

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

*Claimants*

v.

**THE REPUBLIC OF PERU**

*Peru*

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**CLAIMANTS' COMMENTS ON THE NON-DISPUTING PARTY  
SUBMISSION BY THE UNITED STATES OF AMERICA**

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ICSID CASE No. ARB/19/28

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## I. INTRODUCTION

1. In accordance with Article 10.20.2 of the United States-Peru Trade Promotion Agreement (“**TPA**”) and Section 25 of Procedural Order No. 2, Claimants, Latam Hydro LLC (“**Latam Hydro**”) and CH Mamacocha S.R.L. (“**CHM**”), respectfully respond to the Non-Disputing Party Submission (“**U.S. NDPS**”) filed by the Government of the United States of America (“**USG**”) on November 19, 2021.<sup>1</sup>

2. Most significantly, the U.S. NDPS provides an unambiguous endorsement of Claimants’ position that the waiver provision of Article 10.18.2(b) of the TPA does not preclude the submission of concurrent treaty and contract claims before the same ICSID tribunal. In other words, the U.S. NDPS squarely rejects the waiver argument advanced in this arbitration by Respondent, the Republic of Peru (“**Peru**”).

3. The U.S. NDPS is also notable for what it does not say. Because it had the benefit of the parties’ pleadings in this arbitration, the USG’s silence on important interpretive issues disputed between the parties must be viewed as deliberate. For example, the USG does not endorse Peru’s argument that Article 10.16.2 of the TPA precludes Claimants from bringing claims for related Treaty breaches that occurred after Claimants filed their notice of dispute. The USG likewise declined to endorse or even to address Peru’s theory that two belated decisions in an *Amparo* proceeding based in the region of Arequipa—which were issued years after Peru’s Treaty breaches destroyed the Mamacocha Project—retroactively exempts Peru from the obligation to compensate Claimants for prior breaches.

4. Elsewhere, especially with respect to the interpretation of the Minimum Standard of Treatment (“**MST**”) and Most-Favored-Nation (“**MFN**”) standards found in Articles 10.4 and

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<sup>1</sup> Any terms not defined in these Comments shall have the meaning ascribed to them in Claimants’ Memorial and Reply.

10.5 of the TPA, the USG repeats positions with which Claimants disagree and that international tribunals have consistently rejected. As shown in the Claimants' Reply and in these Comments, these positions are not supported by the weight of relevant investment arbitration jurisprudence on those issues. If anything, the USG's positions on MST and MFN reflect the USG's interests as a frequent respondent in investor-State disputes.

5. At the outset, Claimants observe that the U.S. NDPS is not an authoritative Contracting State interpretation of the TPA that would be owed deference by the Tribunal. Non-disputing party submissions in contested cases are not authoritative interpretations of treaties. Investment tribunals and other authorities have repeatedly found that "argument[s] made by a [State] party in the context of an arbitration are entitled to no special deference, whether under Article 31(3) of the Vienna Convention or otherwise."<sup>2</sup> As one leading scholar has explained:

[W]hen a treaty creates rights or benefits for non-state actors, the treaty's creators and beneficiaries are not one and the same. Accordingly, transnational courts and tribunals cannot assume a no-harm-no-foul approach to accepting interpretations . . . treaty parties will have dual interests as both treaty parties (with a legitimate interest in interpretation) and actual or potential respondents (with a potentially illegitimate interest in avoiding liability), which may make these judicial bodies skeptical about the

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<sup>2</sup> *Gas Natural SDG S.A. v Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005, ¶ 47, fn.12 (CL-0258) ("We do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties."); *see also Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, May 25, 2006, ¶¶ 112-113 (CL-0269) ("[T]he Tribunal is not convinced that positions on interpretation of a treaty provision, expressed by a Contracting State in its defensive brief filed in an international direct arbitration initiated against it by an investor of the other Contracting State, amounts to 'practice' of that State, as this requirement is understood in public international law, nor does it appear relevant in order to ascertain 'how the treaty has been interpreted in practice' by the parties thereto.") (internal quotations omitted); K. Magraw, *Investor-State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties*, 1 ICSID REV. 142 (2015), 166 (CL-0261) (Surveying multiple awards, including NAFTA awards, and noting "[i]t is clear from the above jurisprudence that many tribunals are hesitant to determine that [state party pleadings] can constitute a subsequent agreement or subsequent practice under Articles 31(3)(a) and (b) of the VCLT.").

motives behind certain interpretations, particularly those that appear to restrict rights granted to non-state actors.<sup>3</sup>

6. The TPA itself contains an express mechanism for Peru and the USG to “issue interpretations of the provisions of” the TPA through an established Free Trade Commission “comprising cabinet-level representatives of the Parties.”<sup>4</sup> It is only a “decision of the Commission declaring its interpretation of a provision of this Agreement” that “shall be binding on a tribunal.”<sup>5</sup> To date, however, the Free Trade Commission has not issued any decisions interpreting the provisions in Chapter 10 of the TPA.<sup>6</sup> For avoidance of doubt, the U.S. NDPS is not such an interpretation.

7. Accordingly, the “Tribunal is not bound by the views of either State Party” and “the proper interpretation of [the TPA] and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal.”<sup>7</sup> That being said, Claimants submit that to the extent the USG has explicitly—or implicitly—taken positions supportive of Claimants’

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<sup>3</sup> See A. Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in *Treaties and Subsequent Practice* (George Nolte, ed., 2013), at 100 (CL-0250).

<sup>4</sup> TPA, Arts. 20.1.1, 20.1.3(c) (C-0001).

<sup>5</sup> TPA, Art. 10.22.3 (C-0001).

<sup>6</sup> As the International Law Commission has explained, subsequent agreement must “be ‘reached’ and presupposes a deliberate common act or undertaking by the parties.” ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (2018), at 30 (CL-0272).

<sup>7</sup> *The Renco Group Inc v. Republic of Peru*, UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶ 156 (RL-0079). See also *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, October 21, 2005, ¶ 251 (CL-0248) (finding that Bolivia’s position in the arbitration and official statements by the Government of the Netherlands, “despite the fact that they both relate to the present dispute, are not a ‘subsequent agreement between the parties’”); *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, May 25, 2006, ¶ 111 (CL-0269) (holding that “[t]he distinct, independent positions taken by the two Contracting States as respondents in different arbitral proceedings, moreover not involving the other Contracting State, does not amount to an ‘agreement’, in any one of the manifold forms admitted by international law, between the two parties concerning such an interpretation”), fn. 65 (noting that “contracting States have sometimes provided that mixed commissions made of their representatives may issue authentic, binding interpretations of the relevant treaty provisions, that amount to subsequent agreements by the parties”).

interpretation of the TPA, such positions may be worthy of greater attention because they do not advance the interests of a frequent respondent in investor-State disputes.<sup>8</sup>

## II. THE USG SUPPORTS CLAIMANTS' INTERPRETATION OF THE WAIVER REQUIREMENT IN TPA ARTICLE 10.18.2(b) OF THE TPA

8. In the U.S. NDPS, the USG unambiguously rejects Peru's position in this arbitration that the waiver provision embodied in Article 10.18.2(b) of the TPA should be interpreted as requiring Claimants to choose between forfeiting either their Treaty or contractual rights as the price of advancing the other set of rights.

9. Consistent with Claimants' prior pleadings and Professor Christoph Schreuer's Expert Report, the U.S. NDPS expressly recognizes that the waiver provision in Article 10.18.2(b) of the TPA "is not implicated when multiple Article 10.16.1 claims are submitted in a single Chapter Ten proceeding."<sup>9</sup> The U.S. NDPS also observes that other provisions in Chapter 10 of the TPA "do not suggest that a claimant is barred from bringing multiple, related claims under Article 10.16.1 in one proceeding before a Chapter Ten tribunal."<sup>10</sup> Accordingly, the U.S. NDPS concludes that "[t]he waiver provision thus *does not preclude the concurrent submission of treaty and contract claims under Article 10.16.1 before one tribunal*, provided that issues such as potential double-recovery and inconsistent findings are otherwise addressed."<sup>11</sup>

10. Grounding this conclusion in "the ordinary meaning" of the terms and "[t]extual context" of Article 10.18.2(b) of the TPA, the USG's position is in accord with Professor Schreuer's opinion that, "[a]n ICSID tribunal may exercise jurisdiction in one proceeding on the

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<sup>8</sup> See A. Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in *Treaties and Subsequent Practice* (George Nolte, ed., 2013), at 100 (CL-0250).

<sup>9</sup> U.S. NDPS, ¶ 8.

<sup>10</sup> U.S. NDPS, ¶ 9.

<sup>11</sup> U.S. NDPS, ¶ 10 (emphasis added).

basis of several consents given by the parties.”<sup>12</sup> As the U.S. NDPS and Claimants’ prior submissions explain, Article 10.18.2(b) serves “to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of ‘conflicting outcomes (and thus legal uncertainty).’”<sup>13</sup> Peru’s waiver argument fails for these reasons as well as for those already set forth in Claimants’ prior submissions.<sup>14</sup> It follows that the Tribunal has jurisdiction over Claimants’ treaty *and* contractual claims.

### **III. THE U.S. NDPS DOES NOT SUPPORT PERU’S POSITION THAT THE NOTICE AND WAIT REQUIREMENT UNDER ARTICLE 10.16.2 OF THE TPA IS A BAR TO SEEKING COMPENSATION FOR RELATED TPA BREACHES AFTER AN INVESTMENT DISPUTE IS UNDERWAY**

11. The U.S. NDPS correctly observes that Article 10.16.2 of the TPA serves the “important functions” of giving a respondent notice of a dispute with a foreign investor, as well as the opportunity, among other things, to identify and assess the dispute, coordinate internally, and consider amicable settlement.<sup>15</sup>

12. Those “important functions” have been served in this case. Indeed, following Claimants’ Notice of Intent to Submit a Claim to Arbitration, dated May 28, 2019, Peru knew that the dispute at issue in this arbitration arose out of its multiple unlawful interferences with the Mamacocha Project in breach of the TPA, RER Contract, and Peruvian law.<sup>16</sup> Peru has likewise had ample opportunity to prepare its case and to consider and abandon any effort at amicable settlement.

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<sup>12</sup> Reply, ¶¶ 331-348. *See also* Schreuer I, ¶¶ 59-69.

<sup>13</sup> U.S. NDPS, ¶ 6. *See also* Schreuer I, ¶ 106; *The Renco Group v. the Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶ 84 (RL-0079).

<sup>14</sup> Memorial, Section III; Reply, Section III.B.

<sup>15</sup> U.S. NDPS, ¶ 15.

