INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LATAM HYDRO LLC AND CH MAMACOCHA S.R.L.

Claimants

and

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/19/28

AWARD

Members of the Tribunal
Prof. Dr. Guido Santiago TAWIL
Prof. Raúl E. VINUESA
Prof. Dr. Albert Jan VAN DEN BERG (President)

Secretary of the Tribunal
Ms. Ana Constanza CONOVER BLANCAS
Ms. Luisa Fernanda TORRES

Assistant to the Tribunal
Ms. Emily HAY

Date of dispatch to the Parties: 20 December 2023

REPRESENTATION OF THE PARTIES

Representing Latam Hydro LLC and CH Mamacocha S.R.L.:

Mr. Kenneth B. Reisenfeld
Mr. Mark A. Cymrot
Ms. Analía González
Mr. James East
Mr. Diego Zuniga
Ms. Nahila Cortés
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW
Suite 1100
Washington, D.C. 20036-5034
United States of America

and

Mr. Marco Molina
Mr. Gonzalo S. Zeballos
Mr. Carlos Ramos-Mrosovsky
BAKER & HOSTETLER LLP
45 Rockefeller Plaza, 14th Floor
New York, NY 10111-0100
United States of America

Representing the Republic of Peru:

Ms. Vanessa Rivas Plata Saldarriaga
Mr. Enrique Jesús Cabrera Gómez
COMISIÓN ESPECIAL DEL MINISTERIO DE ECONOMÍA Y FINANZAS
Republic of Peru
Jr. Junín 319, Cercado de Lima
Lima, Peru

and

Mr. Paolo Di Rosa
Mr. Patricio Grané Labat
Ms. Amy Endicott
Mr. Álvaro Nistal
Ms. Claudia Taveras Alam
Ms. Cristina Arizmendi
Ms. Julia Calderón Carcedo
Ms. Natalia Giraldo Carrillo
Mr. Andrés Álvarez Calderón
Mr. Brian Bombassaro
Ms. Ana Pirnia
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ARNOLD & PORTER KAYE SCHOLER LLP
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* until January 2022

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Ampuero First Statement	First Witness Statement of Mr. Ricardo Ampuero Llerena, dated 3 February 2021
Ampuero Second Statement	Second Witness Statement of Mr. Ricardo Ampuero Llerena, dated 6 November 2021
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, in force as of 10 April 2006
Bartrina First Statement	First Witness Statement of Mr. Andrés Bartrina, dated 14 September 2020
Bartrina Second Statement	Second Witness Statement of Mr. Andrés Bartrina, dated 20 July 2021
Benavides First Report	*Opinión de Experto en Derecho Peruano* of Dr. Eduardo Benavides Torres, dated 14 September 2020
Benavides Second Report	Second *Opinión de Experto en Derecho Peruano* of Dr. Eduardo Benavides Torres, dated 20 July 2021
Benzaquén First Statement	First Witness Statement of Dr. Licy Benzaquén, dated 14 September 2020
Benzaquén Second Statement	Second Witness Statement of Dr. Licy Benzaquén, dated 20 July 2021
BRG First Report	Expert Report on Damages, prepared by Messrs. Santiago Dellepiane and Andrea Cardani of Berkeley Research Group, dated 14 September 2020
BRG Second Report	Reply Expert Report on Damages, prepared by Messrs. Santiago Dellepiane and Andrea Cardani of Berkeley Research Group, dated 20 July 2021
C-[#]	Claimants' exhibit
C-CS	Claimants' Submission on Costs, dated 1 August 2022
Chávez Statement	Witness Statement of Mr. Jorge Chávez Blancas, dated 20 July 2021
CHM	CH Mamacocha S.R.L.

CL-[#]	Claimants' legal authority
Claimants	Latam Hydro LLC and CH Mamacocha S.R.L.
Cl. Mem. or Memorial	Claimants' Memorial on the Merits, dated 14 September 2020
Cl. Reply or Reply	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, dated 20 July 2021
Confidentiality Agreement	Confidentiality agreement entered into between Claimants and Peru's Special Commission, dated 5 December 2017
C-PHB	Claimants' Post-Hearing Brief, dated 17 June 2022
Diez First Statement	First Witness Statement of Mr. Carlos Diez Canseco, dated 14 September 2020
Diez Second Statement	Second Witness Statement of Mr. Carlos Diez Canseco, dated 16 July 2021
FTI	FTI Consulting Inc.
Hearing	Hearing on jurisdiction, merits and quantum held by videoconference, from 7 to 18 March 2022
HKA First Report	Expert Report on Delay Matters, prepared by Mr. John McTyre of HKA Global Ltd., dated 14 September 2020
HKA Second Report	Second Expert Report on Delay Matters, prepared by Mr. John McTyre of HKA Global Ltd., dated 20 July 2021
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Ísmodes First Statement	First Witness Statement of Mr. Francisco Ísmodes Mezzano, dated 27 January 2021
Ísmodes Second Statement	Second Witness Statement of Mr. Francisco Ísmodes Mezzano, dated 15 October 2021

Jacobson First Statement	First Witness Statement of Mr. Michael Jacobson, dated 14 September 2020
Jacobson Second Statement	Second Witness Statement of Mr. Michael Jacobson, dated 20 July 2021
Latam Hydro	Latam Hydro LLC
Lava First Report	*Análisis de experto en Derecho Peruano* of Dr. Claudio Lava Cavassa, dated 3 February 2021
Lava Second Report	Second *Análisis de experto en Derecho Peruano* of Dr. Claudio Lava Cavassa, dated 4 November 2021
Mamacocha Project or the Project	Project for the development, construction, and operation of a run-of-the-river 20-megawatt hydroelectric plant and transmission line project near the Mamacocha Lagoon in the Arequipa Region of Peru
Mendoza Statement	Witness Statement of Mr. Jaime Raúl Mendoza Gacon, dated 1 February 2021
MINEM	Ministry of Energy and Mining (*Ministerio de Energía y Minas*) of Peru
Monteza First Report	*Informe Legal Experto en Derecho Administrativo* of Dr. Carlos Javier Monteza Palacios, dated 7 February 2021
Monteza Second Report	Second *Informe Legal Experto en Derecho Administrativo* of Dr. Carlos Javier Monteza Palacios, dated 5 November 2021
NDP	Non-Disputing Party
NDP Submission	Non-Disputing Party Submission of the United States under Article 10.20(2) of the TPA, dated 19 November 2021
Parties	Claimants and Respondent
Quiñones First Report	*Informe Legal Experto* of Dr. María Teresa Quiñones Alayza, dated 8 September 2020
Quiñones Second Report	Second *Informe Legal Experto* of Dr. María Teresa Quiñones Alayza, dated 20 July 2021

R-[#]	Respondent's exhibit
R-CS	Respondent's Submission on Costs, dated 1 August 2022
Request for Arbitration	Request for Arbitration, dated 30 August 2019, as supplemented by letter of 18 September 2019
RER	Renewable Energy Resources
RER Contract	Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System executed between CHM and MINEM, dated 18 February 2014
Respondent or Peru	Republic of Peru
Resp. C-Mem. or Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated 9 February 2021
Resp. Rej. or Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction, dated 9 November 2021
RL-[#]	Respondent's legal authority
R-PHB	Respondent's Post-Hearing Brief, dated 17 June 2022
Second Claimant's External Counsel First Statement	First Witness Statement of Second Claimant's External Counsel, dated 14 September 2020
Second Claimant's External Counsel Second Statement	Second Witness Statement of Second Claimant's External Counsel, dated 16 July 2021
Schreuer Report	Legal Opinion titled "*Questions of Jurisdiction and Merits in Latam Hydro LLC and CH Mamacocha S.R.L. v Republic of Peru* (ICSID Case No. ARB/19/28)" by Prof. Christoph Schreuer, dated 20 July 2021
Sillen First Statement	First Witness Statement of Mr. Goran Stefan Sillen, dated 14 September 2020
Sillen Second Statement	Second Witness Statement of Mr. Goran Stefan Sillen, dated 20 July 2021
Special Commission	*Comisión Especial que representa al Estado en Controversias Internacionales de Inversión* of Peru

TPA or Treaty	United States – Peru Trade Promotion Agreement, signed on 12 April 2006 and in force since 1 February 2009
Transcript (Day #), [Date], [page:line]	Transcript of the Hearing (floor version as revised by the Parties on 18 April 2022)
Tribunal	Arbitral tribunal constituted on 9 March 2020 in ICSID Case No. ARB/19/28
U.S. or United States	United States of America
Versant First Report	Expert Report of Versant Partners prepared by Messrs. Matthew Shopp and Kiran Sequeira, dated 9 February 2021
Versant Second Report	Second Expert Report of Versant Partners/Secretariat International prepared by Messrs. Matthew Shopp and Kiran Sequeira, dated 9 November 2021
Whalen Report	Expert Report by Mr. Michael Whalen of Berkeley Research Group, dated 20 July 2021

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of ***(i)*** the United States – Peru Trade Promotion Agreement, which was signed on 12 April 2006 and entered into force on 1 February 2009 ("**TPA**" or the "**Treaty**"); ***(ii)*** a Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, dated 18 February 2014 ("**RER Contract**"); and ***(iii)*** the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 ("**ICSID Convention**"). This proceeding is conducted in accordance with the ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006 (the "**ICSID Arbitration Rules**") except to the extent modified by the TPA.

2. This dispute relates to measures implemented by Respondent which allegedly negatively impacted Claimants' investment in the development, construction, and operation of a run-of-the-river 20-megawatt hydroelectric plant and transmission line project near the Mamacocha Lagoon in the Arequipa Region of Peru ("**Mamacocha Project**").

3. The Award is divided into the following sections. Section II sets out the Parties. Section III sets out the procedural background of the case. Section IV sets out the factual background to the dispute between the Parties. A summary of the Parties' claims and reliefs sought is set out in Section V. Section VI contains an introduction to the Tribunal's analysis. Section VII addresses the jurisdictional objections raised by Respondent. Section VIII addresses the merits of Second Claimant's claims for breach of the RER Contract and Peruvian law. Section IX addresses Claimants' claims for breach of the TPA. Section X addresses Claimants' claim in respect of the Confidentiality Agreement. Section XI addresses the Parties' submissions on costs. The Tribunal's conclusions are set out in Section XII. The dispositive is contained in Section XIII.

