 14, 2020	<i>c</i>	2.019
Total Damages Using FMV Standard as of September 14, 2020	<i>d = a + b + c</i>	47.049

b. Alternate Damages Theory: Investment Value Approach

539. Although Claimants’ expert and, notably, Respondent’s Peruvian civil law expert,⁹⁶⁷ believe that the DCF method provides the most reliable means to determine the Mamacocha Project’s FMV as of the Valuation Date, in the event that Tribunal chooses not to adopt this methodology, Claimant provides an alternative approach to damages using the investment value approach.⁹⁶⁸

540. The investment value of the Mamacocha Project is equal to the aggregate investment amount, *i.e.*, the total amount expended by Claimants over the course of the development of the Mamacocha Project and the Upstream Projects, plus an appropriate return

⁹⁶⁵ The Upstream Projects were not included as part of the FMV analysis, as their projected income streams were not considered to be sufficiently quantifiable to include in that assessment at this time. However, expenditures made by Claimants in connection with the Upstream Projects are sufficiently certain for inclusion in the investment value analysis. See BRG Report I, ¶¶ 160-167. Claimants reserve their right to submit a FMV assessment of the Upstream Projects if additional information becomes available that renders sufficiently quantifiable the income streams associated with those projects.

⁹⁶⁶ See BRG Report I, ¶ 170, Table 11.

⁹⁶⁷ See Benavides Report I, ¶¶ 210-233; *cf. Bear Creek v. Peru*, Award, ¶ 604 (CL-0016).

⁹⁶⁸ It is important to note that the investment value approach is not an estimate of the FMV of the Mamacocha Project, but rather an alternative damages remedy. See BRG Report I, ¶ 130.

based on the cost of equity capital of a project with similar risks to the Mamacocha Project (i.e., 8.63%) plus the value of the performance bonds.⁹⁶⁹

541. Legal Entitlement. It is generally accepted that the investment value approach is not a substitute for an FMV valuation.⁹⁷⁰ Indeed, an investment value approach is typically reserved as a “reality check” on the reasonableness of damages asserted⁹⁷¹ or highly speculative operations. Where tribunals have found that a DCF methodology cannot be employed, which Claimants assert is not the case here, the restoration of the *status quo ante* where the investment would have never occurred has been utilized by tribunals as an alternate, though less favored, damages methodology.⁹⁷²

542. Methodology. In order to calculate the investment value of the Mamacocha Project and the Upstream Projects, BRG first determined the total amount of investment expended by Claimants through the date of the BRG Report, then updated the expenses incurred by Claimants in the investment value approach from the date they were incurred to the date of the BRG Report using an update rate equal to the cost of equity capital of a project with similar

⁹⁶⁹ As stated above, the Upstream Projects were not included as part of the FMV analysis as their projected income streams were not sufficiently quantifiable to include in that assessment at this time. However, expenditures made by Claimants in connection with the Upstream Projects are sufficiently certain for inclusion in the investment value analysis. See BRG Report I, ¶¶ 40, 160.

⁹⁷⁰ See *Crystallex v. Venezuela*, Award, ¶ 911 (CL-0026) (“The Tribunal has already explained that in this case it does not consider it appropriate to resort to such [referring to sunk costs] method, as the fair market value of an object is not related to its historical cost but to its future performance.”). Sunk costs is a component of the investment value approach, which, as noted by the *Crystallex* tribunal, is an imperfect substitute for a DCF analysis, as a sunk costs analysis looks backwards to prior expenses rather than forward to expected cash flow streams. For this reason, among others, BRG’s investment value approach compensates by adding an update rate based on the cost of equity in order to provide a more reasonable proxy for the value of the investment rather than just the costs associated with that investment. Nevertheless, it remains an imperfect substitute for the DCF method.

⁹⁷¹ See *Foresight Luxembourg Solar 1 S. Á.R.L., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, November 14, 2018 ¶ 535 (CL-0091) (“The Majority of the Tribunal agrees with the *Eiser* tribunal that the amount invested can act as a “reality check” on the reasonableness of a damages assessment.”)