<sup>16</sup> *See generally* Notice of Intent, May 28, 2019.



13. Though prepared with the benefit of both parties' pleadings, the U.S. NDPS does not engage with the essence of the parties' actual dispute over the operation of Article 10.16.2 of the TPA. In particular, the U.S. NDPS does not address Peru's argument that the specifics of every discrete claim comprising a dispute must first be specified in a notice of intent to submit a claim to arbitration.

14. The U.S. NDPS's circumspection with respect to Peru's interpretation of Article 10.16.2 speaks volumes. A rule requiring a claimant to commence a wholly new arbitration over each and every post-notice breach would require *seriatim* ICSID proceedings and be unworkable. Worse, interpreting Article 10.16(2) to require a claimant to commence a wholly new arbitration for each and every post-notice breach, as Peru does, creates an obvious moral hazard—offering a State a free pass over post-notice breaches and thereby encouraging them.<sup>17</sup>

15. Nor do the relevant authorities support Peru's arguments that a new arbitration must be noticed over every post-notice breach. The TPA, the ICSID Convention, the ICSID Arbitration Rules, and investment arbitration jurisprudence all confirm that a claimant may bring additional, post-notice claims that have "a close relationship to the original or primary claim."<sup>18</sup> As Professor Schreuer explains, "[e]ven if the treaty providing for consent to arbitration contains a notice and wait requirement, these incidental or additional claims are not subject to separate procedures for the notification of claims and for the observance of a waiting period."<sup>19</sup>

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<sup>17</sup> Claimants disagree with the USG's characterization of the notice and wait requirement contained in Article 10.16.2 of the TPA as a prerequisite to consent to arbitration. *See* U.S. NDPS, ¶¶ 15-16. As Professor Schreuer has explained, the weight of the investment arbitration jurisprudence has found that "notice and wait provisions [are] procedural in nature and that their non-observance [does] not affect the tribunal's jurisdiction." Schreuer I, ¶¶ 83-91. *See also* Reply, ¶¶ 351-355.

<sup>18</sup> *ADF v. United States*, Award, ICSID Case No. ARB(AF)/00/1, January 9, 2003, ¶ 144 (RL-0138) (discussed in Schreuer I, ¶¶ 114-115).

<sup>19</sup> Schreuer I, ¶ 122.

16. A contextual reading of the TPA confirms that claims related to the same dispute may be raised in an ongoing arbitration. For example, Article 10.16(4) provides, in relevant part, that “[a] claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.”<sup>20</sup> TPA Articles 10.20(4)(a) and (c) similarly anticipate that a claimant may amend its notice of arbitration.<sup>21</sup> The U.S. NDPS says nothing to contradict this account of the TPA.

17. The ICSID Convention and Arbitration Rules also leave room for Claimants to raise incidental and additional claims arising directly out of the subject matter of the dispute. Article 46 of the Convention authorizes an ICSID tribunal to “determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.”<sup>22</sup> ICSID Arbitration Rule 40, in turn, authorizes a party to advance such claims “not later than in the reply.”<sup>23</sup> Again, the U.S. NDPS says nothing to the contrary.

18. The U.S. NDPS likewise takes no issue with the jurisprudence of ICSID tribunals that have repeatedly analyzed provisions analogous to Article 10.16.2 to conclude that “claims additional to those listed in a notice of dispute do not require a separate notice and wait[] period, provided that they are a factual extension of the case and related to the same dispute.”<sup>24</sup>

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<sup>20</sup> Schreuer I, ¶ 107.

<sup>21</sup> Schreuer I, ¶ 108.

<sup>22</sup> Schreuer I, ¶¶ 110-114.

<sup>23</sup> ICSID Arbitration Rule 40 (discussed in Schreuer I, ¶¶ 114-115).

<sup>24</sup> Schreuer I, ¶ 94; *RREEF v. Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 226 (CL-0173); *Daniel W Kappes v. Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections, March 13, 2020, ¶ 199 (CL-0126).

19. This established rule—that incidental or additional claims arising directly out of the subject-matter of the dispute are within the Tribunal’s jurisdiction and can be deemed to be within the scope of consent granted by the Treaty—advances efficiency and fairness while preventing abuse of process. Disputes, after all, evolve. That is what happened here. Peru formalized its charges against Claimants’ lead Peruvian lawyer on October 18, 2019, a month *after* the registration of this arbitration. Because the charges in this criminal proceeding are premised on the same specious allegations that had been made in the lawsuit filed by the Regional Government of Arequipa against the Mamacocha Project,<sup>25</sup> the claims arising from that proceeding are within the scope of Peru’s consent to arbitration. Nothing in the U.S. NDPS calls for a different result.

#### **IV. THE USG’S COMMENTS ON THE BURDEN OF PROOF FAIL TO DISTINGUISH BETWEEN PROOF OF JURISDICTION AND PROOF OF SPECIFIC FACTS**

20. The U.S. NDPS states that “a claimant has the burden of proving its claims.”<sup>26</sup> Claimants do not disagree with this statement, as far as it goes.

21. As explained in Claimants’ prior submissions and Professor Schreuer’s Expert Report, however, international courts and tribunals typically have not found the “burden of proof” concept useful to the question of jurisdiction. Rather, where questions of jurisdiction “arise from the construction” of the applicable treaty, “[i]ssues of *onus do not come into play* and the process of *interpretation* engaged in by the Tribunal determines the result.”<sup>27</sup> As Professor Schreuer explains, on matters of jurisdiction, the decision-maker must look at the preponderance of authority for or against jurisdiction. A focus on burden of proof, therefore, is not the correct

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<sup>25</sup> See generally Reply, ¶¶ 360-364.

<sup>26</sup> U.S. NDPS, ¶ 3.

<sup>27</sup> *WNC Factoring Ltd. v. Czech Republic*, PCA Case No. 2014-34, Award, February 22, 2017, ¶ 293 (CL-0273).

approach. The International Court of Justice as well as investment tribunals have discarded the burden of proof approach and have adopted a method whereby the weight of legal arguments is decisive to establish jurisdiction.<sup>28</sup>

22. The U.S. NDPS is not apposite on this point. In Paragraph 4 of that submission, the USG broadly states that “the burden is on the claimant to prove *the necessary and relevant facts* to establish that a tribunal had jurisdiction.”<sup>29</sup> But the USG does not acknowledge the highly differentiated analysis undertaken by investment tribunals with respect to issues of jurisdiction and burden of proof on merits questions, including the application of burden-shifting rules and norms. Moreover, the USG insufficiently distinguishes between the proof of specific factual allegations—as to which the burden of proof is a relevant concept—and establishing the existence of jurisdiction, an inquiry where the burden concept has less relevance and where interpretative legal questions must be determined based on the strength of the competing legal arguments.<sup>30</sup>

23. As to questions of fact—whether jurisdictional or going to the merits—it is uncontroversial that the burden of proof ordinarily lies with the party asserting a fact, whether that party be the claimant or respondent. Here again, however, it is important to note the nuance, not acknowledged in the U.S. NDPS, that where a party that originally bore the burden of proof has adduced sufficient *prima facie* evidence to raise a presumption that what is claimed is true,

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<sup>28</sup> Schreuer I, ¶ 6.

<sup>29</sup> U.S. NDPS, ¶ 4 (Emphasis added).

<sup>30</sup> *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment, 4 December 1998, I.C.J. Reports 1998, p. 432 (CL-0140) (The Court found that “there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, ‘whether the force of the arguments militating in favour of jurisdiction is preponderant, and to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.’”); *See also Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment, 20 December 1988, I.C.J. Reports 1988, pp. 69, 76 (CL-0161). *See also Raiffeisen Bank v. Croatia*, ICSID Case No. ARB/17/34, Decision on Jurisdiction, September 30, 2020, ¶¶ 93-94, 128 (CL-0171).

the burden then shifts to the other party, who will not prevail unless it adduces sufficient evidence to rebut the presumption.<sup>31</sup>

24. In any event, Claimants have amply satisfied any potentially applicable burden of proof, both as to the merits and the Tribunal's jurisdiction.<sup>32</sup>

**V. THE USG INTERPRETS THE CAUSATION STANDARD UNDER ARTICLE 10.16.1 IN THE SAME WAY AS CLAIMANTS AND DOES NOT SUPPORT PERU'S RETROACTIVE CAUSATION ARGUMENT REGARDING THE AMPARO PROCEEDING**

25. As set out in the U.S. NDPS, the USG's interpretation of the causation standard under Article 10.16.1 of the TPA is consistent with the parties' shared interpretation of the same. Significantly, the U.S. NDPS offers no support for Peru's attempt to argue as a causation defense that recent decisions in the *Amparo* proceeding issued long after the arbitration was underway

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<sup>31</sup> See *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 177 (CL-0257); *Soufraki v. UAE*, ICSID Case No. ARB/02/7, Award, July 7, 2004, ¶¶ 58, 81 (RL-0067) (“Mr. Soufraki had submitted to the Tribunal certificates of Italian nationality, which were *prima facie* evidence of the existence of such Italian nationality. Therefore, it would appear that the burden of proving the contrary should have shifted to the Respondent”); *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, September 24, 2008, ¶ 76 (RL-0174); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶¶ 252, 315-320 (CL-0221); *Id.* at ¶ 317 (“[c]laimants stated that Mr Siag had provided extensive *prima facie* evidence of his Lebanese nationality, and that accordingly ‘the burden of proof is now on Egypt.’ The Tribunal agrees with this contention.”); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, ¶¶ 235-238 (CL-0012); *Id.* at ¶ 236 (“once a party adduces sufficient evidence in support of an assertion, the burden ‘shifts’ to the other party to bring forward evidence to rebut it.”); *Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Partial Award, February 5, 2021, ¶ 221 (CL-0270) (quoting the ICJ in *Amadou Sadio Diallo (Guinea v Democratic Republic of Congo)*, Merits, Judgment, 2010 ICJ Reports 639, p. 660, ¶ 54 (“Although there is a general rule that it is for the party which alleges a fact in support of its claims to prove the existence of that fact, as the International Court of Justice stated: ‘it would be wrong to regard this rule, based on the maxim *onus probandi actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute.”)); *Thunderbird v. Mexico* (UNCITRAL), Award, January 26, 2006, ¶ 95 (RL-0154); *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶ 83 (CL-0266); *OKO Pankki v. Estonia*, ICSID Case No. ARB/04/6, Award, November 19, 2007, ¶ 211 (RL-0151); *Rompetrol v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, ¶ 75 (CL-0265); *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶¶ 221, 232 (CL-0228); *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment, September 1, 2009, ¶ 215 (CL-0252).