II. THE PARTIES

A. CLAIMANTS

4. First Claimant is Latam Hydro LLC ("**Latam Hydro**" or "**First Claimant**"), with principal place of business as follows:[1]

> 1865 Brickell Avenue
> A-1603
> Miami, Florida 33129-1645
> United States

5. First Claimant is a limited liability company organised and existing under the laws of Delaware, USA, with Delaware File Number 5527780.

6. Second Claimant is CH Mamacocha S.R.L. ("**CH Mamacocha**", also referred to as "**CHM**", "**Concessionaire Company**", or "**Second Claimant**"), with registered office at:

> Juan Dellepiani 354,
> Urb. Country Club El Golf
> San Isidro
> Lima 15076
> Peru

7. Second Claimant is a Peruvian legal entity constituted or organised under the laws of Peru on 15 November 2012.[2] Second Claimant was formerly known as Hidroeléctrica Laguna Azul S.R.L.[3]

8. First Claimant submits its investment claims to arbitration on its own behalf under TPA Article 10.16(1)(a) and on behalf of its subsidiary, CH Mamacocha under TPA Article 10.16(1)(b)(i)(C).[4]

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1 Request for Arbitration ¶ 279; Memorial ¶ 192; *citing* **C-019**, Latam Hydro LLC, Certificate of Formation, 5 May 2014.

2 Memorial ¶ 195; *citing* **C-021**, Registration of Hidroeléctrica Laguna Azul S.R.L.'s (today CH Mamacocha S.R.L.) Articles of Incorporation, 23 November 2012.

3 Memorial ¶ 195.

4 Memorial ¶ 194.

9. Claimants are represented in this arbitration by their duly authorised attorneys, identified on page (i) above.

B. RESPONDENT

10. Respondent is the Republic of Peru ("**Peru**" or "**Respondent**").

11. Respondent is represented in this arbitration by its duly authorised attorneys, identified on page (i) above.

12. Claimants and Respondent are jointly referred to as the "**Parties**." Claimants and Respondent are individually referred to as a "**Party**."[5]

III. PROCEDURAL HISTORY

13. On 30 August 2019, ICSID received a request for arbitration from Latam Hydro and CHM against Peru, as supplemented by letter of 18 September 2019 ("**Request for Arbitration**"). The Request for Arbitration was accompanied by exhibits C-0001 to C-0027.

14. On 19 September 2019, the Acting Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the notice of registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible, in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings in force as of 10 April 2006 ("**ICSID Institution Rules**").

15. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention, as follows: the Tribunal would consist of three arbitrators, one to be

[5] The Tribunal notes that throughout the proceeding Claimants and Respondent have been referred to as "Parties," and it has chosen the same denomination in this Award in the interest of procedural consistency. The Tribunal is aware that TPA Article 10.28 refers to Claimants and Respondent together as the "disputing parties" and to either of them as a "disputing party," and has been mindful of those denominations in its analysis of the TPA provisions. The Tribunal is further aware that the TPA also refers to the States signatories to the TPA (United States and Peru) as "Party," and has also been mindful of those denominations when analyzing the TPA provisions. For the clarity of the Award, however, the State signatories of the TPA will be referred to as the "TPA Party," or the "TPA Parties," or simply Peru and the United States.

appointed by each Party and the third, presiding, arbitrator to be appointed by agreement of the Parties.

16. The Tribunal is composed of Professor Dr. Albert Jan van den Berg, a national of The Netherlands, President, appointed by agreement of the Parties; Professor Dr. Guido Santiago Tawil, a national of Argentina and Portugal, appointed by Claimants; and Professor Raúl E. Vinuesa, a national of Argentina and Spain, appointed by Respondent.

17. On 9 March 2020, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Ana Constanza Conover Blancas, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

18. On the same date, Respondent submitted an application for the Tribunal: (i) not to read Claimants' notice of intent nor the Request for Arbitration without first ruling on a request from Respondent to expunge information from both documents allegedly covered by a confidentiality agreement entered into between Claimants and Peru's *Comisión Especial que representa al Estado en Controversias Internacionales de Inversión* ("**Special Commission**") on 5 December 2017 ("**Confidentiality Agreement**"); and (ii) to order the Centre not to publish the notice of intent or the Request for Arbitration on the ICSID website while Respondent's request was pending before the Tribunal.

19. On 12 March 2020, the Tribunal granted one week to the Parties to confer and seek to agree on the confidentiality issues raised by Respondent. The Tribunal also informed the Parties that, failing agreement: (i) Respondent would be allowed to submit an application to the Tribunal on 19 March 2020, indicating the parts of the documents which it considered to be in breach of the Confidentiality Agreement; (ii) Claimants would be allowed to reply to Respondent's submission by 26 March 2020; and (iii) the Tribunal would decide upon any application following receipt of both Parties' views.

20. On the same date, the Tribunal informed the Parties that, pending any agreement of the Parties or application by Respondent, the Tribunal would not review the notice of intent nor the Request for Arbitration, and ICSID would not publish such documents on its website pending resolution of the issue.

21. On 19 March 2020, Respondent filed an application for the Tribunal: (i) to order the expungement of those portions of the notice of intent and the Request for Arbitration which it considered that violated the Confidentiality Agreement; and (ii) not to take that information into account in its deliberations and determinations in this arbitration ("**Respondent's Application on Confidentiality**").

22. On 26 March 2020, Claimants filed a response to Respondent's Application on Confidentiality ("**Claimants' Response on Confidentiality**").

23. On 27 March 2020, Respondent requested leave from the Tribunal to reply to Claimants' Response on Confidentiality. Claimants submitted observations on Respondent's request on the same date. On 30 March 2020, the Tribunal invited Respondent to reply to Claimants' Response on Confidentiality by 1 April 2020 and Claimants to file rejoinder comments by 6 April 2020.

24. On 2 April 2020, Respondent submitted a reply to Claimants' Response on Confidentiality ("**Respondent's Reply on Confidentiality**").

25. On 6 April 2020, Claimants submitted a rejoinder to Respondent's Reply on Confidentiality ("**Claimants' Rejoinder on Confidentiality**").

26. On 15 April 2020, the Tribunal issued Procedural Order No. 1 ("**PO 1**"), setting out its decision on Respondent's Application on Confidentiality. In its order, the Tribunal found, upon review of the Parties' submissions and the terms of the Confidentiality Agreement, that Respondent had not established a basis for any of the proposed deletions under the terms of the Confidentiality Agreement. Accordingly, the Tribunal rejected Respondent's application, indicated that the Parties' costs related to the application would be reserved for later determination, and revoked the instruction not to publish Claimants' notice of intent and the Request for Arbitration on the ICSID's website.

27. On 29 April 2020, the Tribunal held a first session with the Parties by videoconference pursuant to ICSID Arbitration Rule 13(1).

28. Following the first session, on 13 May 2020, the Tribunal issued Procedural Order No. 2 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues ("**PO 2**"). PO 2 established, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, except to the extent modified by Section B of Chapter Ten (Investment) of the TPA and supplemented by any decision adopted by the Commission under Articles 10.22(3) and 10.23 of the TPA; that the procedural languages would be English and Spanish; and that the Tribunal's award, orders and decisions, the notice of intent and the Request for Arbitration, the Parties' pleadings, memorials and briefs, and the transcripts of hearings would be publicly available subject to the deletion of protected information. PO 2 also set out that the place of the proceeding would be Washington, D.C. and included a procedural calendar of the arbitration.[6]

29. On 29 June 2020, the President of the Tribunal, through the Secretary of the Tribunal, sent a letter to the Parties enquiring whether they would agree to the appointment of Ms. Emily Hay, of the firm Hanotiau & van den Berg, as Assistant to the Tribunal. The letter set out Ms. Hay's proposed role and tasks to the Parties.

[6] The procedural languages in this case are English and Spanish, and the Award is being rendered in both languages (PO 2, ¶¶ 11.1 and 11.13). However, pursuant to PO 2, in this case the Parties submitted pleadings, witness statements, expert reports, exhibits and legal authorities in either procedural language without translation into the other, and therefore several materials on the record are in only one of the languages (PO 2, ¶ 11.4). Similarly, the final-corrected version of the transcript only reflects the original language of the speaker (PO 6, ¶ 52). Accordingly, in this Award, any verbatim quote from a document filed by a Party in only one procedural language without a translation into the other will reflect the original language of the document, and any quote to the transcript will reflect the original language of the speaker/transcript. The Award in English may therefore contain quotes in Spanish, and vice-versa the Award in Spanish may contain quotes in English. The Tribunal considers this is both procedurally efficient and proper in light of the provisions of PO 2 and PO 6 regarding language of the Parties' filings and final transcript, and consistent with the Parties' expectations expressed during the Pre-Hearing Conference. When the Parties did file a translation of the quoted document into the other language, the Tribunal has quoted from that translation.

30. By emails of 2 and 6 July 2020, the Parties agreed to Ms. Hay's appointment as Assistant to the Tribunal. On 7 July 2020, the Secretary of the Tribunal transmitted a copy of Ms. Hay's signed declaration of independence and impartiality to the Parties.

31. On 14 August 2020, following an agreement between the Parties to extend several procedural deadlines, including the deadline for Claimants' Memorial, the Tribunal issued an amended procedural timetable for the arbitration.