⁹⁷² See, e.g., *Bear Creek v. Peru*, Award, ¶ 657 (CL-0016); *Metalclad v. Mexico*, Award, ¶¶ 121-122 (CL-0037); *Copper Mesa v. Ecuador*, ¶¶ 7.24-7.29 (CL-0025).

risks to the Mamacocha Project (*i.e.*, 8.63%) for a total value of US \$28.209 million.⁹⁷³ The update rate for Claimants’ investments is designed to compensate Claimants for the return they otherwise would have earned had they invested in a similar project without Peru’s interference.⁹⁷⁴ In addition, BRG includes the value of the performance bonds.⁹⁷⁵ Finally, BRG included Additional Costs and Expenses, the calculus of which is the same as that included in the DCF analysis. Table 12, below, from the BRG Report, summarizes Claimants’ Investment Value Damages, inclusive of the value of performance bonds and additional costs and expenses:

Table 4 Summary of Damages Using the Investment Value, Including Value of the Performance Bonds and Additional Costs and Expenses Incurred by Claimants as of September 14, 2020 (USD Millions)

Investment Value of the Mamacocha Project	<i>a</i>	28.067
Performance Bonds for the Mamacocha Project	<i>b</i>	5.549
Investment Value of the Upstream Projects	<i>c</i>	0.142
Additional Costs and Expenses Incurred by the Claimants Including Pre-Award Interest at 7.06% up to September 14, 2020	<i>d</i>	2.019
Damages Using Investment Value	<i>e = a + b + c + d</i>	35.777

543. In addition, the Claimants respectfully request that the investment value of the Upstream Projects of US \$0.142 million⁹⁷⁶ should be awarded to Claimants’ even if the Tribunal awards Claimants damages under the FMV approach.⁹⁷⁷ As of the date of this Memorial,

⁹⁷³ The application of an update rate for Claimants’ investments is intended to compensate Claimants for the return that they would have earned had they invested in a similar project without Peru’s interference. *See* BRG Report I, ¶ 164.

⁹⁷⁴ *See, e.g., Windstream v. Canada*, Award, ¶ 476 (CL-0066).

⁹⁷⁵ Since the cash amounts corresponding to these performance bonds have been unavailable to the Claimants from the time these bonds were posted, and MINEM may execute these bonds, BRG included the corresponding amount in the damages calculation under the Investment Value approach. In order to account for the opportunity cost to Claimants associated with the unavailable cash underlying the performance bonds, BRG calculated interest from the dates in which these performance bonds were expected to be released had the Respondent not interfered with the Mamacocha Project. BRG calculated interest up to the filing date of its report using Claimants’ cost of debt, 7.06%.

⁹⁷⁶ *See* BRG Report I, § IV.6.

⁹⁷⁷ This would bring aggregate damages for FMV for the Mamacocha Project and investment value for the Upstream Projects to \$47.191 million. That is, \$47.049 million + \$0.142 million=\$47.191 million. *See* BRG Report I, ¶ 15, fn. 38.

insufficient facts exist to conduct a FMV analysis of the Upstream Projects using the DCF approach. Accordingly, investment value provides the sole means at this time to assess damages relating to the Upstream Projects.⁹⁷⁸ Including the investment value of the Upstream Projects in this context would be consistent with *Chorzow Factory's* principle that the remedy for Treaty breaches should “wipe out” the consequences of Peru’s actions and omissions.⁹⁷⁹

D. Costs, Fees and Expenses in These Proceedings

544. Claimants also request that the Tribunal award Claimants all of the costs and expenses incurred in connection with these arbitration proceedings, inclusive of attorneys’ and expert’s costs and fees and the Tribunal fees, costs and expenses. Peru has breached its obligations to Claimants under the TPA and destroyed the economic value of Claimants’ investments in the Mamacocha Project. Claimants would not have incurred these costs and expenses had Peru complied with its duties under the Treaty and the relevant applicable contracts. In order to place Claimants in a position that wipes out the harm incurred as a result of Peru’s unlawful acts and omissions, Claimants should be awarded all costs, fees and expenses incurred in connection with these proceedings. Claimants will provide the Tribunal with a schedule of such costs, fees and expenses as part of its post-hearing submissions or as otherwise directed by the Tribunal.

E. Compound Post-Award Interest

545. In addition to the compensatory damages set forth above, Claimants should be awarded compound post-award (until the date Peru pays in full) interest at the highest possible

⁹⁷⁸ As explained herein, Claimants, however, reserve their right to update the value of the Upstream Projects using the FMV approach should additional information become available.