<sup>32</sup> See Memorial, Sections II-III; Reply, Sections II-III.

could somehow—and retroactively—break the chain of causation that made Peru liable for its breaches of the Treaty as of the time of those breaches.<sup>33</sup>

26. Article 10.16.1 of the TPA provides the causation standard for investment claims. Specifically, Article 10.16(1)(a)(ii) provides that when a claimant pursues a claim on its own behalf, that claimant must establish that it suffered damages “by reason of, or arising out of” respondent’s breaches.<sup>34</sup> Similarly, Article 10.16(1)(b)(ii) provides that when a claimant pursues a claim on behalf of an enterprise that the claimant owns or controls directly or indirectly, that claimant must establish that the enterprise suffered damages “by reason of, or arising out of” respondent’s breaches.<sup>35</sup>

27. The parties to this arbitration broadly concur that the causation standard provided in Article 10.16.1 of the TPA requires that the claimant establish: (i) cause; (ii) effect; and (iii) a logical link between the two.<sup>36</sup> Both parties rely, at least in part, on the arbitral award in *Lemire v. Ukraine* for this conclusion, which provides in relevant part:

The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause (in our case the wrongful acts of [the State]) to the final effect (the loss in value of [the investment]); while the negative aspect permits the offender to break the chain by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like force majeure).<sup>37</sup>

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<sup>33</sup> Reply, Section IV.E.

<sup>34</sup> TPA, Art. 10.16(1)(a)(ii) (C-0001).

<sup>35</sup> TPA, Art. 10.16(1)(b)(ii) (C-0001).

<sup>36</sup> See Counter-Memorial, ¶ 1114 (citing *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 157 (RL-0028)); Reply, ¶ 959 (same).

<sup>37</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 157 (RL-0028).

28. As to the “positive aspect” of this standard, the tribunal in *Lemire* elaborated that “[i]f it can be proven that in the normal course of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.”<sup>38</sup> At that point, the burden shifts to the respondent to prove the “negative aspect” of this standard, *i.e.*, that an intervening cause attributable to the victim, a third-party, or a *force majeure* event broke the chain of causation that the claimant established.<sup>39</sup>

29. The U.S. NDPS agrees that the accepted standard for causation in investment arbitration jurisprudence is that the claimant must establish there is a “sufficient causal link” between the respondent’s breach and the victim’s injury, such that it can be said that the former is the “proximate cause” of the latter.<sup>40</sup> The U.S. NDPS also agrees that a respondent may rebut this showing with proof that the injury in question was caused by intervening “events or circumstances not attributable to the alleged breach.”<sup>41</sup> And the USG agrees that “Article 10.16.1 contains no indication that the States Parties intended to vary from this established rule.”<sup>42</sup>

30. Here, Latam Hydro has satisfied its burden, under Article 10.16.1 of the TPA, of proving that Peru’s breaches proximately caused its losses as well as CHM’s losses, thereby creating a presumption in favor of causation and shifting the burden to Peru. As for the “cause” requirement, Latam Hydro—the party bringing claims under the TPA on its own behalf and on

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<sup>38</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 169 (RL-0028).

<sup>39</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 157 (RL-0028).

<sup>40</sup> U.S. NDPS, ¶ 45.

<sup>41</sup> U.S. NDPS, ¶ 47.

<sup>42</sup> U.S. NDPS, ¶ 46.

behalf of CHM—has proven that Peru breached the TPA through each of seven (7) measures between March 14, 2017 (when the Regional Government of Arequipa launched a frontal attack against the Mamacocha Project’s environmental permits) and December 31, 2018 (when the Ministry of Energy and Mines denied CHM’s third extension request).<sup>43</sup> Latam Hydro has also proven these measures, individually and cumulatively, had the “effect” of substantially depriving the value of Latam Hydro’s investments under the Mamacocha Project and the related Upstream Projects as well as causing CHM’s damages under the RER Contract.

31. Further, Latam Hydro has proven that the “logical link” between these causes and effects has everything to do with the required progression of milestones under the RER Contract. Specifically, Peru’s breaches individually and collectively made it impossible for CHM to achieve any of these milestones, including the all-important commercial operation milestone.<sup>44</sup> This impossibility ultimately caused the RER Contract to terminate as a matter of law and, with it, the “Guaranteed Revenue” concession.<sup>45</sup> As Claimants have proven through Peru’s admissions, contemporaneous documents, fact-witness testimony, and their experts, this “Guaranteed Revenue” concession was critical to Claimants’ ability to secure the more than US \$80 million needed to construct and operate the Mamacocha Project.<sup>46</sup> When Peru unilaterally and unjustifiably stripped CHM of this concession through its seven-linked chain of adverse and unlawful measures, the Mamacocha Project and Upstream Projects were rendered valueless.<sup>47</sup>

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<sup>43</sup> Reply, ¶ 959.

<sup>44</sup> Reply, ¶ 960.

<sup>45</sup> Reply, ¶ 960.

<sup>46</sup> Reply, ¶ 960.

<sup>47</sup> Reply, ¶ 960.



32. By contrast, Peru has not met its burden of proving that an intervening event broke this chain of causation. In this arbitration, Peru has argued there were several intervening events that supposedly broke the chain of causation established by Claimants. But, as shown in detail in Claimants' Reply, none of these events broke the chain of causation formed by Peru's seven (7) measures that directly caused the RER Contract to terminate as a matter of law on December 31, 2018 and the Mamacocha and Upstream Projects to become valueless.<sup>48</sup>

33. In its Rejoinder, Peru sets out an intervening causation defense that principally focuses on decisions in an *Amparo* proceeding commenced by a third-party individual and issued by courts based in Arequipa, the same region in Peru where the regional government waged a years-long, arbitrary campaign to kill the Mamacocha Project.<sup>49</sup> These decisions were rendered on January 30, 2020 and February 4, 2021, *i.e.*, **after**: (i) Peru effected the seven (7) measures that destroyed the Project; (ii) the RER Contract had already terminated as a matter of law on December 31, 2018 (an uncontroverted fact in this arbitration); and (iii) Claimants had suffered their claimed losses. Accordingly, Peru's *Amparo*-related causation defense fails because the *Amparo* decision could not possibly have been the cause-in-fact (much less the proximate cause) of these injuries.

34. Nothing in the U.S. NDPS is to the contrary. If anything, the USG confirms that "[e]vents that develop subsequent to" the alleged chain of causation established by the claimant

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<sup>48</sup> See Reply, ¶¶ 254-302. In its Counter-Memorial, Peru attempted to attribute the loss of Claimants' investment to: (i) supposed riskiness of Claimants' financial strategy; (ii) supposed opposition to the Project by the local Ayo community; and (iii) supposed flaws in Claimants' construction schedule. Counter-Memorial, ¶¶ 200-203, 293-303, 352-356. In their Reply, Claimants demonstrated through contemporaneous documents, fact-witness testimony, and expert analysis from Claimants' project finance and delay experts that these defenses are completely unfounded and do nothing to rebut Claimants' proof that Peru's measures proximately caused Claimants' damages. Reply, ¶¶ 254-290, 959-983. Notably, Respondent failed to respond to many of these arguments in its Rejoinder, choosing instead to go "all in" on the *Amparo* Action as being the definitive intervening event that supposedly broke the chain of causation in this case.

<sup>49</sup> See Counter-Memorial, ¶¶ 1132-1136.

cannot be intervening events that break this chain but, rather, can only “increase” the alleged damages or “decrease” them (if, for instance, the injured party is able to mitigate its damages post-breach).<sup>50</sup> It is notable that the U.S. NDPS offers no support for Peru’s contention that a measure that occurred many months after the alleged chain of causation can be transmuted into an “intervening” chain-breaking event. The USG’s silence is even more deafening given that this is Peru’s main defense to causation in this arbitration.

35. Peru’s causation defense similarly finds no support in the relevant jurisprudence. Well-settled investment arbitration jurisprudence confirms that events that happen after the alleged damages occurred cannot break the chain of causation. For example, the tribunal in *Mondev v. United States* held that a lawsuit decided in 1994 did not break the chain of causation alleged in the investment arbitration because the alleged breaches and the ensuing damage had occurred years earlier.<sup>51</sup>

36. The same conclusion is applicable here. The *Amparo* decisions mistakenly identified by Peru as “intervening” events were issued in January 2020 and February 2021, respectively, ***more than a year after*** the undisputed date on which the Mamacocha Project ended (December 31, 2018). Those decisions, thus, are irrelevant to the determination of proximate cause in this case.<sup>52</sup> This conclusion is consistent with basic principles of the law of State

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<sup>50</sup> U.S. NDPS, ¶ 47.

<sup>51</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 61-63 (CL-0158). Notably, in its Rejoinder, Peru failed to address this authority.

<sup>52</sup> Peru attempts to overcome this hurdle by arguing that the *Amparo* proceeding was filed in September 2016. But, as Claimants have shown, the *Amparo* proceeding had no discernible effect on the Mamacocha Project during the relevant period. See Reply, ¶¶ 291-302, 652-657. Before the termination of the RER Contract (and, with it, the financial viability of the Mamacocha and Upstream Projects) on December 31, 2018, the *Amparo* proceeding: (i) had been dismissed on two (2) separate occasions by the court of first instance; (ii) was mired in appeals for most of the relevant time period; (iii) did not gain any traction until January 2020; (iv) was characterized as “unfounded” by the very same Peruvian government agencies who were parties to that proceeding and who are the very responsible state actors in this investment treaty arbitration; and (v) was extensively vetted by lawyers for Deutsche Investitions- und Entwicklungsgesellschaft (the Mamacocha Project’s preferred lending institution) on December 21, 2018 (just days before Peru killed the Mamacocha Project) as part of a red flag analysis. Those independent, outside lawyers

responsibility, under which “the general obligation of reparation arises *automatically upon commission* of an internationally wrongful act.”<sup>53</sup> The *Amparo* decisions—issued years after Peru’s breaches had “automatically” given rise to Peru’s obligation of compensation under international law—cannot retroactively excuse Peru for its existing liability to Claimants under international law.<sup>54</sup>

37. Accordingly, Peru’s breaches were the proximate cause for their injuries within the meaning of Article 10.16.1 of the TPA and the U.S. NDPS is not to the contrary.