32. On 14 September 2020, Claimants filed a memorial on the merits ("**Memorial**"), with exhibits C-0028 to C-0210 and legal authorities CL-0001 to CL-0097. Claimants also filed the following six witness statements and four expert reports:

- First Witness Statement of Mr. Michael Jacobson, dated 14 September 2020 ("**Jacobson First Statement**");
- First Witness Statement of Mr. Goran Stefan Sillen, dated 14 September 2020 ("**Sillen First Statement**");
- First Witness Statement of Mr. Andrés Bartrina, dated 14 September 2020 ("**Bartrina First Statement**");
- First Witness Statement of Mr. Carlos Diez Canseco, dated 14 September 2020 ("**Diez First Statement**");
- First Witness Statement of Second Claimant's External Counsel, dated 14 September 2020 ("**Second Claimant's External Counsel First Statement**");[7]
- First Witness Statement of Dr. Licy Benzaquén, dated 14 September 2020 ("**Benzaquén First Statement**");
- *Informe Legal Experto* of Dr. María Teresa Quiñones Alayza, dated 8 September 2020, with exhibits MQ-001 to MQ-083 ("**Quiñones First Report**");

[7] *See* ¶ 184 below regarding the non-identification of Second Claimant's External Counsel in this Award.

- *Opinión de Experto en Derecho Peruano* of Dr. Eduardo Benavides Torres, dated 14 September 2020, with exhibits EB-0001 to EB-0043 ("**Benavides First Report**");

- Expert Report on Delay Matters, prepared by Mr. John McTyre of HKA Global Ltd., dated 14 September 2020, with exhibits HKA-0001 to HKA-0038 ("**HKA First Report**"); and

- Expert Report on Damages, prepared by Messrs. Santiago Dellepiane and Andrea Cardani of Berkeley Research Group, dated 14 September 2020, with exhibits BRG-0001 to BRG-0079 ("**BRG First Report**").

33. On 25 January 2021, following an agreement between the Parties to extend the deadline for Respondent's Counter-Memorial, the Tribunal issued an amended procedural timetable for the arbitration.

34. On 9 February 2021, Respondent filed a counter-memorial on the merits and memorial on jurisdiction ("**Counter-Memorial**"), with exhibits R-0001 to R-0150 and legal authorities RL-0001 to RL-0180. Respondent also filed the following three witness statements and three expert reports:

- Witness Statement of Mr. Jaime Raúl Mendoza Gacon, dated 1 February 2021 ("**Mendoza Statement**");

- First Witness Statement of Mr. Francisco Ísmodes Mezzano, dated 27 January 2021 ("**Ísmodes First Statement**");

- First Witness Statement of Mr. Ricardo Ampuero Llerena, dated 3 February 2021 ("**Ampuero First Statement**");

- *Análisis de experto en Derecho Peruano* of Dr. Claudio Lava Cavassa, dated 3 February 2021, with exhibits CLC-0001 to CLC-0099 ("**Lava First Report**");

- *Informe Legal Experto en Derecho Administrativo* of Dr. Carlos Javier Monteza Palacios, dated 7 February 2021, with exhibits CM-0001 to CM-0054 ("**Monteza First Report**"); and

- Expert Report of Versant Partners prepared by Messrs. Matthew Shopp and Kiran Sequeira, dated 9 February 2021, with exhibits VP-0001 to VP-0039 ("**Versant First Report**").

35. On 16 February 2021, the Secretary of the Tribunal transmitted to the Tribunal a communication from Respondent of 15 February 2021 informing the Centre and Claimants of clerical corrections made to its Counter-Memorial. Similarly, by email of 19 February 2021, Claimants filed a revised version of their Memorial that corrected clerical errors.

36. By letter of 22 February 2021, the Tribunal approved the filing of the corrected versions of Claimants' Memorial (attached to their email of 19 February 2021) and of Respondent's Counter-Memorial (attached to its email of 15 February 2021). For the sake of good order, the Tribunal requested both Parties to submit marked-up versions showing the changes made to their respective corrected pleadings. The Parties submitted the requested marked-up versions of their respective pleadings to the Tribunal on 23 February 2021.

37. On 23 March 2021, following exchanges between the Parties, each Party filed a request for the Tribunal to decide on production of documents.

38. On 1 April 2021, the Tribunal issued Procedural Order No. 3, ruling on the Parties' respective requests for document production ("**PO 3**"). With respect to documents withheld or redacted on the basis of privilege or other alleged confidentiality, the Tribunal invited the Parties to produce, by 13 April 2021, a privilege log identifying any documents or redactions in respect of which a claim of privilege was asserted and the legal basis for such claim. In the event that either Party disputed a claim of privilege identified in the privilege log, the Tribunal noted that such Party could apply to the Tribunal by 20 April 2021, following which the Tribunal would issue further directions.

39. Following an extension of time agreed by the Parties and confirmed by the Tribunal, on 21 April 2021, the Parties filed their respective privilege logs, and applied to the Tribunal with respect to disputed claims of privilege. Respondent's application was accompanied by legal authorities RL-0181 to RL-0183.

40. On 3 May 2021, the Tribunal issued Procedural Order No. 4, deciding on the disputed claims of privilege between the Parties in relation to the production of documents ("**PO 4**").

41. On 9 May 2021, Claimants filed an application in relation to the allegedly deficient production of documents by Respondent. Following an invitation to provide comments by the Tribunal, Respondent submitted its observations on Claimants' application on 14 May 2021. Respondent's submission was accompanied by exhibit R-0151.

42. On 24 May 2021, the Tribunal issued Procedural Order No. 5, deciding on the Claimants' application of 9 May 2021 ("**PO 5**").

43. On 8 June 2021, following an agreement between the Parties to extend the deadlines for Claimants' Reply and Respondent's Rejoinder, the Tribunal issued an amended procedural timetable for the arbitration.

44. On 14 July 2021, following an agreement between the Parties to further extend the deadline for Claimants' Reply, the Tribunal issued an amended procedural timetable for the arbitration.

45. On 20 July 2021, Claimants filed a reply on the merits and a counter-memorial on jurisdiction ("**Reply**"), with exhibits C-0211 to C-0302 and legal authorities CL-0098 to CL-0246. Claimants also filed the following seven witness statements and six expert reports:

- Witness Statement of Mr. Jorge Chávez Blancas, dated 20 July 2021 ("**Chávez Statement**");
- Second Witness Statement of Mr. Michael Jacobson, dated 20 July 2021 ("**Jacobson Second Statement**");
- Second Witness Statement of Mr. Goran Stefan Sillen, dated 20 July 2021 ("**Sillen Second Statement**");

- Second Witness Statement of Mr. Andrés Bartrina, dated 20 July 2021 ("**Bartrina Second Statement**");

- Second Witness Statement of Mr. Carlos Diez Canseco, dated 16 July 2021 ("**Diez Second Statement**");

- Second Witness Statement of Second Claimant's External Counsel, dated 16 July 2021 ("**Second Claimant's External Counsel Second Statement**");

- Second Witness Statement of Dr. Licy Benzaquén, dated 20 July 2021 ("**Benzaquén Second Statement**");

- Second *Informe Legal Experto* of Dr. María Teresa Quiñones Alayza, dated 20 July 2021, with exhibits MQ-0084 to MQ-0183 ("**Quiñones Second Report**");

- Second *Opinión de Experto en Derecho Peruano* of Dr. Eduardo Benavides Torres, dated 20 July 2021, with exhibits EB-0044 to EB-0075 ("**Benavides Second Report**");

- Second Expert Report on Delay Matters, prepared by Mr. John McTyre of HKA Global Ltd., dated 20 July 2021, with exhibits HKA-0039 to HKA-0051 ("**HKA Second Report**");

- Reply Expert Report on Damages, prepared by Messrs. Santiago Dellepiane and Andrea Cardani of Berkeley Research Group, dated 20 July 2021, with exhibits BRG-0080 to BRG-0101 ("**BRG Second Report**");

- Expert Report by Mr. Michael Whalen of Berkeley Research Group, dated 20 July 2021, with exhibits MW-0001 to MW-0024 and MW-Tech. Annex 1 through MW-Tech. Annex 5 ("**Whalen Report**"); and

- Legal Opinion titled "*Questions of Jurisdiction and Merits in Latam Hydro LLC and CH Mamacocha S.R.L. v Republic of Peru* (ICSID Case No. ARB/19/28)" by Prof. Christoph Schreuer, dated 20 July 2021 ("**Schreuer Report**").

46. On 5 August 2021, Claimants filed a request for the Tribunal to decide on the admissibility of a new document. On 10 August 2021, Respondent filed observations indicating that they did not oppose Claimants' request of 5 August 2021. On 11 August 2021, in view of the Parties' agreement to admit the document, the Tribunal admitted the requested document into the record and invited Claimants to file the document as a numbered exhibit. Per the Tribunal's instructions, Claimants filed the new document as exhibit C-0303 on 18 August 2021.

47. On 25 October 2021, following an agreement between the Parties to extend the deadline for Respondent's Rejoinder, the Tribunal issued an amended procedural timetable for the arbitration.

48. On 9 November 2021, Respondent filed a rejoinder on the merits and reply on jurisdiction ("**Rejoinder**"), with exhibits R-0152 to R-0187 and legal authorities RL-0184 to RL-0251. Respondent also filed the following two witness statements and three expert reports:

- Second Witness Statement of Mr. Francisco Ísmodes Mezzano, dated 15 October 2021 ("**Ísmodes Second Statement**");
- Second Witness Statement of Mr. Ricardo Ampuero Llerena, dated 6 November 2021 ("**Ampuero Second Statement**");
- Second *Análisis de experto en Derecho Peruano* of Dr. Claudio Lava Cavassa, dated 4 November 2021, with exhibits CLC-0100 to CLC-0148 ("**Lava Second Report**");
- Second *Informe Legal Experto en Derecho Administrativo* of Dr. Carlos Javier Monteza Palacios, dated 5 November 2021, with exhibits CM-0055 to CM-0100 ("**Monteza Second Report**"); and
- Second Expert Report of Versant Partners/Secretariat International prepared by Messrs. Matthew Shopp and Kiran Sequeira, dated 9 November 2021, with exhibits VP-0040 to VP-0069 ("**Versant Second Report**").

49. On 19 November 2021, pursuant to section 25 of PO 2 and TPA Article 10.20(2), the United States of America ("**United States**") filed a written submission to the Tribunal as non-disputing party ("**NDP**") on questions of interpretation of the TPA ("**NDP Submission**").