⁹⁷⁹ See, *supra*, Section VI.A.1.

lawful rate.⁹⁸⁰ An award of compound interest is consistent with modern economic practice, providing a proxy for a commercial lending rate for monies due and owing to Claimants.⁹⁸¹

Claimants respectfully request that the Tribunal grant post-award interest at the same rate as the pre-award interest rate calculated by BRG. In the alternative, because the monies due and owing from Peru effectively constitute a loan from Claimants, Claimants could be compensated for amounts due in the same matter as any lender, and thus should be awarded an interest rate no lower than Peru's highest external cost of debt financing from private lenders.⁹⁸²

546. Arbitral tribunals, in awarding compound interest,⁹⁸³ have consistently held that a presumption exists in favor of an award of compound interest.⁹⁸⁴ Such a presumption is consistent with the compensatory principles set forth in *Chorzów Factory* to ensure that the claimant "receives the full present value of the compensation that it should have received at the

⁹⁸⁰ See, e.g., *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, May 31, 2002, ¶ 90 (CL-0046) ("[T]he Tribunal awards interest on the principal sum at the rate of 5% per annum compounded quarterly as an appropriate rate . . ."). (emphasis added)

⁹⁸¹ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Spain*, ICSID Case No. ARB/13/30, Award, December 11, 2019, ¶ 67 (CL-0092) (finding compound interest better reflects current business and economic realities and therefore the actual damage suffered by a party).

⁹⁸² *Cargill v. Mexico*, Award, ¶ 544 (CL-0019) ("With respect to interest, the Tribunal believes that Claimant is entitled to interest on this Award at a rate based upon the U.S. Monthly Bank Prime Loan Rate as Claimant has effectively loaned this sum to Respondent for the duration of this dispute. This interest shall be compounded annually and paid from 1 January 2008, until the date of this Award and thereafter until full payment is received.")

⁹⁸³ See, e.g., *Metalclad v. Mexico*, Award, ¶ 128 (CL-0037) ("So as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually."); *Pope & Talbot v. Government of Canada*, Award in Respect of Damages, ¶ 90 (CL-0046) ("[T]he Tribunal awards interest on the principal sum at the rate of 5% per annum compounded quarterly as an appropriate rate . . .")

⁹⁸⁴ See, e.g., *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, July 21, 2017, ¶ 1125 (CL-0082) (finding that compound interest has been awarded more often than not and is becoming widely accepted as an appropriate and necessary component of compensation.); see also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award, November 27, 2013, ¶ 261 (CL-0093) ("[T]he standard of full reparation would not be met if an award were to deprive a Claimant of compound interest which would have been available on the sums awarded had they been paid in a timely manner."); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, February 17, 2000 (CL-0081); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000 (CL-0005); *Vivendi v. Argentina (II)*, Award (CL-0064); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002 (CL-0094).

REDACTED VERSION

time of the taking,” and to prevent “the State [from being] unjustly . . . enriched[ed] by reason of the fact that the payment of compensation has long been delayed.”⁹⁸⁵

⁹⁸⁵ *Santa Elena v. Costa Rica*, Award, ¶ 101 (CL-0081).

VII. REQUEST FOR RELIEF

547. On the basis of the foregoing, without limitation and reserving their right to supplement or revise these prayers for relief, including any further actions taken by Peru against Claimants, Claimants respectfully request that the Tribunal:

- a. DECLARE that Peru has breached Articles 10.4, 10.5 and 10.7 of the TPA;
- b. DECLARE that Peru has breached its obligations under the RER Contract, including Peru's obligations: (i) under Clauses 1.4.26, 1.4.37, 2.2.1, 4.3, 6.3, and 11.3; (ii) to adhere to the review periods under the GLAP and TUPA, which form part of the governing law under the RER Contract; and (iii) to execute the RER Contract in accordance with the doctrines of good faith, *actos propios*, and *confianza legitima*;
- c. DECLARE that the RER Contract is terminated and, with it, all of CHM's obligations and duties owed thereunder;
- d. DECLARE that all bonds put up by either Claimant as part of the Mamacocha and Upstream Projects be returned to CHM, including the US \$5 million performance bond under the RER Contract;
- e. ORDER Peru to compensate Claimants for their losses resulting from Peru's breaches under the TPA, the RER Contract, Peruvian law, and international law, which, as of the date of this Memorial, amount to at least **US \$47,049,000** but continue to increase due to the ongoing nature of Peru's unlawful breaches;
- f. ORDER Peru to pay all costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs;



- h. ORDER the parties to protect the status quo and not aggravate the dispute pending resolution of the ICSID arbitration;
- i. ORDER Peru to cease its pursuit of the Lima Arbitration pending resolution of the ICSID arbitration;
- j. ORDER that Peru may not call or collect any bond put up by either Claimant in relation to the Mamacocha and Upstream Projects, including the performance bond under the RER Contract;
- k. ORDER further relief as counsel may advise or the Tribunal may deem just and appropriate; and
- l. AWARD such other relief as the Tribunal considers appropriate.

September 14, 2020

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized, cursive 'K' followed by a horizontal line extending to the right.

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