## **VI. THE USG’S INTERPRETATION OF THE ARTICLE 10.5 FAIR AND EQUITABLE TREATMENT OBLIGATION IS UNDULY RESTRICTIVE AND IS NOT SUPPORTED BY RECENT DECISIONS OF DISTINGUISHED PANELS**

38. The U.S. NDPS presents nearly identical arguments as those presented by Peru in this arbitration concerning the fair and equitable treatment (“FET”) component of the MST protections under Article 10.5 of the TPA. Claimants, along with Professor Schreuer, previously rebutted these arguments in their Reply Memorial, including by demonstrating that the USG and Peru’s rigid approach to evidencing customary international law and the scope of FET is not supported in international investment law.<sup>55</sup> Claimants, nonetheless, will explain further below why the USG’s and Peru’s rigid interpretations are unworkable under international investment law. At the outset, however, some preliminary observations on the U.S. NDPS’s approach are in order.

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for the development finance institution concluded that the Amparo Action’s effect on the Project was negligible because its probability of success was “remote.” *Id.* Peru does not, and cannot, dispute any of these facts.

<sup>53</sup> ILC Draft Articles on State Responsibility, Art. 31, cmt. 4 (CL-0072).

<sup>54</sup> And, of course, it is a bedrock principle that a “responsible State may not rely on the provisions of its internal law as justification for failure to comply” with its international obligations. *See generally* ILC Draft Articles on State Responsibility, Art. 32 (CL-0072).

<sup>55</sup> *See* Reply, Section IV.A.1; Schreuer I, ¶¶ 156-192.

39. **First**, as explained in Section I, *supra*, the USG’s interpretation is neither authoritative nor binding. The USG’s restrictive interpretation of the FET standard reflects the USG’s self-serving interests as a frequent respondent in investor-State disputes.<sup>56</sup> For this reason, investment tribunals have previously rejected the USG’s interpretation of FET, notwithstanding a comparable USG non-disputing party submissions in those cases. In *Clayton v. Canada*, for example, the USG filed a non-disputing party submission that, just like the U.S. NDPS, rejects the modern near-consensus that the autonomous FET standard and the FET component of MST are indistinguishable.<sup>57</sup> The *Clayton* tribunal declined to adopt the USG’s interpretation and instead held that “the international minimum standard . . . has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it.”<sup>58</sup> The *Clayton* tribunal also found that Article 1105 was a mere “reference point” and proceeded to draw on previous arbitral awards in order to establish the content of the FET standard under customary international law, which notably included the protection of an investor’s legitimate expectations.<sup>59</sup>

40. **Second**, the U.S. NDPS is internally inconsistent. The USG argues that the content of the FET standard must be established primarily through State practice and *opinio juris*. At the same time, the USG downplays the role of investor-State decisions interpreting the FET standard, while noting that “national court decisions or domestic legislation” and

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<sup>56</sup> See A. Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in *Treaties and Subsequent Practice* (George Nolte, ed., 2013), at 100 (CL-0250) (“[T]reaty parties will have dual interests as both treaty parties (with a legitimate interest in interpretation) and actual or potential respondents (with a potentially illegitimate interest in avoiding liability), which may make these judicial bodies skeptical about the motives behind certain interpretations, particularly those that appear to restrict rights granted to non-state actors.”).

<sup>57</sup> See *Clayton/Bilcon v. Canada*, UNCITRAL, Submission of the United States of America, ¶¶ 2-6 (CL-0253).

<sup>58</sup> *Clayton/Bilcon v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, ¶ 438 (CL-0020).

<sup>59</sup> *Clayton/Bilcon v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 441, 448 (CL-0020).

“declarations by relevant State actors” constitute State practice.<sup>60</sup> Paradoxically, however, the USG cites no such decisions, legislation, or declarations but instead cites to numerous investor-State decisions to support its arguments related to FET.<sup>61</sup> The USG’s observations concerning the evidentiary value of arbitral decisions, thus, appears to be best viewed as an instance of “watch what I say, not what I do.” They also demonstrate that it is the practice of States—including the USG—to look to investor-State arbitral awards as evidence of the content of customary international law.

41. **Third**, the U.S. NDPS fails to take into account the long line of arbitral jurisprudence that finds a convergence or even identity between the autonomous FET standard and the FET component of the MST.<sup>62</sup> As Professor Schreuer explained in his Expert Opinion, the evolution of the MST is driven by arbitral practice on FET.<sup>63</sup> The USG provides no direct response nor does it attempt to refute the proposition that the FET component of the MST offers protections substantially broader than those set forth in the 1926 *Neer* case.<sup>64</sup>

**A. The USG’s Arguments Concerning Proof Of Customary International Law As It Relates To FET Under The TPA Are Unconvincing**

42. The U.S. NDPS contends that the FET standard expressly identified under Article 10.5 of the TPA offers no more protections than those established by customary international law.<sup>65</sup> According to the USG, these protections must be established through State practice and *opinio juris*.<sup>66</sup> The U.S. NDPS also says that “decisions of international courts and tribunals

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<sup>60</sup> U.S. NDPS, ¶¶ 19-21.

<sup>61</sup> See, e.g., U.S. NDPS, fns. 24, 29, 30-32, 35-41, 45-47, 50.

<sup>62</sup> See Schreuer I, ¶¶ 176-192.

<sup>63</sup> See Schreuer I, ¶¶ 169-175.

<sup>64</sup> See Reply, ¶¶ 446-450; Schreuer I, ¶¶ 157-159.

<sup>65</sup> U.S. NDPS, ¶¶ 17-22.

<sup>66</sup> U.S. NDPS, ¶¶ 19-20.

interpreting ‘fair and equitable treatment’ as a concept of customary international law are not themselves instances of ‘State practice.’”<sup>67</sup> The U.S. NDPS further states that, “[a] formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5.”<sup>68</sup> As explained below, the USG’s overly restrictive arguments implausibly discount the value of arbitral awards in the context of international investment law.

43. **First**, contrary to the USG’s position in the U.S. NDPS, international arbitral awards interpreting and applying the FET standard are appropriate evidence of the content of customary international law.<sup>69</sup> States have delegated to arbitral tribunals the authority to decide on the application of their respective treaties. Those tribunals are constituted pursuant to that State’s treaties and the State agrees to be bound by the result as a matter of law. As the *Clayton* tribunal explained, States have accepted an evolving and investor-friendly standard because it protects their own nationals in other countries and encourages the inflow of visitors and investment.<sup>70</sup>

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<sup>67</sup> U.S. NDPS, ¶ 22.

<sup>68</sup> U.S. NDPS, ¶ 22.

<sup>69</sup> See Schreuer I, ¶ 168; see also *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 441 (CL-0049) (stating that, even though the claim arose under DR-CAFTA, “[i]n interpreting the international minimum standard, the Tribunal also drew guidance from earlier NAFTA Chapter Eleven decisions.”); I. Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008), pp. 83, 85 (CL-0199) (“The transformation of FET from a conventional to a customary standard is supported in great part by the existing network of BITs, which stand for a constant and uniform State practice. . . . the words of Schreuer summarize the situation: ‘in practice its (the FET standard’s) application is not restrained by the traditional international minimum standard. If anything, fair and equitable treatment may turn out to be a locomotive in the development of customary international law.’ The FET standard became a customary norm of its time: quick in its formation and based essentially on a State practice derived from the treaties signed by an overwhelming number of States, which in the majority contain a FET clause.”) (citing C. Schreuer, “Investment Arbitration - A Voyage of Discovery,” 5 TDM 9 (2005) (CL-0200)).

<sup>70</sup> *Clayton/Bilcon v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, ¶ 438 (CL-0020) (“At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it.

44. Renowned scholars coincide with the *Clayton* tribunal's conclusions. For example, Anthea Roberts has explained how investment treaty arbitral decisions are evidence of State practice:

In theory, states and states alone make international law while decisions of international courts and tribunals are merely subsidiary means of determining international law rather than sources of international law per se. In practice, when states delegate power to international courts and tribunals to resolve disputes under treaties and/or to interpret and apply those treaties, they impliedly delegate some law-making functions to those judicial bodies. Those judicial decisions are then routinely cited as evidence of what the law is, even when these decisions clearly develop rather than merely apply the law.<sup>71</sup>

45. Similarly, Sir Hersch Lauterpacht criticized a rigid distinction between the sources and evidence of international law:

The distinction between the evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed. ... the legal profession is not unduly troubled by the phenomenon of the mysterious birth of an authoritative source [of] law out of what is supposed to be no more than evidence of the existing law.<sup>72</sup>

Judicial legislation, so long as it does not assume the form of deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable.<sup>73</sup>

46. And, in this arbitration, Professor Schreuer has explained how, in the context of an investor-State dispute, FET under customary international law must therefore be determined in accordance with current arbitral practice:

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States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment.”).

<sup>71</sup> A. Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in *Treaties and Subsequent Practice* (George Nolte, ed., 2013), at 95 (CL-0250).

<sup>72</sup> Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982), at 21 (CL-0260).

<sup>73</sup> Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982), at 156 (CL-0260).

[I]t is generally accepted in the case law of investment tribunals that the content of the international minimum standard is to be determined in accordance with present notions of international law and on the basis of contemporary practice. It cannot be regarded as whatever may have been its content at a certain historical point in time.<sup>74</sup>

47. Professor Schreuer concludes that “the evolution of the minimum standard of treatment is driven by the practice on fair and equitable treatment.”<sup>75</sup> In other words, by entering into bilateral investment treaties containing FET and investor-State dispute resolution clauses, States accept a binding legal obligation to comply with a tribunal’s interpretation of the FET standard, which will inevitably be derived through arbitral practice.

48. Professor Schreuer’s conclusion is followed by other eminent scholars, such as Dr. Iona Tudor, who states:

The transformation of FET from a conventional to a customary standard is supported in great part by the existing network of BITs, which stand for a constant and uniform State practice. ... the words of Schreuer summarize the situation: ‘in practice its (the FET standard’s) application is not restrained by the traditional international minimum standard. If anything, fair and equitable treatment may turn out to be a locomotive in the development of customary international law.’ The FET standard became a customary norm of its time: quick in its formation and based essentially on a State practice derived from the treaties signed by an overwhelming number of States, which in the majority contain a FET clause.<sup>76</sup>

49. Professor Schreuer’s opinion has not been challenged by competing expert evidence in this proceeding. Accordingly, the fact that a State willingly adopts a FET clause in

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<sup>74</sup> Schreuer I, ¶ 168.

<sup>75</sup> Schreuer I, ¶ 172.

<sup>76</sup> I. Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008), pp. 83, 85 (CL-0199)



its investment treaty manifests its custom and practice to be bound by contemporary jurisprudence on this standard of treatment as it exists through established arbitral practice.