50. On 24 November 2021, Respondent submitted a revised version of its Rejoinder that corrected clerical errors.

51. On 2 December 2021, pursuant to sections 19.1 and 20.2 of PO 2, the Tribunal held a procedural status conference with the Parties by videoconference. During the conference, the Tribunal and the Parties discussed whether the circumstances at that time made it difficult, burdensome or dangerous to have an in-person hearing and whether a virtual hearing was a preferable option considering the circumstances. No decision was reached during the conference as to the format of the hearing. Rather, it was agreed to hold a second procedural status conference in January 2022 to revisit this issue.

52. On 8 December 2021, each Party filed observations on the NDP Submission.

53. On 14 January 2022, the Tribunal held a second procedural status conference with the Parties by videoconference. During the conference, the Tribunal decided that the hearing would be held in a fully virtual format, unless circumstances changed such that having an in-person hearing would not expose participants to any risk of COVID-19 contagion.

54. On 17 January 2022, the Parties notified the Tribunal of the witnesses and experts that they wished to call for cross-examination at the hearing.

55. On 18 January 2022, the Tribunal informed the Parties that it would not call for examination any of the remaining witnesses and experts, pursuant to paragraph 18.7 of PO 2.

56. On 21 January 2022, the Tribunal held a pre-hearing organisational meeting with the Parties by video conference to discuss any outstanding procedural, administrative, and logistical matters in preparation for the hearing.

57. On 1 February 2022, following an invitation from the Tribunal, the United States confirmed that it would attend the hearing as NDP and that it would exercise its right to make oral submissions at the hearing under TPA Article 10.20(2).

58. On 2 February 2022, the Tribunal issued Procedural Order No. 6 concerning the organization of the hearing ("**PO 6**").

59. A hearing on jurisdiction, merits and quantum was held by videoconference from 7 to 18 March 2022 (the "**Hearing**"), hosted by FTI Consulting Inc. ("**FTI**"). The following persons were present at the Hearing:

Tribunal:

Prof. Dr. Albert Jan van den Berg	President
Prof. Dr. Guido Santiago Tawil	Arbitrator
Prof. Raúl E. Vinuesa	Arbitrator

Assistant to the Tribunal:

Ms. Emily Hay	Assistant to the Tribunal

ICSID Secretariat:[8]

Ms. Ana Constanza Conover Blancas	Secretary of the Tribunal
Mr. Federico Salon-Kajganich	Paralegal

For Claimants:

Counsel

Mr. Kenneth B. Reisenfeld	BakerHostetler LLP
Mr. Mark A. Cymrot	BakerHostetler LLP
Mr. Gonzalo S. Zeballos	BakerHostetler LLP
Mr. Marco Molina	BakerHostetler LLP
Ms. Analia Gonzalez	BakerHostetler LLP
Mr. Carlos Ramos-Mrosovsky	BakerHostetler LLP
Mr. James J. East, Jr.	BakerHostetler LLP
Ms. Nahila Cortés	BakerHostetler LLP
Mr. Diego Zuniga	BakerHostetler LLP

Party representatives

Mr. Michael Jacobson	Latam Hydro LLC
Mr. Jeffrey M. Lepon	Latam Hydro LLC
Mr. Andrés Bartrina	Latam Hydro LLC
Ms. Licy Benzaquén	CH Mamacocha S.R.L.

[8] With the authorization of the Parties and the Tribunal, two interns from the ICSID Secretariat observed the Hearing.

Witness	
Mr. Stefan Sillen	Latam Hydro LLC
Experts	
Mr. Eduardo Benavides	Berninzon & Benavides
Ms. María Teresa Quiñones Alayza	QA Legal
Mr. Pablo Ferreyros	QA Legal
Ms. Mylene Jayme	QA Legal
Mr. Andrea Cardani	Berkeley Research Group
Mr. Santiago Dellepiane	Berkeley Research Group
Mr. Julian Honowitz	Berkeley Research Group
Mr. Peter Somi	Berkeley Research Group
Mr. José Picos	Berkeley Research Group
Mr. Matías Galarza	Berkeley Research Group
EPE Operator	
Mr. Tom Beyer	TrialGraphix

For Respondent:

Counsel	
Mr. Paolo Di Rosa	Arnold & Porter
Mr. Patricio Grané Labat	Arnold & Porter
Ms. Amy Endicott	Arnold & Porter
Mr. Alvaro Nistal	Arnold & Porter
Ms. Claudia Taveras Alam	Arnold & Porter
Ms. Cristina Arizmendi	Arnold & Porter
Ms. Natalia Giraldo Carrillo	Arnold & Porter
Ms. Julia Calderón Carcedo	Arnold & Porter
Mr. Andrés Alvarez Calderón	Arnold & Porter
Ms. Gabriela Guillén	Arnold & Porter
Ms. Emily Betancourt	Arnold & Porter
Mr. Peter Saban	Arnold & Porter
Mr. Hugo Forno Flórez	Garrigues
Ms. Melissa Núñez Santti	Garrigues
Mr. Kevin Villanueva	Garrigues
Mr. Tomás Leonard	TZL Global
Party representatives	
Ms. Vanessa Rivas Plata Saldarriaga	Presidenta de la Comisión Especial
Mr. Enrique Jesús Cabrera Gómez	Abogado de la Secretaría Técnica de la Comisión Especial
Ms. Mónica Guerrero Acevedo	Abogada de la Secretaría Técnica de la Comisión Especial

Mr. Mijail Cienfuegos Falcón	Abogado de la Secretaría Técnica de la Comisión Especial
Ms. Erika Tuesta Vela	Abogada de la Secretaría Técnica de la Comisión Especial
Mr. Giancarlo Coello Gadea	Abogado de la Dirección General de Electricidad del Ministerio de Energía y Minas
Mr. Miguel Alemán Urteaga	Director de Negociaciones Económicas Internacionales del Ministerio de Relaciones Exteriores
Ms. Giovanna Gómez Valdivia	Subdirectora de Organismos Económicos y Financieros Internacionales del Ministerio de Relaciones Exteriores
Ms. Evelyn Vargas Soto	Especialista Legal de la Dirección de Negociaciones Económicas Internacionales del Ministerio de Relaciones Exteriores

Witnesses
Mr. Francisco Ísmodes Mezzano
Mr. Ricardo Ampuero Llerena

Experts

Mr. Carlos Monteza	MOAR Abogados
Mr. Claudio Lava Cavassa	Lava Cavassa Abogados
Mr. David Vidal Panduro	Lava Cavassa Abogados
Mr. Matthew Shopp	Secretariat International (previously Versa Partners)
Mr. Kiran Sequeira	Secretariat International (previously Versa Partners)
Mr. Paul Baez	Secretariat International (previously Versa Partners)
Ms. Sydney Stein	Secretariat International (previously Versa Partners)
Ms. Abigail Alpert	Secretariat International (previously Versa Partners)

For the United States (*non-disputing party*):

Ms. Nicole Thornton	U.S. Department of State, Office of the Legal Adviser
Ms. Lisa Grosh	U.S. Department of State, Office of the Legal Adviser

Mr. John Daley	U.S. Department of State, Office of the Legal Adviser
Ms. Margaret Sedgewick	U.S. Department of State, Office of the Legal Adviser
Mr. Matthew Hackell	U.S. Department of State, Office of the Legal Adviser
Ms. Catherine Gibson	Office of the U.S. Trade Representative
Mr. Patrick Childress	Office of the U.S. Trade Representative

Court Reporters:

Mr. Dante Rinaldi	Court reporter (Spanish)
Mr. Leandro Iezzi	Court reporter (Spanish)
Ms. Diana Burden	Court reporter (English)
Ms. Laurie Carlisle	Court reporter (English)

Interpreters:

Mr. Jesús Getan Bornn	Interpreter
Ms. Anna Sophia Chapman	Interpreter
Ms. Pilar Fernández	Interpreter

FTI:

Mr. Andrew Skim	Technician

60. During the Hearing, the following persons were examined:

On behalf of Claimants:

Mr. Michael Jacobson	Latam Hydro LLC
Mr. Stefan Sillen	Latam Hydro LLC
Mr. Eduardo Benavides	Berninzon & Benavides
Ms. María Teresa Quiñones Alayza	QA Legal
Mr. Santiago Dellepiane	Berkeley Research Group
Mr. Andrea Cardani	Berkeley Research Group

On behalf of Respondent:

Mr. Francisco Ísmodes Mezzano	
Mr. Ricardo Ampuero Llerena	
Mr. Carlos Monteza	MOAR Abogados
Mr. Claudio Lava Cavassa	Lava Cavassa Abogados
Mr. Matthew Shopp	Secretariat International (previously Versant Partners)
Mr. Kiran Sequeira	Secretariat International (previously Versant Partners)

61. In the course of the Hearing, the Tribunal posed 19 questions to the Parties ("**Tribunal Questions**"), which were addressed by the Parties orally in their Closing Statements.[9]

62. On 18 April 2022, the Parties submitted agreed corrections to the Hearing transcripts.

63. In accordance with TPA Article 10.21 and section 23.1 of PO 2, copies of the transcripts and recordings of the Hearing were made publicly available on the ICSID website on 26 April 2022 and 18 May 2022, respectively.

64. The Parties filed simultaneous post-hearing briefs on 17 June 2022 ("**C-PHB**" and "**R-PHB**," respectively).

65. On 22 July 2022, Claimants requested leave from the Tribunal to provide updated calculations of their damages. On 27 July 2022, Respondent submitted comments on Claimants' request to update their damages calculations. Additional observations on this matter were filed by Claimants on 29 July 2022, and by Respondent on 2 August 2022.

66. The Parties filed their submissions on costs on 1 August 2022 ("**C-CS**" and "**R-CS**," respectively).

67. On 4 August 2022, the Tribunal addressed the Parties with respect to Claimants' request of 22 July 2022. The Tribunal took note of: (i) Claimants' agreement to withdraw their request on the condition that they were allowed to present updates to their damages figures at the end of the case, should they prevail on any of their claims; and (ii) Respondent's indication that it was amenable to such proposal, subject to its right to respond to any such update by Claimants. Accordingly, the Tribunal stated that "with the agreement of the Parties, [it] defer[red] the Claimants' request until the end of the proceedings, in the event that the Claimants should prevail on any of their claims," adding that Respondent would be granted the opportunity to respond to any such update by Claimants.

[9] Email of A. Conover to the Parties, 17 March 2022 (the "**Tribunal Questions**").

68. On 9 June 2023, the Centre informed the Parties that Ms. Ana Constanza Conover Blancas, ICSID Legal Counsel, would be taking maternity leave, and that during her absence, Ms. Luisa Fernanda Torres, ICSID Legal Counsel, would serve as Secretary of the Tribunal.

69. The proceeding was closed on 20 December 2023.

IV. FACTUAL BACKGROUND

70. In this Section the Tribunal will set out some of the factual background relevant to the Parties' dispute. This account is not exhaustive. The Tribunal will revisit and elaborate upon certain events as appropriate in the course of this Award.

A. FOUNDERS OF FIRST CLAIMANT

71. First Claimant was co-founded by Mr. Michael Jacobson and Mr. Gary Bengier, who are both U.S. citizens. Mr. Jacobson is a businessman who served as Senior Vice President, General Counsel and Secretary of eBay, Inc. for almost 17 years.[10] Mr. Bengier is Mr. Jacobson's former colleague at eBay, Inc., *inter alia* having served as the Chief Financial Officer from 1997 to 2001.[11]

B. TPA

72. On 12 April 2006, the US-Peru Trade Promotion Agreement ("**TPA**" or "**Treaty**") was signed, and on 1 February 2009 it entered into force.[12]

C. RER LAW AND REGULATIONS

73. On 1 May 2008, the Legislative Decree No. 1002 for the Promotion of Investment for the Generation of Electricity from Renewable Energies ("**RER Law**") was enacted in Peru and

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10 Jacobson First Statement ¶ 4. *See* Memorial ¶ 24.

11 Jacobson First Statement ¶ 24. *See* Memorial ¶ 25.

12 **C-001/RL-051**, United States-Peru Trade Promotion Agreement, 1 February 2009 ("**TPA**"), Ch. 23. *See* Memorial ¶ 28.

entered into force on 2 May 2008.[13] The preamble to Legislative Decree No. 1002 provides, in part:[14]

> The Congress of the Republic by means of Law Nº 29157 and in accordance with Article 104 of the Political Constitution of Peru has delegated to the Executive Branch the power to legislate on specific matters, in order to facilitate the implementation of the United States – Peru Trade Promotion Agreement and its Protocol of Amendment, and the support to the economic competitiveness for its exploitation, considering that some of the delegation matters are the improvement of the regulatory framework, the institutional strengthening, the modernization of the State, the promotion of private investment, the drive to technological innovation, as well as the institutional strengthening of Environmental Management;
>
> …
>
> The promotion of renewable energies, eliminating any barrier or obstacle for their development, implies promoting the diversification of the energy matrix, becoming an advance towards an energy security and environmental protection policy, being of public interest to provide a legal framework in which these energies are developed to encourage these investments and amend existing rules and regulations that have not been effective due to the fact that they lack minimum incentives provided for in comparative law…

74. The object of Legislative Decree No. 1002 was to "promote the use of Renewable Energy Resources (RER) in order to improve the quality of life of the population and to protect the environment by promoting investment in electricity production."[15] Renewable energy resources ("**RER**") are understood in the RER Law as "the energy resources such as biomass, wind, solar, geothermal and tidal. In the case of hydraulic power, when installed capacity does not exceed 20 MW."[16]

75. The RER Law includes a number of incentives for RER projects, including: (i) purchase of all energy produced by RER generators at the price in the short-term market, complemented by the premium set by the Supervisory Agency for Investment in Energy and Mining (*Organismo Supervisor de la Inversión en Energía y Minería*,

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13 **C-007**, Legislative Decree No. 1002, 1 May 2008, First Supplementary Provision. *See* Counter-Memorial ¶ 90.

14 **C-007**, Legislative Decree No. 1002, 1 May 2008, Preamble. *See* Memorial ¶ 29.

15 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 1. *See* Counter-Memorial ¶ 91.

16 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 3. *See* Counter-Memorial ¶ 90.

"**OSINERGMIN**") in the event that the marginal cost is less than the price determined by OSINERGMIN;[17] (ii) priority for the daily load dispatch carried out by the System Financial Operation Committee (*Comité de Operación Económica del Sistema*, "**COES**"), for which a variable production cost equal to zero will be considered;[18] (iii) priority to connect to the electric transmission and distribution networks of the National Interconnected Power System (*Sistema Eléctrico Interconectado Nacional*, "**SEIN**");[19] and (iv) 20-year stable rates established by the RER auctions.[20]

76. The Peruvian Ministry of Energy and Mines (*Ministerio de Energía y Minas del Perú*, "**MINEM**") was designated in Legislative Decree No. 1002 as the competent national authority responsible for promoting projects using RER.[21] The electricity sector regulator OSINERGMIN would:[22]

> …auction the allocation of premiums to each project with RER generation, according to guidelines set by [MINEM]. Investments appearing at the auction will include the transmission lines necessary for their connection to the National Interconnected Power System (SEIN)…

77. As such, a series of auctions would be held for the award of the guaranteed price ("**Award Tariff**") to be paid to the successful bidders for the RER energy they produced based on RER projects, under the conditions in the law and regulations.[23]

78. On 2 October 2008, the first Regulation for the Generation of Electricity with Renewable Energies was approved.[24] This Regulation was repealed on 22 March 2011 by an updated Regulation of the RER Law ("**2011 RER Regulation**").[25] The 2011 RER Regulation was further amended by Supreme Decree 024-2013 of 6 July 2013 ("**SD 24**," see further ¶¶ 89-

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17 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 5. *See* Counter-Memorial ¶ 92.

18 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 5. *See* Counter-Memorial ¶ 92.

19 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 8. *See* Counter-Memorial ¶ 92.

20 **R-097**, *La Industria de la Energía Renovable en el Perú: 10 Años de Contribuciones a la Mitigación del Cambio Climático*, Osinergmin, March 2017, p. 50. *See* Counter-Memorial ¶ 92; Reply ¶ 31.

21 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 4.

22 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 7.1. *See* Memorial ¶ 30.

23 Counter-Memorial ¶ 99.

24 **MQ-004**, *Decreto Supremo No. 050-2008-EM,* 1 October 2008. *See* Counter-Memorial ¶ 93.

25 **MQ-005**, *Decreto Supremo No. 012-2011-EM*, 22 March 2011, amended by *Decreto Supremo No. 024-2013-EM*, 6 July 2013 ("*Reglamento RER*"), Art. 1. *See* Counter-Memorial ¶ 93.

90 below).[26] The 2011 RER Regulation as updated by SD 24 will be referred to in this Award as the "**RER Regulations**."

79. In their submissions, Claimants use the term "**RER Promotion**" to refer to the above regulatory framework, which in their view was established to encourage private investments in Peru's renewable energy sector and to further Peru's goal of increasing the generations of electricity using RER.[27]

D. FIRST AND SECOND RER PUBLIC AUCTIONS

80. In 2009, the first public auction for renewable energy projects took place in Peru, resulting in winning bids for 29 renewable energy projects, 19 of which were for "small-hydro," i.e., hydroelectric projects with installed capacity of 20 MW or less. In 2011, the second public auction took place, resulting in 10 winning bids, seven of which were small-hydro projects.[28]

81. The projects arising from the first and second public auctions suffered from significant pre-operational delays.[29] Some winning bidders also intended to sell the RER project to third parties to develop the project.[30] For such bidders, according to Respondent, there was an incentive to wait before selling the project to third parties as the 20 year guaranteed tariff would remain fixed, while RER technology and construction costs would be lower over time.[31]

E. THE MAMACOCHA PROJECT

82. Around December 2011, a team of professionals commissioned by Mr. Jacobson, through his companies Greinvest Americas LLC and Greinvest Latin America (BVI) Ltd (together "**Greinvest**"), identified a potential location for a hydroelectric project in a mountainous

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26 **MQ-005**, *Reglamento RER*. *See* Counter-Memorial ¶ 93.

27 Memorial ¶ 9.

28 **C-104**, *Clasificación del Estudio Ambiental para las Concesiones de Generación con Recursos Energéticos Renovables, Informe de OSINERGMIN*; Mendoza Statement ¶ 28. *See* Memorial ¶ 59; Counter-Memorial ¶ 94.

29 Memorial ¶ 60; *quoting* Second Claimant's External Counsel First Statement ¶ 43; Counter-Memorial ¶ 94.

30 Memorial ¶ 60; Counter-Memorial ¶ 95.

31 Counter-Memorial ¶ 95.

Arequipa region in Southern Peru ("**the Mamacocha Project**" or "**the Project**").[32] The Mamacocha Lagoon is the largest spring-fed lagoon in the world, located in an area called "the Valley of the Volcanoes."[33] Its location in Peru is depicted in the image below:[34]

83. The Mamacocha Project plan was to build a "run-of-the-river" hydroelectric plant that used part of the runoff from the Mamacocha Lagoon and steep elevation drop-offs to generate electricity.[35] This reliance on overflow waters from a natural source differs from a conventional hydroelectric dam project which uses water from a dammed reservoir.[36] The design for the Project was as follows:[37]

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32 Jacobson First Statement ¶ 6; Sillen First Statement ¶ 21; Bartrina First Statement ¶ 11. *See* Memorial ¶ 41.