50. **Second**, the U.S. NDPS, through its “actions” and not its “words,” shows that investor-State arbitral decisions drive the evolution of FET under customary international law and serve as evidence of which protections are afforded under FET. The USG’s copious citations to arbitral authorities themselves evidence that it is State practice to look to arbitral decisions as a source of customary international law.<sup>77</sup> This conclusion is consistent with the USG’s admission while citing to the *Jurisdictional Immunities of the State (Germany v. Italy)* International Court of Justice decision, that State practice and *opinio juris* are not the exclusive sources for establishing customary international law.<sup>78</sup>

51. **Third**, the USG maintains that an investor bears the burden of establishing the rule of customary international law on which it relies.<sup>79</sup> The USG supports this view by citing an award in the *Cargill v. Mexico* arbitration.<sup>80</sup> But Claimants have demonstrated in their Reply that the *Cargill* award has been rejected as outlier cases for their strict adherence to the since-abandoned *Neer* standard.<sup>81</sup>

52. Furthermore, it is not settled that the claimant bears the burden of proving a customary international law norm. As the *Windstream v. Canada* tribunal found:

The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist...should be established. The Tribunal is therefore ***unable to accept the Respondent’s argument that the burden of proving the content of the rule falls exclusively***

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<sup>77</sup> See, e.g., U.S. NDPS, fns. 24, 29, 30-32, 35-41, 45-47, 50.

<sup>78</sup> See U.S. NDPS, ¶ 20.

<sup>79</sup> See U.S. NDPS, ¶ 23.

<sup>80</sup> See U.S. NDPS, ¶ 23.

<sup>81</sup> Reply, ¶¶ 446-450. Even then, moreover, the *Cargill* tribunal itself recognized that arbitral decisions constitute evidence of the FET standard’s content under customary international law. *Cargill, Incorporated v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶¶ 277-278 (CL-0019).

*on the Claimant.* In the Tribunal’s view, *it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence.*”<sup>82</sup>

53. Accordingly, Peru has not met its burden of demonstrating that the outdated *Neer* standard and its progeny (e.g., *Cargill*) still reflect the current status of FET under customary international law. Claimants, with the support of Professor Schreuer, have shown conclusively that Peru has not, and cannot, make such a showing in light of the weight of arbitral authority against this position.<sup>83</sup> Tellingly, in its Rejoinder, Peru conspicuously walked back its previously unduly restrictive arguments (similar to those presented by the USG in the U.S. NDPS) by conceding that the *Neer* standard is outdated and that MST under customary international law has “evolved” to a more investor-friendly standard.<sup>84</sup>

54. In any event, even if (*quod non*) the burden of proving customary international law rested solely on Claimants—and it does not—Claimants have satisfied that burden, as established in their Reply.<sup>85</sup>

**B. Claimants Have Already Demonstrated That There Is No Material Difference Between The Autonomous FET Standard And The FET Component Of The MST**

55. The USG also argues that “the practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5” and “arbitral decisions interpreting ‘autonomous’ fair and equitable treatment . . . outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by

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<sup>82</sup> *Windstream v. Canada*, PCA Case No. 2013-22, Award, September 27, 2016, ¶ 350 (CL-0066).

<sup>83</sup> Reply, ¶¶ 446-463; Schreuer I, ¶¶ 156-192.

<sup>84</sup> Rejoinder, ¶¶ 609-610.

<sup>85</sup> Reply, ¶¶ 453-463.

Article 10.5.”<sup>86</sup> The USG draws an artificial distinction between the FET component of the MST and the autonomous FET standard.

56. **First**, as Claimants have already briefed,<sup>87</sup> the weight of authority now recognizes that FET under customary international law is a progressive standard that has converged with the autonomous FET standard to provide the same level of protection.<sup>88</sup> It is generally accepted that the MST has evolved, and acts that once may not have been considered breaches of the MST may be adjudged so today.<sup>89</sup> This near-consensus has fundamental impacts, as Professor Schreuer explains:

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<sup>86</sup> U.S. NDPS, ¶ 21.

<sup>87</sup> Reply, ¶¶ 453-463.

<sup>88</sup> See, e.g., *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶¶ 274-76, 284 (CL-0023) (“[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, March 10, 2015, ¶ 489 (CL-0263) (“The minimum customary standard has not remained frozen. It has developed significantly since its early formulations 100 years ago [. . .]. What is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today[.]”); *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, ¶ 520 (CL-0022) (“[T]here is no substantive difference in the level of protection afforded by both standards.”). See also *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 291 (CL-0052) (finding that “the difference between the [treaty FET standard] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real”); *Murphy v. Ecuador (II)*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, ¶ 208 (CL-0040) (“The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT.”); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 125 (CL-0158) (“[T]he [Free Trade Commission] interpretations [of the international law minimum standard of treatment] incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for ‘fair and equitable’ treatment of [. . .] the foreign investor and his investments.”).

<sup>89</sup> See, e.g., *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, ¶ 744 (CL-0256) (“the Tribunal does not accept that the meaning of MST under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves”); *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶ 213 (CL-0036) (“[T]oday’s minimum standard is broader than that defined in the *Neer* case and its progeny.”); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 567 (CL-0031) (“It is the Tribunal’s view that public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case on which Respondent relies.”); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 117 (CL-0158) (“It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927.”).

Once it is accepted that there is no material difference between the customary law minimum standard of treatment and fair and equitable treatment, it is possible to apply the rich repository of authorities on FET in cases governed by provisions offering ‘treatment in accordance with customary international law, including fair and equitable treatment.’<sup>90</sup>

57. **Second**, a Vienna Convention on the Law of Treaties (“VCLT”) analysis confirms that the USG’s overly restrictive views cannot be endorsed. Specifically, tribunals applying the VCLT have concluded that the relevant treaty’s provisions must be interpreted “neither liberally nor restrictively.”<sup>91</sup> Instead, the tribunal’s task is to interpret the provision “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>92</sup> Annex 10-A clarifies that FET, in accordance with customary international law, must be interpreted to include “***all customary international law principles*** that protect the economic rights and interests of aliens.”<sup>93</sup> As Professor Schreuer explains, “Article 10.5(1) of the TPA speaks of ‘customary international law, including fair and equitable treatment.’ In other words, customary international law includes FET.”<sup>94</sup> This means that “[u]nder Article 10.5(1), [FET] and customary international law are not distinct standards . . . FET is part of customary international law.”<sup>95</sup>

58. With these considerations in mind, Claimants address below the USG’s observations regarding the specific standards for protections afforded to investors under FET.

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<sup>90</sup> Schreuer I, ¶ 193.

<sup>91</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 81 (CL-0268) (“[T]he Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention.”).

<sup>92</sup> Vienna Convention on the Law of Treaties (RL-0078), Art. 31.

<sup>93</sup> TPA, Annex 10-A (C-0001) (emphasis added).

<sup>94</sup> Schreuer I, ¶ 169.

<sup>95</sup> Schreuer I, ¶ 147.

**C. The USG’s Observations Related To The Individual Elements Of FET Are Not Supported**

59. In its submissions, Claimants identified five (5) substantive protections of FET that were breached by Peru: (i) legitimate expectations; (ii) arbitrariness; (iii) transparency; (iv) discrimination; and (v) good faith.<sup>96</sup> While the USG does not dispute that Article 10.5 protects against arbitrary government action, the USG propounds an interpretation of Article 10.5 that is unduly narrow with respect to legitimate expectations, transparency, discrimination, and good faith.<sup>97</sup> In prior submissions, Claimants has demonstrated that each of these elements form part of the FET standard.<sup>98</sup> Professor Schreuer similarly confirms that these typical elements of an FET analysis have also been found to be part of the MST.<sup>99</sup>

**1. The USG Does Not Dispute That The Article 10.5 FET Standard Includes A Protection Against Arbitrariness**

60. Claimants demonstrated in prior submissions that Article 10.5’s FET standard encompasses a protection against arbitrariness, and that Peru’s measures constitute a breach of FET on this basis alone.<sup>100</sup> Peru, however, contends that the concept of arbitrariness under the MST is subject to a substantially higher threshold than the same concept under the autonomous FET standard.<sup>101</sup> The U.S. NDPS does not offer any support for Peru’s position but omits any mention of the concept of arbitrary government conduct in its discussion of the FET standard.. At least tacitly, then, the USG appears unwilling to dispute that the FET standard applies in

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<sup>96</sup> See Memorial, Section IV.B; Reply, Section IV.A.2; see also Schreuer I, ¶ 194.

<sup>97</sup> See U.S. NDPS, ¶¶ 25-30.

<sup>98</sup> See Reply, ¶¶ 464-506.

<sup>99</sup> Schreuer I, ¶¶ 195-204.

<sup>100</sup> See Memorial, ¶ 280; Reply, ¶¶ 476-482.

<sup>101</sup> See Counter-Memorial, ¶ 636 (quoting *Cargill v. Mexico*, Award, ¶ 285 (CL-0019)).

situations involving arbitrary governmental conduct, including conduct that is not justified by a legitimate, rational policy objective.<sup>102</sup>

## **2. The USG’s Contention That Article 10.5 Does Not Protect An Investor’s Legitimate Expectations Is Not Supported By The Weight Of Authority**

61. The USG argues that “the concept of ‘legitimate expectations’ is not a component element of ‘fair and equitable treatment’ under customary international law that gives rise to an independent host State obligation.”<sup>103</sup> This position is inconsistent with the weight of authority reflected in arbitral awards, commentary, and as affirmed by Professor Schreuer.<sup>104</sup> Notably, the USG’s scant citations to legal authorities on this point undermine its own position.<sup>105</sup>

62. Even tribunals that have interpreted the customary international law standard of treatment in its narrowest terms (such as by deferring to the State’s arguments as to the scope of this standard) have concluded that an investor’s legitimate expectations are a core element of FET. As mentioned previously, the USG made a similar submission on the scope of FET in *Clayton v. Canada*—a case under NAFTA. Notwithstanding the USG’s restrictive interpretations there, the *Clayton* tribunal reviewed previous arbitral awards in order to deduce

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<sup>102</sup> See U.S. NDPS, ¶¶ 25-30; see also Reply, ¶¶ 476-482; Schreuer I, ¶¶ 194, 198, 201, 204. That the USG should decline to embrace Peru’s position with respect to arbitrary government action is consistent with U.S. law, including the U.S. Administrative Procedure Act. See generally 5 U.S.C. § 706(2)(A) (CL-0247) (authorizing a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>103</sup> U.S. NDPS, ¶ 27.

<sup>104</sup> The USG’s statement that it is “aware of no general and consistent State practice and *opinio juris* establishing an obligation under the MST not to frustrate investors’ expectations,” can only be understood in the context of its narrow view on what can establish State practice and *opinio juris*. U.S. NDPS, ¶ 27. The great weight of investor-State decisions, including those under NAFTA and DR-CAFTA, conclude that FET encompasses the protection of an investor’s legitimate expectations.