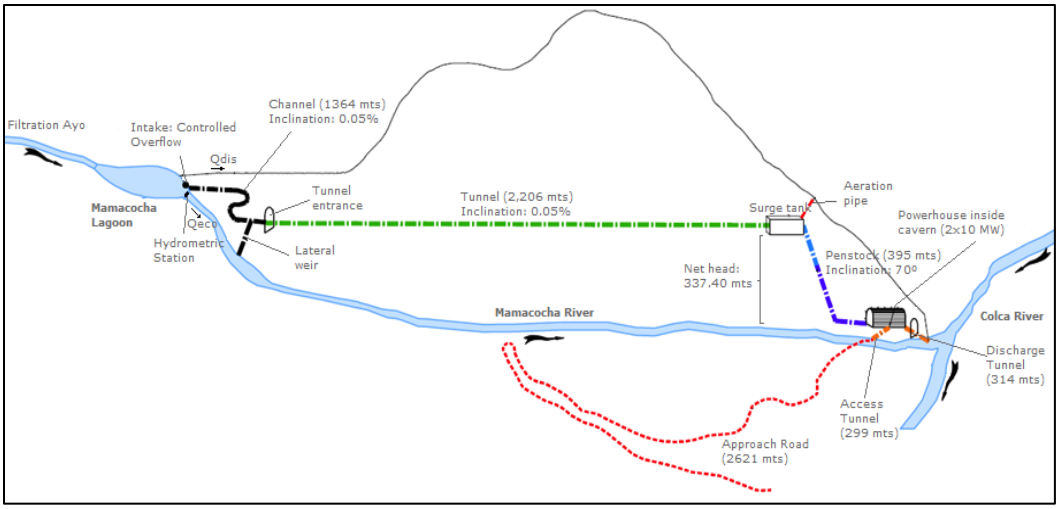
33 **R-095**, "*Arequipa: laguna de Mamacocha, la nueva maravilla natural de la Comunidad Andina*", El Comercio, 4 June 2019. *See* Counter-Memorial ¶ 83.

34 BRG First Report, Figure 1, p. 20.

35 Sillen First Statement ¶ 21. *See* Memorial ¶ 41; Counter-Memorial ¶ 84.

36 *See* Memorial, fn 64.

37 Chart entitled "Basic Design (Pöyry final design)", in **BRG-008**, Latam Hydro LLC: Investor Presentation, Equitas Partners, August 2014, p. 8.



84. On 22 February 2012, Mr. Jacobson's team commissioned a nine-month pre-feasibility study by an engineering firm, finalised in October 2012.[38]

85. In November 2012, Mr. Jacobson and his team incorporated Hidroeléctrica Laguna Azul S.R.L. to serve as the Project's local operations company and prospective concessionaire.[39] On 22 February 2017, the company name was changed to CH Mamacocha S.R.L, i.e., CH Mamacocha or Second Claimant.[40]

86. In July 2013, the first phase of the feasibility report for the Project by Pöyry was finalised.[41]

87. In addition to the Mamacocha Project, the first phase feasibility report concluded that the waterways upstream of the Mamacocha Lagoon could power a number of small hydroelectric plants ("**Upstream Projects**").[42]

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38 **C-100(a)-(e)**, *CESEL Ingenieros, Estudio de Prefactibilidad*, Vols. I-V, 26 October 2012. *See* Memorial ¶¶ 45-46.

39 **C-021**, Registration of Hidroeléctrica Laguna Azul S.R.L, Articles of Incorporation, 23 November 2012. *See* Memorial ¶ 49.

40 **C-020**, Registration of Hidroeléctrica Laguna Azul S.R.L's name change to CH Mamacocha S.R.L, 22 February 2017. *See* Memorial ¶ 49.

41 **C-101**, Mamacocha Hydroelectric Project, Peru: Feasibility Study—Phase I—Final Report, Pöyry, July 2013. *See* Memorial ¶ 51.

42 **C-101**, Mamacocha Hydroelectric Project, Peru: Feasibility Study—Phase I—Final Report, Pöyry, July 2013, p. 14. *See* Memorial ¶ 56.

88. In October 2013, Pöyry provided an initial conceptual design for the Upstream Projects, as commissioned by Second Claimant.[43]

F. THIRD RER PUBLIC AUCTION

89. In order to address the issues that arose in the first and second auctions (see ¶ 81 above), on 6 July 2013, Peru issued Supreme Decree No. 024-2013-EM ("**SD 24**") modifying the 2011 RER Regulation that would apply to the third auction ("**Third Auction**") and fourth auction ("**Fourth Auction**") (see ¶ 78 above).[44]

90. SD 24 made a number of changes to the terms that would apply in contracts with the winning bids, including: (i) a non-modifiable contract termination date, until which date the concessionaire would be paid the guaranteed tariff;[45] (ii) a reference commercial operation start-up date, 20 years in advance of the contract termination date;[46] and (iii) an actual commercial operation start-up date, which could not be delayed by more than two years beyond the reference commercial operation start-up date, otherwise the contract would terminate and the performance bond would be forfeited.[47]

91. By Respondent's account, on 12 July 2013, the Third Auction was called.[48]

92. In October 2013, Second Claimant submitted its bid for the Mamacocha Project in the Third Auction for a hydroelectric powerplant with an installed capacity of 20 MW.[49]

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43 **C-102**, Email from A. Bartrina to S. Sillen attaching Pöyry's Memorandum titled "Upstream Addition Mamacocha II", 3 October 2013. *See* Memorial ¶ 57.

44 **MQ-005**, *Reglamento RER*. *See* Counter-Memorial ¶ 96.

45 **MQ-005**, *Reglamento RER*, Reg 1.13B. *See* Counter-Memorial ¶ 97.

46 **MQ-005**, *Reglamento RER*, Reg 1.13D. *See* Counter-Memorial ¶ 97.

47 **MQ-005**, *Reglamento RER*, Reg 1.13C. *See* Second Claimant's External Counsel First Statement ¶ 44; Memorial ¶ 61; Counter-Memorial ¶ 97.

48 Counter-Memorial ¶ 110.

49 *See* **R-139**, *Declaración Jurada del Participante*, CH Mamacocha, 22 October 2013. *See* Memorial ¶ 66.

93. In a declaration dated 30 October 2013, Second Claimant submitted Annex 6-9 to its bid, recognising the non-modifiable character of the termination date of the contract to be entered into, even in case of force majeure events:[50]

> *DECLARAMOS BAJO JURAMENTO que reconocemos el carácter no modificable de la Fecha de Término del Contrato, aun cuando se presenten eventos de Fuerza Mayor*.

94. In December 2013, OSINERGMIN notified Second Claimant that it was one of 19 successful bidders in the Third Auction, all of which were small-hydro projects.[51]

G. THE RER CONTRACT

95. On 18 February 2014, Second Claimant executed the RER Contract with MINEM.[52] Clause 1.4.31 of the RER Contract states that MINEM "enters into this Contract on behalf of the Government."[53]

96. The nature, legal regime and allocation of risks in the RER Contract is disputed. The Parties' respective positions in that regard will be addressed further in Sections VI *et seq.* below.

97. The RER Contract provides for a "Reference Date of Commercial Operation Start-Up" ("**Reference COS"**) of 31 December 2016.[54] The "Actual Date of Commercial Operation Start-Up" ("**Actual COS**") is defined as "the actual date of Operation Start-up of each power plant, certified by the COES [i.e., the Economic Operational Committee of the National Interconnected Electric System] according to its Procedures, which may not be more than two (02) years after" the Reference COS. As such, the Actual COS was not to exceed 31 December 2018.[55]

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50 **R-138**, *Declaración Jurada sobre reconocimiento de carácter no modificable de la fecha de término del contrato, aun cuando se presenten eventos de fuerza mayor,* CH Mamacocha*,* 30 October 2013.

51 Jacobson First Statement ¶ 22; Sillen First Statement ¶ 56; Mendoza Statement ¶ 47. *See* Memorial ¶ 68; Counter-Memorial ¶ 111.

52 **C-002**, Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System, 18 February 2014 ("RER Contract"). *See* Memorial ¶ 69; Counter-Memorial ¶ 111.

53 **C-002**, RER Contract, Clause 1.4.31.

54 **C-002**, RER Contract, Clause 1.4.24. *See* Memorial ¶ 70; Counter-Memorial ¶ 119.

55 **C-002**, RER Contract, Clause 1.4.23. *See* Memorial ¶ 70; Counter-Memorial ¶ 119.

98. Clause 8.4 of the RER Contract is entitled "Commercial Operation Start-up after December 31, 2018" and provides:[56]

> If, for any reason, Commercial Operation Start-up of the RER Generation Project provided for hereunder has not taken place by December 31, 2018, this Contract shall be automatically terminated, and the Performance Bond shall be enforced.

99. In relation to the termination date, Clause 1.4.22 of the RER Contract provides:[57]

> **"Termination Date of the Contract"** means December 31, 2036, a date that cannot be modified for any reason whatsoever and until which the Concessionaire is guaranteed the Award Tariff. (emphasis in original)

100. Clause 1.4.9 of the RER Contract defines "Financial Closing" as:[58]

> …the date on which the entire RER project financing contract is signed by all the parties involved in the financing and all the conditions under such contract are met to make disbursements.

101. Clause 1.4.11 of the RER Contract concerns the "Final Concession" ("*Concesión Definitiva*"), and defines it as:[59]

> …the electricity right granted by the appropriate Authority, in accordance with the provisions of the LCE [*Ley de Concesiones Eléctricas* (Electricity Concession Law)] and the RLCE [*Reglamento de la Ley de Concesiones Eléctricas* (Regulation of the Electricity Concessions Law)], for RER generation.

102. Pursuant to Clause 1.3 of the RER Contract:[60]

> The execution of this Contract shall not eliminate or affect the Concessionaire Company's obligation to request, sign and comply with the requirements for the Final Concession of the Power Plant to be obtained by the Concessionaire Company from the Ministry.

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56 **C-002**, RER Contract, Clause 8.4. *See* Memorial ¶ 70.

57 **C-002**, RER Contract, Clause 1.4.22. *See* Memorial ¶ 70; Counter-Memorial ¶ 119.

58 **C-002**, RER Contract, Clause 1.4.9. *See* Memorial ¶ 71.

59 **C-002**, RER Contract, Clause 1.4.11.

60 **C-002**, RER Contract, Clause 1.3. *See* Counter-Memorial ¶ 126. *See also* **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Clause 1.4.1.

103. Clause 3.2 of the RER Contract likewise concerns the Final Concession, as well as construction of the plant:[61]

> The Concessionaire Company shall manage and comply with all the requirements in furtherance of obtaining the Final Concession and building the power generation plant as specified in Annex No. 1.