<sup>105</sup> For instance, the *Waste Management II* tribunal’s decision—which is cited by the USG for showing legitimate expectations is not part of FET—held that for “the minimum standard of treatment of fair and equitable treatment” it is “relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.” *Waste Management, Inc. v. United Mexican States II*, NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 98-99 (CL-0065). See U.S. NDPS, ¶ 27, fn. 40.

the content of FET and proceeded to hold that legitimate expectations are part of the FET standard under NAFTA.<sup>106</sup>

63. Another NAFTA tribunal explained:

Having considered recent investment case law and the good faith principle of international customary law, the concept of ‘legitimate expectations’ relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.<sup>107</sup>

64. The *RDC v. Guatemala* tribunal, which involved claims under DR-CAFTA—containing nearly identical language as Article 10.5 of the TPA—held that FET under the MST is violated where there is a “breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>108</sup> Furthermore, the *Electrabel v. Hungary* award classifies legitimate expectations as “the most important function” of the standard,<sup>109</sup> explaining:

The Tribunal shares the well-established scholarly opinions (e.g. Dolzer and Schreuer, pp. 133-147); and decisions cited by *Electrabel* . . . that the obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking

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<sup>106</sup> *Clayton/Bilcon v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, ¶ 441, 448 (CL-0020).

<sup>107</sup> *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, NAFTA, Award, January 26, 2006, ¶ 147 (RL-0154) (citations omitted). *See also Waste Management, Inc. v. United Mexican States II*, NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 98-99 (CL-0065); *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 141 (RL-0109); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, ¶¶ 620-21 (CL-0030) (citing *International Thunderbird Gaming* with approval and observing that “[i]n this way, a State may be tied to the objective expectations that it creates in order to induce investment”) (emphasis in original).

<sup>108</sup> *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 219 (CL-0049).

<sup>109</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, ¶ 7.75 (RL-0013). *See also Devas v. India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, July 25, 2016, ¶¶ 458, 463 (CL-0129) (“There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith. [ . . . ] [W]hatever the scope of the FET standard, the legitimate expectations of the investors have generally been considered central to its definition.”).

arbitrary or discriminatory measures *or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment.*<sup>110</sup>

65. Without citing to any authority, the USG in the NDPS maintains that an investor's "own expectations about the legal regime governing its investment . . . impose no obligation[] on the State."<sup>111</sup> While Claimants have rebutted a similar argument raised by Peru,<sup>112</sup> it bears further emphasis that tribunals have routinely held that a State's reversal of express or implied assurances that created legitimate expectations would breach the host State's FET obligation.<sup>113</sup>

### **3. Contrary To The USG's View, Transparency Forms Part of FET**

66. The USG also suggests that transparency is not an element that has "crystallized" as an element of FET.<sup>114</sup> This view, which Peru already argued in this proceeding, has been

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<sup>110</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, ¶ 7.74 (RL-0013) (emphasis added). While the *Electrabel* tribunal's comments related to an autonomous FET standard (as opposed to the MST), the tribunal made clear that the two standards provided "similar" protection. *See id.*, ¶ 7.157-7.158 ("Hungary, for its part, submits that the minimum standard under international law constitutes a lower level of protection than the fair and equitable treatment standard under Article 10(1) of the ECT. . . . In regard to the development of investment protection in treaty law and customary international law, the Tribunal considers that the content of this standard is, at the present time, similar to the other standards expressly mentioned in Article 10(1) ECT, which also exist as standards of protection in customary international law.")

<sup>111</sup> U.S. NDPS, ¶ 27.

<sup>112</sup> *See Reply*, ¶¶ 471-474.

<sup>113</sup> *See, e.g., LG&E v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, October 3, 2006, ¶ 133 (CL-0034) ("Having created specific expectations among investors, Argentina was bound by its obligations concerning the investment guarantees vis-à-vis public utility licensees, and in particular, the gas distribution licensees."); *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, May 31, 2019, ¶ 295 (CL-0218) ("There is no doubt that an enforceable 'legitimate expectation' requires a clear and specific commitment, but in the view of this Tribunal there is no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant's investment and once made resulted in losses to the Claimant.")

<sup>114</sup> U.S. NDPS, ¶ 28.



addressed and rebutted in Claimants’ submissions.<sup>115</sup> Notably, the Preamble of the TPA states that one of its purposes is to:

PROMOTE *transparency* and prevent and combat corruption, including bribery, in international trade and investment;<sup>116</sup>

67. Furthermore, transparency has been recognized as a crystallized component of the MST by numerous tribunals, including tribunals before which the USG submitted NDPSs challenging the existence of a transparency obligation.<sup>117</sup> The cases cited in the U.S NDPS do not show otherwise. To the contrary, the tribunal’s decision in the most recent of these, *Merrill & Ring v. Canada*, rendered in 2010, conceded that transparency was “approaching that stage” of crystallizing as a component of FET.<sup>118</sup> Customary international law has not regressed since then; to the contrary, Claimants have demonstrated in their Reply that investor-State jurisprudence since *Merrill & Ring* unequivocally establishes transparency as an independent obligation of the host State under the FET standard.<sup>119</sup>

#### 4. Good Faith Is A Fundamental Component Of FET

68. Claimants established in their submissions that good faith is a core element of FET protection.<sup>120</sup> Raising the same argument as Peru, the USG alleges that good faith is “one of the basic principles governing the creation and performance” of a State’s “legal obligations,”

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<sup>115</sup> See Memorial, ¶¶ 279, 303-305, 318-319, 340-341, 350-351; Reply, ¶¶ 483-492.

<sup>116</sup> TPA, Preamble (C-0001) (emphasis added).

<sup>117</sup> See *Waste Management, Inc. v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98 (CL-0065) (finding MST “is infringed by conduct attributable to the State and harmful to the claimant if the conduct [. . .] 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.”); *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, July 6, 2020, ¶¶ 276, 278 (CL-0191) (endorsing the standard of MST advanced by the tribunal in *Waste Management II* despite the U.S. filing a NDPS that disputed whether transparency had crystallized as an obligation).

<sup>118</sup> U.S. NDPS, ¶ 28, fn. 41.

<sup>119</sup> Reply, ¶¶ 486-491.

<sup>120</sup> Memorial, ¶ 282; Reply, ¶¶ 501-506.

but that good faith is not a “free-standing obligation . . . absent a specific treaty obligation.”<sup>121</sup>

The FET clause contained in Article 10.5 of the TPA is indeed such an obligation. Contrary to the USG’s argument, good faith forms the basis of FET and is an inextricable element of the FET standard.<sup>122</sup> The *Devas v. India* tribunal laced the element of good faith, inherent in FET, into the broader perspective of international law:

If one searches for a general obligation of good faith under international law, one need not go further than the Vienna Convention on the Law of Treaties in which one can find no less than five mentions of the requirement of good faith. This principle of good faith is not only self-standing, but it also stems from the concept of FET.<sup>123</sup>

69. Put another way, good faith is “the common guiding beacon” to the obligation under investment treaties, it is “at the heart of the concept of FET,” and “permeates the whole approach” to investor protection.<sup>124</sup>

## **5. Discriminatory Conduct May Also Lead To A Breach Of FET**

70. The USG maintains that Article 10.5 does not protect against discriminatory conduct by the host State. Rather, a State has discretion to treat foreign investors differently.<sup>125</sup> Notably, the U.S. NDPS makes no mention of a heightened threshold of “extreme conduct”—as alleged by Peru—for finding that discrimination has occurred.<sup>126</sup> Claimants have established in its prior submissions that these arguments are contradicted by the weight of investor-State

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<sup>121</sup> U.S. NDPS, ¶ 29.

<sup>122</sup> *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 367 (CL-0229); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 450 (CL-0221).

<sup>123</sup> *Devas v. India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, July 25, 2016, ¶ 467 (CL-0129).

<sup>124</sup> *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶¶ 297-299 (CL-0055).

<sup>125</sup> See U.S. NDPS, ¶ 30.

<sup>126</sup> See U.S. NDPS, ¶ 30; Counter-Memorial, ¶¶ 638-640.

authorities.<sup>127</sup> Indeed, the protection against discrimination—on any ground of “unjustifiable distinction”<sup>128</sup>—is a recognized element of the FET standard. The protection against discrimination is so well recognized, in fact, that it was recently jointly articulated by the claimant and the respondent in *Tenaris v. Venezuela*:

Notwithstanding the issue between the Parties as to whether or not the Treaty standard should be interpreted as an autonomous standard, both referenced the decision in the *Saluka* case as setting out the applicable test — namely: “any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.”<sup>129</sup>

71. As set forth by the *Saluka* tribunal, discrimination constitutes “differential treatment” that bears no “reasonable relationship to rational policies.”<sup>130</sup> Accordingly, the FET standard forbids treatment that is discriminatory *per se*.

**D. The USG’s Theory That A “Level of Deference” Must Be Accorded To The Host State Is Belied By Investor-State Jurisprudence**

72. The USG suggests that the standard for finding a breach of the FET protection requires a Tribunal to grant the host State a “high level of deference . . . to regulate matters within their own borders.”<sup>131</sup> The USG’s proposition would unduly circumscribe the scope of Peru’s FET obligation and is not supported by the weight of authority.

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<sup>127</sup> See Reply, ¶¶ 493-500.

<sup>128</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 309 (CL-0052).

<sup>129</sup> *Tenaris S.A. v. Venezuela*, ICSID Case No. ARB/11/26, Award, January 29, 2016, ¶¶ 385-388 (CL-0185).

<sup>130</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 309 (CL-0052).

<sup>131</sup> U.S. NDPS, ¶ 24.

73. Peru's ability to regulate covered investors must necessarily be tempered by the obligations it has voluntarily undertaken in the TPA.<sup>132</sup> Where a State engages in actions that are otherwise substantively or procedurally improper, it has breached its obligations under the TPA.<sup>133</sup> A tribunal should not defer to a State's breaches of its international law obligations.<sup>134</sup>

74. The USG makes the general observation that a "failure to satisfy requirements of domestic law does not necessarily violate international law."<sup>135</sup> This statement downplays the significance of a violation of domestic law for the violation of the FET standard. Tribunals have indeed held that a State's non-compliance with its own law may amount to a violation of FET, as well as under the MST. For instance, the *GAMI v. Mexico* NAFTA tribunal explained:

The duty of NAFTA tribunals is rather to appraise whether and how preexisting laws and regulations are applied to the foreign investor. It is no excuse that regulation is costly. Nor does a dearth

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<sup>132</sup> See, e.g., *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, ¶ 525 (CL-0088) ("The right to regulate, however, does not authorize States to act in an arbitrary or discriminatory manner, or to disguise measures targeted against a protected investor under the cloak of general legislation.").