104. Clause 4 is entitled "Construction of the Generation Plant" and Clause 4.3 provides:[62]

> The Ministry [i.e., MINEM] shall create any such easements as may be required in accordance with the Applicable Laws but shall not bear any costs incurred in obtaining them.
>
> Furthermore, the Ministry shall, upon request of the Concessionaire Company, use its best endeavors in order to allow the latter to access third-party facilities, and shall assist it in obtaining permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right, in the event of these not being timely granted by the relevant Government Authority despite all requirements and procedures required under the Applicable Laws having been met.

105. Clause 4.6 concerns the schedule of the execution of works and provides:[63]

> The Concessionaire Company shall, within a maximum term of six (6) months upon the Closing Date, submit the detailed schedule for the execution of works, providing information enough -to the satisfaction of the OSINERGMIN- to oversee the progress made at the project. Such schedule, a printed as well as a digital (MS Project) version of which shall be submitted, shall at least include the following deadlines: financial closing, commencement of civil works, arrival of the main electromechanical equipment at the construction site, Operation Start-up of electromechanical equipment and Commercial Operation Start-up and shall identify the works critical path. Moreover, the Concessionaire Company shall, on a quarterly basis, submit to the OSINERGMIN a detailed report on the progress made in connection with the project tasks in the terms and within the dates established by the OSINERGMIN to that end.

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61 **C-002**, RER Contract, Clause 3.2. *See* Counter-Memorial ¶ 126.

62 **C-002**, RER Contract, Clause 4.3.

63 **C-002**, RER Contract, Clause 4.6.

106. On 12 February 2014, Banco de Crédito del Peru issued the bond letter in relation to the performance bond ("**Performance Bond**").[64] The Performance Bond is maintained to date.[65]

107. On 18 August 2014, as contemplated by Clause 4.6 of the RER Contract (see ¶ 105 above), Second Claimant submitted its Works Execution Schedule for the RER Contract. The schedule anticipated an Actual COS by 2 January 2017.[66]

108. According to Respondent, the Works Execution Schedule was not signed, and Second Claimant resubmitted a signed version on 7 November 2017, which included changes to the dates of some milestones, including financial closing and the start of works.[67]

H. PERMITS

109. Second Claimant required a number of permits in order to carry out the Project. The precise role and responsibility of each of the Parties in obtaining each of the permits is disputed.[68] For present purposes, the Tribunal is only addressing which permits were required for the Project to proceed, without prejudice to its considerations on any respective responsibilities for obtaining them. These included:

(i) Water Use: One of the authorisations required by the Electricity Concessions Law was an authorisation for the use of natural resources owned by the State (*autorización del uso de recursos naturales de propriedad del Estado*).[69] For the Project, this entailed a resolution issued by the National Water Authority (*Autoridad Nacional del Agua del Ministerio de Agricultura y Riego del Perú*, "**ANA**"), which would approve a water use study of the water resources available for the power generation activity (*Estudio de Aprovechamiento Hídrico*).[70] The

64 **C-033**, *Banco de Crédito Carta Fianza No. G706797*, 12 February 2014. *See* Memorial ¶ 72.

65 Jacobson First Statement ¶ 22. *See* Memorial ¶ 72.

66 **C-148**/**R-142**, *Cronograma de Ejecución*, 18 August 2014. *See* Memorial ¶ 71.

67 **C-148**/**R-142**, *Cronograma de Ejecución*, 18 August 2014; **R-143**, *Cronograma de Ejecución*, 7 November 2014. *See* Counter-Memorial ¶ 147.

68 *See*, *inter alia*, Counter-Memorial ¶¶ 126-129, 143; Reply ¶¶ 746-754.

69 **RL-001**, *Decreto Ley No. 25844*, 7 November 1992 ("*Ley de Concesiones Eléctricas*"), Art. 25(b). *See* Counter-Memorial ¶ 152.

70 **R-003**, *Decreto Supremo No. 041-2011-EM*, 19 July 2011, Art. 3.1.

Estudio de Aprovechamiento Hídrico was approved by the ANA's *Administración Local del Agua de Camaná – Majes* in August 2013, prior to the execution of the RER Contract.[71]

(ii) Environmental Certification: Pursuant to the *Ley del Sistema Nacional de Evaluación de Impacto Ambiental (Ley No. 27446)*, a prior environmental certification by the competent authority is required before commencing construction projects that may cause negative environmental impacts ("**Environmental Certification**").[72] The competent authority for certifying the Mamacocha Project was the *Autoridad Regional del Medio Ambiente* ("**ARMA**").[73] On 11 October 2013, ARMA provided an Environmental Certification of the generation plant as "Category III," requiring a detailed environmental impact study (*Estudio de Impacto Ambiental*, "**EIA**").[74] Second Claimant appealed the decision, which was granted on 17 February 2014 when ARMA re-classified the generation plant as Category I, requiring only a sworn environmental impact statement (*Declaración de Impacto Ambiental*, "**DIA**").[75] The DIA was approved, and Second Claimant was granted an Environmental Certification for the generation plant of the Mamacocha Project by Resolution dated 3 September 2014 (transmitted on 5 September 2014) ("**Generation Plant Environmental Certification**").[76] Second Claimant filed a separate application for

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71 **R-004**, *Carta No. 038-2013-ANA-AAA I C-O de la Autoridad Nacional del Agua a HLA*, 14 January 2013; **R-006**, *Resolución Directoral No. 590-2103-ANA-AAA I C-O, Autoridad Nacional del Agua*, 29 August 2013. *See* Counter-Memorial ¶ 153.

72 **RL-002**, *Ley No. 27446, Ley del Sistema Nacional de Evaluación de Impacto Ambiental*, 23 April 2001, Arts. 2-3. *See* Counter-Memorial ¶ 155.

73 **C-184**, *Oficio No. 748-2013-GRA/ARMA/SG de la Autoridad Regional Ambiental a HLA*, 11 October 2013. *See* Memorial ¶ 76; Counter-Memorial ¶ 157.

74 **C-184***, Oficio No. 748-2013-GRA/ARMA/SG de la Autoridad Regional Ambiental a HLA*, 11 October 2013.

75 **C-185**, *Informe No. 009/2014-GRA/ARMA-SG-EA-E*, 17 February 2014. *See* Memorial ¶ 77; Bartrina First Statement ¶ 37; Chavez Statement ¶¶ 7-24. *See also* Tribunal Question 14 ("Please comment on the legal and factual basis required by Peruvian law to grant the environmental permits for projects such as the Mamacocha Project.") and Parties' responses thereto: Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1914:3-2034:13; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2036:12-2144:2.

76 **RL-036**, *Resolución Sub Gerencial Regional No. 110-2014-GRA/ARMA-SG, que aprueba la Declaración de Impacto Ambiental de la Planta de Generación*, 3 September 2014; **R-024**, *Oficio No. 957-2014-GRA/ARMA/SG de la Autoridad Regional Ambiental a HLA*, 5 September 2014. *See* Counter-Memorial ¶ 160.

the Environmental Certification for the 65km transmission line from the project site to the electricity substation, which was classified by ARMA as Category I, requiring a DIA.[77] On 24 December 2014, the DIA was approved and the Resolution containing the Environmental Certification was granted for the transmission line ("**Transmission Line Environmental Certification**").[78] The Environmental Certifications of the Mamacocha Project are the subject of various disputed circumstances that will be addressed in the course of this Award.

(iii) Pre-Operational Grid Impact Study: A certification of a pre-operational study on grid impact is required from the COES.[79] The COES is a private non-profit entity made up of stakeholders in the SEIN.[80] The COES provided its approval on 28 January 2015.[81] According to Respondent, delays in the issuance of this approval were attributable to Second Claimant.[82]

(iv) Archaeological Certificate: A certification of the absence of archaeological remains is required from the Ministry of Culture for any electricity generation project.[83] This was granted for the Mamacocha Project on 6 March 2015.[84]

(v) Final Concessions: As set out in Clauses 1.3 and 3.2 of the RER Contract (see ¶¶ 102-103 above), the Project needed a Final Concession for power generation in order to operate. The Electricity Concessions Law provides that a final concession is required, *inter alia*, for: (i) the generation of electrical energy that uses hydraulic

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77 **R-014**, *Carta de HLA a la Autoridad Regional del Medio Ambiente*, 3 March 2014; **R-019**, *Oficio No. 899-2014-GRA/ARMA/SG de la Autoridad Regional Ambiental a HLA*, 20 August 2014.

78 **RL-037**/**MQ-014**, *Resolución Sub Gerencial Regional No. 158-2014-GRA/ARMA-SG, que aprueba la Declaración de Impacto Ambiental de la Línea de Transmisión*, 24 December 2014. *See* Counter-Memorial ¶ 162.

79 *See* Memorial ¶ 74; Counter-Memorial ¶ 164.

80 Counter-Memorial ¶ 164; Reply ¶ 703 fn 1179.

81 **R-032**, *Carta No. COES/D/DP-127-215 de COES a HLA*, 28 January 2015. *See* Counter-Memorial ¶ 165.

82 Counter-Memorial ¶¶ 165-166.

83 **RL-004,** *Decreto Supremo No. 003-2014-MC, Aprueban Reglamento de Intervenciones Arqueológicas*, 4 October 2014, Art. 54. *See* Memorial ¶ 74; Counter-Memorial ¶ 167.