<sup>133</sup> See, e.g., *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, December 11, 2013, ¶ 529 (CL-0089) ("In the Tribunal's view, the correct position is that the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state's conduct must be procedurally proper (e.g., in compliance with due process and fair administration). If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability.").

<sup>134</sup> See *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 466 (CL-0018) ("Here, the Government has agreed to specific international obligations and there is no 'margin of appreciation' qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine."); *Teco Guatemala Holdings LLC v. Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, ¶ 492 (CL-0060) ("[T]he deference to the State's regulatory powers cannot amount to condoning behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduct of the regulatory process."); *Antaris Solar GMBH and Dr. Michael Göde v. The Czech Republic*, UNCITRAL, PCA Case No. 2014-01, Dissenting Opinion of Mr. Gary Born, May 2, 2018, ¶¶ 48, 50 (CL-0249) ("The application of a margin of appreciation to a state's fair and equitable treatment obligations under investment treaties is not a generally accepted principle of international law."); *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion of Mr. Gary Born, July 8, 2016, ¶ 87 (CL-0264) ("The 'margin of appreciation' is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT (or to questions of fair and equitable treatment more generally).").

<sup>135</sup> U.S. NDPS, ¶ 24.

of able administrators or a deficient culture of compliance provide a defense. Such is the challenge of governance that confronts every country. Breaches of NAFTA are assuredly not to be excused on the grounds that a government's compliance with its own law may be difficult. Each NAFTA Party must to the contrary accept liability if its officials fail to implement or implement regulations or do so in a discriminatory or arbitrary fashion.<sup>136</sup>

75. In *Clayton v. Canada*, the tribunal similarly found that Canadian administrative authorities failed to “assess[] and decide[]” the investor’s project application “in a manner consistent with Canada’s own laws” and thus violated FET under NAFTA.<sup>137</sup> The *Zelena v. Serbia* tribunal likewise endorsed the principle that a State’s failure to enforce its own legislation amounts to a violation of FET:

In sum, as regards the implementation and enforcement of the Serbian ABP legislation by the Respondent, the Tribunal concludes that it was reasonable and legitimate for the Claimants to rely on a reasonable level of implementation and enforcement of the Serbian ABP legislation within a reasonable time and that these legitimate expectations were frustrated by the Respondent’s conduct. Thus, the Respondent has breached its obligation, under Article 3(1) of the BIT, to accord fair and equitable treatment to the Claimants’ investment.<sup>138</sup>

76. Other tribunals also have indicated that a State’s failure to apply its own law may amount to a violation of FET.<sup>139</sup> It follows from these authorities that an investor has the right to

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<sup>136</sup> *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 94 (RL-0137).

<sup>137</sup> *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, ¶¶ 602-603 (CL-0020).

<sup>138</sup> *Zelena v Serbia*, ICSID Case No. ARB/14/27, Award, November 9, 2018, ¶ 267 (CL-0194).

<sup>139</sup> *The Rompetrol Group N.V. v. Romania*, Award, May 6, 2013, ¶¶ 174, 177 (CL-0265); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 385 (CL-0147); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 43 (RL-0028); *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability, August 24, 2015, ¶ 145 (CL-0254); *Tenaris and Talta v. Venezuela*, ICSID Case No. ARB/11/26, Award, January 29, 2016 ¶¶ 490-496 (CL-0185); *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, ¶ 679 (CL-0082); *RREEF v. Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, November 30, 2018, ¶ 287 (CL-0215); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶¶ 451-455 (CL-0221); *Georg Gavrilovic and Gavrilovic d.o.o. v. Croatia*, Award, July 26, 2018, ¶ 878 (CL-0259); *Micula v. Romania II*, Award, March 5, 2020, ¶¶ 367-372 (CL-0262); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, September 3, 2001, ¶ 232 (CL-0172).

expect that a host State will apply its own legal system. Indeed, although not every violation of domestic law by the host State will automatically amount to a treaty violation, a systematic and persistent non-application by a State of its own law, as is the case here, will amount to a violation of the FET standard.

77. In conclusion, Claimants have demonstrated in their prior submissions that contemporary investor-State jurisprudence considers FET, in accordance with the MST under customary international law, as providing substantively identical protections as those provided under an autonomous FET standard.<sup>140</sup> In particular, as confirmed by Professor Schreuer, it is well-established that a State must accord the investor and its investments the following substantive protections of FET: (i) legitimate expectations; (ii) arbitrariness; (iii) transparency; (iv) discrimination; and (v) good faith.<sup>141</sup> Furthermore, Claimants have established that Peru's conduct effectuated a breach of each of these individual elements of FET, although the Tribunal need only find one such breach in order to constitute a violation of Article 10.5.<sup>142</sup> The U.S. NDPS does nothing to refute these conclusions.

## **VII. THE USG'S RESTRICTIVE INTERPRETATION OF THE ARTICLE 10.4 MOST-FAVORED-NATION TREATMENT OBLIGATION IS CONTRARY TO THE ORDINARY MEANING OF ARTICLE 10.4 AND ESTABLISHED PRACTICE**

78. Claimants established in their prior submissions that Respondent accorded more favorable substantive protections in other investment treaties; and, as a result, Claimants are entitled to rely on those protections.<sup>143</sup> In particular, Respondent: (1) conferred on Paraguayan investors the more favorable right to necessary permit approvals and performance under Article

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<sup>140</sup> Memorial, ¶¶ 270-277; Reply, ¶¶ 450-451.

<sup>141</sup> See Schreuer I, ¶ 194.

<sup>142</sup> Memorial, Section IV.B; Reply, Section IV.A.3.

<sup>143</sup> Memorial, ¶¶ 388-394.

3(2) of the Peru-Paraguay bilateral investment treaty (“**BIT**”), and Claimants are thus entitled to invoke that protection; and (2) Claimants are entitled to rely upon the umbrella clause contained in Article 4(2) of the Thailand-Peru BIT in order to trigger international liability for Respondent’s RER Contract breaches.<sup>144</sup> Claimants further demonstrated that Respondent breached those protections and is thus liable under the TPA.<sup>145</sup>

79. The U.S. NDPS does not address these particular arguments but rather makes several unfounded, conclusory assertions about the MFN clause in Article 10.4 of the TPA, *without citing to any supporting legal authorities whatsoever*. As will be demonstrated below, the U.S. NDPS sets out an unduly restrictive interpretation of MFN clauses which finds no basis in the language of Article 10.4 or in investor-State practice.

80. *First*, without citation, the U.S. NDPS states that the TPA’s MFN clause “does not accord treatment through the *mere existence* of provisions in its other international agreements.”<sup>146</sup> Rather, according to the USG, a claimant must prove better treatment “that is actually being accorded” to a third-Party investor or investment in like circumstances.<sup>147</sup> The USG argues that:

[T]he claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might be applied to investors of a non-Party or another Party.<sup>148</sup>

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<sup>144</sup> Memorial, ¶¶ 395-398.

<sup>145</sup> Reply, ¶¶ 633-641.

<sup>146</sup> U.S. NDPS, ¶ 42 (emphasis added).

<sup>147</sup> U.S. NDPS, ¶ 42.

<sup>148</sup> U.S. NDPS, ¶ 42.

81. Giving the terms their ordinary meaning pursuant to Article 31 of the VCLT, Article 10.4 does not support the USG’s restrictive interpretation.<sup>149</sup> There is no language in Article 10.4 that restricts the TPA’s MFN clause to measures that have been “adopted or, maintained” or that indicates that extending more favorable provisions in treaties with other States is not a form of “more favorable treatment.”

82. Contrary to the USG’s position, it is established practice to import more favorable provisions in treaties with other States.<sup>150</sup> Indeed, imposing a requirement that an investor must prove actual better treatment of a third Party national would emasculate the MFN protection and impose an extreme, implied, but not explicit, burden for a beneficiary of the MFN clause. This approach would render MFN clauses, like Article 10.4, virtually meaningless. In any event, the USG’s position that a claimant must prove actual treatment being accorded to an investor of a third State does not accord with established practice.

83. It is widely accepted that investors, as a matter of right, may rely on MFN clauses to claim a better substantive treatment accorded by a host State through treaties with third States.<sup>151</sup> For instance, the tribunal in *Berschader v. Russian Federation* held that “[i]t is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all

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<sup>149</sup> See Vienna Convention on the Law of Treaties, Art. 31.1 (RL-0078).

<sup>150</sup> See, e.g., *EDF International S.A. and others v. Argentina*, ICSID Case No. ARB/03/23, Award, June 11, 2012, ¶ 237 (CL-0027) (“If German investors in Argentina have the benefit of a treaty provision requiring the Host State to honour commitments undertaken (or entered into) in relation to their investment, then they are being accorded a form of treatment which is not expressly granted to French investors by the Argentina-France BIT. . . . [T]he umbrella clause is part of the same genus of provisions on substantive protection of investments as the fair and equitable treatment clause and other similar provisions which feature in the Argentina-France BIT.”)

<sup>151</sup> See Stephan W. Schill, “Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses,” *Berkeley Journal of International Law* (2009), pp. 520-521 (CL-0267) (MFN clause is a “tool for the multilateralization and harmonization of substantive standards of investment protection. [. . .] MFN clauses elevate the level of protection in any given host State to the maximum level granted in any of that State’s investment treaties.”); D.D. Caron and E. Shirlow, “Most-Favored-Nation Treatment: Substantive Protection: *MTD v. Chile*, ICSID Case No. ARB/01/7” in M. Kinnear, G. R. Fischer, J. Mínguez Almeida, L. Fernanda Torres and M. Uran Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (2016) 399, 400 (CL-0255).



material protection provided by subsequent treaties.”<sup>152</sup> In line with this basic tenet of MFN provisions, which the USG apparently disclaims, tribunals routinely have allowed the importation, by operation of an MFN clause, of substantive standards of protection contained in a third-Party treaty, including umbrella clauses.<sup>153</sup> Therefore, Claimants may invoke the umbrella clause contained in Article 4(2) of the Thailand-Peru BIT<sup>154</sup> and may also rely upon Article 3(2) of the Peru-Paraguay BIT.<sup>155</sup>

84. **Second**, the U.S. NDPS attempts to diminish the impact of the MFN clause in this case by placing the burden on claimants to establish that the “less favorable” treatment is not subject to the exceptions contained in Annex II of the TPA.<sup>156</sup> Annex II provides a carveout from the application of the MFN obligation in Article 10.4 for “all sectors” as follows: “Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any

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<sup>152</sup> *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, April 26, 2004, ¶ 179 (CL-0271).

<sup>153</sup> See, e.g., *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, December 15, 2014, ¶ 541 (CL-0235) (“The Tribunal notes that the most-favoured-nation clause has been applied to matters of dispute-settlement as well as substantive treaty guarantees. This issue has been dealt with by a number of contemporary arbitral decisions, which also recognized the application of most-favoured-nation clauses to import fair and equitable treatment.”); *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶ 396 (CL-0109) (“[T]he Tribunal finds that the MFN clause of the BIT can import an ‘umbrella’ clause (which is substantive in nature), from either the Moldova-UK or Moldova-USA BIT, thereby extending the more favourable standard of protection granted by the ‘umbrella’ clause in either one of these BIT’s into the BIT at hand. Respondent’s arguments to the contrary are rejected. The Tribunal therefore has jurisdiction over Claimant’s ‘specific commitments’ claim via the MFN clause of Article 4.”); *ATA Construction, Industrial and Trading Co. v. Jordan*, Award, May 18, 2010, ¶ 125, fn. 16 (CL-0251) (“[B]y virtue of Article II(2) of the Treaty (the ‘MFN’ clause), the Respondent has assumed the obligation to accord to the Claimant’s investment fair and equitable treatment (see the UK-Jordan BIT) and treatment no less favourable than that required by international law (see the Spain-Jordan BIT).”).

<sup>154</sup> See 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.”).

<sup>155</sup> See 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) (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[.]”) (emphasis added).

<sup>156</sup> U.S. NDPS, ¶ 41.

bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.”<sup>157</sup>

85. It is noteworthy that Peru “reserves the right to adopt or maintain any measure” that provides differential treatment under a multilateral agreement in force when the TPA entered into force. In its Rejoinder, Peru, for the first time, argued that this carveout in its Annex II Schedule supports its position that Claimants may not rely upon rights imported through the TPA MFN provision that arise from treaties that preceded the TPA.

86. Peru’s assertion and the U.S. NDPS’s apparent support for it are incompatible with the TPA’s text, by which Peru expressly only “*reserves* the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.”<sup>158</sup>

87. Annex II on its face contains a *reservation* and not an exercise of rights. This is an important distinction, which has been explored and articulated at length in the jurisprudence concerning the operation of denial of benefits clauses. Such jurisprudence is relevant here where Peru is, in effect, seeking to deny Claimants some of the benefits of the TPA, namely the protection of the MFN clause. But Peru never exercised its putatively reserved right to deny this benefit. In *Plama v. Bulgaria*, for example, the tribunal cautioned that “the existence of a ‘right’ is distinct from the exercise of that right.”<sup>159</sup> Where a State has merely “reserved” the right to deny the benefits of the treaty at issue in that case to certain classes of investors, the State

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<sup>157</sup> See TPA, Annex II, “Schedule of Peru” (C-0001).

<sup>158</sup> Rejoinder, ¶¶ 865-868.

<sup>159</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶ 155 (CL-0274).

not only “must exercise” that reserved right “before applying it to an investor” but also “be seen to have done so.”<sup>160</sup> Such an exercise, moreover, must be prospective, so as to allow an investor to “plan its business affairs” and “also plan not to make an investment at all or to make it elsewhere.”<sup>161</sup> It should also be “associated with publicity or other notice so as to become reasonably available to investors and their advisers.”<sup>162</sup> Raising a reserved right for the first time in the context of an arbitration does not suffice.<sup>163</sup>

88. The same reasoning about the nature of a “reservation” should apply here, where Peru seeks to deny the MFN benefits of the TPA to Claimants on the basis of its Annex II reservation. Article 10.13 of the TPA provides that the MFN clause “do[es] not apply to any measure that a Party *adopts or maintains* . . . as set out in its Schedule to Annex II.”<sup>164</sup> But Peru in Annex II “adopts or maintains” nothing, limiting itself to “reserving” the right to adopt or maintain nonconforming measures—in the future.<sup>165</sup>

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<sup>160</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶ 157 (CL-0274). See also *id.* (characterizing a “reserved” right to deny the benefits of the Energy Charter Treaty as “at best only half a notice”).

<sup>161</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶ 161 (CL-0274). See also *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009, ¶ 456 (CL-0275) (“Article 17(1) does not deny simpliciter the advantages of Part III of the ECT—as it easily could have been worded to do . . . It rather ‘reserves the right’ of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, *to effect denial, the Contracting Party must exercise the right.*”).

<sup>162</sup> See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶ 157 (CL-0274) (suggesting, among other alternatives, “an exchange of letters with a particular investor or class of investors”).

<sup>163</sup> As the *Plama* tribunal explained in finding that a State’s reservation of the right to deny certain investors access to the protection of a treaty could operate only prospectively, “[a]fter an investment is made in the host state, the ‘hostage-factor’ is introduced; the covered investor’s choices are accordingly more limited; and the investor is correspondingly more vulnerable.” *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶ 161 (CL-0274).

<sup>164</sup> TPA, Art. 10.13 (C-0001).

<sup>165</sup> See TPA, Annex II, “Schedule of Peru” (C-0001).

89. In short, that Peru claims to have “reserved” certain rights under Annex II, does not mean that Peru has properly exercised them, and the U.S. NDPS does not state otherwise. As the tribunal in *Khan Resources v. Mongolia* explained, “the ordinary meaning of the verb ‘to reserve’ suggests that the right . . . is being kept by the Contracting Party, to be exercised in the future . . . The interpretation that Article 17 requires an *active exercise* of the Contracting Party’s right . . . is in line with the Treaty’s object and purpose.”<sup>166</sup> Such an exercise, consistent with the bedrock principle of good faith, can only happen prospectively.<sup>167</sup>

90. It follows equally that demonstrating Peru’s “active exercise” of a putatively reserved right must be Peru’s burden and not the Claimants’. But Peru has pointed to no evidence that it acted on this reservation before Claimants’ decision to invest. It has at the very most raised a new argument for the first time in its Rejoinder. That does not satisfy Peru’s burden under Annex II and Article 10.13.<sup>168</sup> Where Peru has not acted on its reservation, Annex II is correspondingly irrelevant. It follows that the MFN clause at Article 10.4 of the

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<sup>166</sup> *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction, Jul. 25, 2021, ¶¶ 421-422 (CL-0276) (citing *Plama* and *Yukos*).

<sup>167</sup> See, e.g., *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction, Jul. 25, 2021, ¶ 429 (CL-0276) (“A good faith interpretation does not permit the Tribunal to choose a construction . . . that would allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny these protections when the investor attempts to invoke them in international arbitration.”). See also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶ 161 (CL-0274); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, Award, Dec. 19 2013, ¶ 745 (CL-0277) (A reservation of rights to deny benefits, could “only apply if a state invoked that provision to deny benefits to an investor before a dispute arose and Respondent did not exercise this right.”).

<sup>168</sup> See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶¶ 161-162 (CL-0274) (“The covered investor enjoys the advantages of Part III unless the host state exercises its right under Article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right’s exercise.”). A contrary rule would create incentives incompatible with a treaty intended to encourage investment: “If, however, the right’s exercise had retrospective effect, the consequences for the investor would be serious . . . an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date.” See *id.* at ¶ 162.

TPA operates with no less force with respect to the Thai and Paraguayan BITs than with respect to any other treaties that Peru has entered into with third countries.

91. **Third**, as shown below, Claimants have in any event satisfied the “like circumstances” test for the purposes of establishing that Peru breached Article 3(2) of the Paraguay-Peru BIT, which, as explained above, Claimants may properly import through Article 10.7 of the TPA. The treatment afforded by Peru to Paraguayan investors in accordance with Article 3(2) of the Peru-Paraguay BIT must be accorded “no less favorably” to United States investors in Peru. And this protection includes Peru’s obligation to “grant all necessary permits . . . including the performance of licensing agreements and technical, commercial or administrative assistance.”<sup>169</sup>

92. Claimants explained in their Reply that the following measures, among others, negatively affected the Mamacocha Project’s permits and approvals in violation of the TPA:

- **First**, Peru breached its obligation to grant all necessary permits for the Mamacocha Project when it commenced the RGA Lawsuit, and sought to annul the Project’s environmental permits, which had been granted years earlier;
- **Second**, Peru breached its obligation to grant all necessary permits when the AEP commenced a criminal investigation and proceeding that attempted to cast doubt on the validity of the Project’s environmental permits;
- **Third**, Peru breached its obligation to grant all necessary permits when it arbitrarily denied the Project’s CWA; and
- **Fourth**, Peru further breached its obligation to grant all necessary permits when it issued a materially defective CWA and failed to fix it for over six (6) months thereby causing the Project to lose precious time and compounding the negative effects of the RGA Lawsuit.<sup>170</sup>

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<sup>169</sup> 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).

<sup>170</sup> Reply, ¶¶ 634-635; Memorial, ¶¶ 391-394.

93. As set forth in Claimants' Reply,<sup>171</sup> the Mamacocha Project was the *only* hydroelectric project in the RER Promotion that was sued by the government for being approved for a DIA (Classification I), rather than an EIA (Classification III). *Every other hydroelectric project had received an environmental approval for a DIA.* Indeed, Regional Council members admitted in public press interviews that the Regional Council's challenge to the authority of ARMA officials to issue the Project's environmental permits was the first time that this authority had ever been challenged, notwithstanding that ARMA had previously issued 109 environmental permits for other projects without its authority ever being challenged. Peru has no answer for these facts. Peru's breach of Article 3(2) of the Peru-Paraguay BIT thus likewise constitutes a breach of the TPA.

94. Accordingly, as Claimants have demonstrated in prior submissions, they are entitled to invoke more favorable substantive protections in other treaties concluded by Peru. Further, Claimants may rely on the more favorable protections to prove Peru's further breaches of the TPA.

#### **VIII. THE USG'S COMMENTS CONCERNING THE TPA PROVISIONS ON EXPROPRIATION OFFER NOTHING NEW**

95. The USG's comments with respect to Article 10.7 of the TPA largely summarize Article 10.7's text and neither add nor detract from either party's prior submissions. In their prior submissions, Claimants have addressed the elements of their expropriation claims under Article 10.7 and refuted Peru's attempted defenses.<sup>172</sup>


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<sup>171</sup> Reply, Section IV.C.2.

<sup>172</sup> Memorial, Section IV.C; Reply, Section IV.B.

December 8, 2021

Respectfully submitted,

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