84 **R-127**, *Oficio No. 223-2014-DDC-ARE/MC adjuntando Oficio CIRA No. 058-2015-DMADDA-ARE/MC de Ministerio de Cultura a HLA*, 6 March 2015; Counter-Memorial ¶ 168.

resources; and (ii) the transmission of electrical energy that affects State property.[85] To be granted a final concession under the Electricity Concessions Law, a number of other permits were required, including those outlined above.[86] Second Claimant applied for and obtained separate final concessions for power generation and transmission of electrical energy. According to an internal report of Second Claimant, the final concession for the transmission line was granted on 9 March 2016, and the final concession for power generation was granted on 24 June 2016.[87]

(vi) Civil Works Authorisation: The civil works authorisation (*Autorización para la Ejecución de Obras*, "**CWA**") was required to commence construction near waterways such as the Mamacocha Lagoon.[88] The competent authority was the *Autoridad Administrativa del Agua I Caplina Ocoña* ("**AAA**"), being a regional branch of the ANA.[89] The application for the CWA was filed on 29 November 2016.[90] Following an initial denial, the CWA was issued in 5 July 2017.[91] On 25 January 2018, the AAA approved Second Claimant's request for rectification of the CWA.[92] The circumstances surrounding the granting of the CWA are disputed and will be further addressed in the course of this Award.

110. According to Claimants, banks and financial institutions required Second Claimant to have its permits and concessions in hand before they would disburse funds for construction (and therefore before achieving Financial Closing).[93]

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85 **RL-001**, *Ley de Concesiones Eléctricas*, Art. 3(a), (b).

86 **RL-001**, *Ley de Concesiones Eléctricas*, Art. 25; **RL-004**, *Decreto Supremo No. 003-2014-MC, Aprueban Reglamento de Intervenciones Arqueológicas*, 4 October 2014, Art. 54; Bartrina First Statement ¶ 27. *See* Memorial ¶ 74; Counter-Memorial ¶ 148.

87 **R-128**, *Informe de Gestión No. 9*, HLA, 11 July 2015, p. 4. *See* Memorial ¶ 82; Counter-Memorial ¶ 169; Bartrina First Statement ¶ 59.

88 **R-039**, *Reglamento de Procedimientos Administrativos para el Otorgamiento de Derechos de Uso de Agua*, September 2010, Art. 2.1. *See* Memorial ¶ 93; Counter-Memorial ¶¶ 169-170.

89 **R-044**, *Carta No. 089-2017-ANA-AAA I C-O de la Autoridad Nacional del Agua a HLA*, 31 January 2017. *See* Memorial ¶ 93; Counter-Memorial ¶ 170.

90 **R-041**, *Formulario No. 001, Solicita Autorización para la Ejecución de Obras de Aprovechamiento Hídrico*, 29 November 2016; Counter-Memorial ¶ 172.

91 **C-122**, *Resolución Directoral Nro. 1928-2017-ANA/AAA I C-O*, 5 July 2017; Counter-Memorial ¶ 173.

92 **HKA-035**, *Resolución Directoral Nro. 151-2018-ANA/AAA*, 25 January 2018; Counter-Memorial ¶ 175.

93 Sillen First Statement ¶ 77. *See* Memorial ¶ 73.

111. Claimants submit that the reviewing agencies did not adhere to administrative time limits for approving permits pursuant to the *Texto Único de Procedimientos Administrativos* ("**TUPA**") guidelines.[94] Respondent rebuts Claimants' position, as will be set out as relevant in the course of this Award.[95]

I. ADDENDUM 1

112. On 24 November 2014, Second Claimant filed a request with MINEM for a 705-day extension to the RER Contract Works Execution Schedule.[96]

113. On 6 April 2015, MINEM granted the request for a 705-day extension.[97] In a legal report of the same date which recommended granting the request for extension, MINEM analysed each of the delays put forward by Second Claimant, including the number of days of delay caused and the party responsible. In summary, MINEM concluded:[98]

> 6. As a result of the above, the total net delay attributable to the Administration is of 763 calendar days.
>
> 7. In this regard, given that the delays in the abovementioned administrative procedures made it impossible to achieve the Financial Closing of the project, which resulted in the non-fulfillment of the deadlines of the Works Execution Schedule Milestones under the Supply Contract because the financing process of the project could not be completed, it must be concluded that such breaches are not within the Concessionaire´s scope of responsibility, pursuant to Article 1314 of the Civil Code, which sets forth that whoever acts with the required ordinary diligence may not be held liable for the non-performance of an obligation or for its partial, late or defective performance..
>
> 8. Following the same criterion, it is important to mention that the OSINERGMIN argues in its Report No. GFE-USPP-23-2015 (submitted through the document referenced in b) above): "(…) The delays in fulfilling the many requirements for the completion of the Concessionaire's project, as described above by the Concessionaire, should not be attributed to the Concessionaire, since such delays are the result of Government entities taking too long for their approvals. Such delays, which are attributable to third-parties'

94 Bartrina First Statement ¶ 30; Sillen First Statement ¶ 74. *See* Memorial ¶ 75.

95 *See*, *inter alia*, Counter-Memorial ¶¶ 150-151.

96 **C-149**, *Carta de HLA (C. Diez) al MINEM (L. Nicho)*, 24 November 2014. *See* Memorial ¶ 78; Counter-Memorial ¶ 177.

97 **C-186**, *Oficio 504-2015-MEM-DGE – MINEM acepta nuevo cronograma*, 6 April 2015. *See* Memorial ¶ 79.

98 **C-201**, Legal Report No. 005-2015-EM-DGE, 6 April 2015, ¶¶ 6-9.

> delayed action or inaction and are beyond Hidroeléctrica Laguna Azul S.R.L.'s control, have affected primarily the Concessionaire's ability to meet in a timely fashion the contractually-set Financial Closing deadline, which has resulted in Hidroeléctrica Laguna Azul S.R.L. not being in a position to comply with the initially-approved Works Execution Schedule ….
>
> 9. It is worth mentioning that, even if the delay attributable to the Administration is of 763 calendar days, the maximum term extension that should be granted to the Concessionaire is limited to the term explicitly requested by it, that is, 705 calendar days.

114. On 3 July 2015, the text of the first Addendum to the RER Contract was approved by MINEM, and as a result of the granted extension, on 17 July 2015 MINEM and Second Claimant signed the first Addendum to the RER Contract ("**Addendum 1**"), registered on 22 July 2015.[99]

115. The Works Execution Schedule in effect prior to Addendum 1 had foreseen the Actual COS to take place on 2 January 2017.[100] By the terms of Addendum 1, the parties agreed to modify the Works Execution Schedule, and "extend, by 705 calendar days, the term for the [COS]," setting it at 8 December 2018.[101]

116. The MINEM Ministerial Resolution of 3 July 2015 approving Addendum 1 stated that "the General Directorate of Electricity of the Ministry of Energy and Mines deemed it appropriate to grant the extension of the term requested due to delays that could be attributed to the State."[102]

117. Reflecting language in the MINEM Ministerial Resolution approving the extension,[103] the Fourth Recital to Addendum 1 states, in part:[104]

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99 **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, Recital 9, p. 8. The Tribunal notes that the text of Addendum 1 on the record is the public record of Addendum 1 by the notary public.

100 **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, Recital 3.

101 **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, Recitals 7, 8.

102 Ministerial Resolution No. 320-2015-MEM/DM, in **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, p. 9.

103 Ministerial Resolution No. 320-2015-MEM/DM, in **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, p. 8.

104 **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, Recital 4.

> The delays in the approval of the administrative procedures mentioned by the Concessionaire were caused by the Regional Environmental Authority of the Regional Government of Arequipa, in the evaluation of the requests for classification of the preliminary environmental study and the subsequent approval of the Declaration of Environmental Impact (DEI), both for the Laguna Azul Hydroelectric Plant as well as the Transmission Line; by the Ministry of Culture with the approval of the execution of the archaeological evaluation project with excavation, as well as the approval of the Final Report; by the Local Water Authority of Camaná - Majes, with the approval of the water use studies; and by the COES with the approval of the Preoperational Study of the project[.]

118. The Sixth Recital further provides:[105]

> Inasmuch as the aforementioned delays in the administrative procedures made it impossible to achieve Financial Closing for the project, entailing the failure to comply with the terms of the Milestones of the Works Execution Schedule of the Concession Agreement – having failed to conclude with the process of financing the project – the conclusion must be reached that said events of non-compliance do not fall within the scope of the Concessionaire's liability, applying article 1314 of the Civil Code which establishes that a party acting in ordinary due diligence cannot be held responsible for failure to execute its obligations or for the partial, late, or defective compliance with said obligations[.]

119. Respondent contends that the request for extension which resulted in Addendum 1 was based on false assertions by Second Claimant as to the causes of delay, and should not have been granted.[106]

J. PUBLIC ROUNDTABLES

120. According to Claimants, the Project had strong support from the local community in Ayo. Claimants assert that the Project was subject to political opposition by certain members of the legislative council of the Regional Government of Arequipa ("**RGA Council**"), who made claims about the environmental impact of the Mamacocha Project which in Claimants' view are unsubstantiated.[107]

121. According to Respondent, on the other hand, there was community opposition to the Project in Ayo, due to Second Claimant's attempt to avoid conducting the necessary

105 **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, Recital 6.

106 Counter-Memorial ¶ 182.

107 Memorial ¶¶ 80-81. *See also* Memorial ¶¶ 114-118.

environmental studies for the Project.[108] In this regard, Respondent states that in July 2016 and January 2018 the Project came close to provoking social conflict, and that in 2017 more than 150 individuals made a written statement of their opposition to the construction of the Project.[109]

122. In April and May 2016, the Conflict Prevention Office (*Oficina de Prevención de Conflictos*) of the RGA organised a series of roundtables (*mesas de trabajo*), with the participation of Second Claimant, local and regional authorities, and members of the public.[110]

123. On 13 June 2016, Second Claimant addressed a letter to Governor Osorio of the RGA stating, *inter alia*, that: (i) during the roundtables, the representatives of the RGA had not shown a moderating or neutral attitude, rendering communication among participants difficult; (ii) any future meetings should be governed under conditions including neutral conduct by government officials, respect for an agenda agreed in advance, and prior registration of participants; and (iii) it was not possible to continue a suspension of works in the district of Ayo, since Second Claimant had contractual obligations under the Works Execution Schedule agreed with Respondent in the RER Contract.[111]

K. REGIONAL INVESTIGATIVE COMMISSION OF THE RGA COUNCIL

124. On 19 July 2016, the RGA Council approved the creation of a special investigative commission ("**Regional Investigative Commission**") on the issuance of the Generation

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108 Counter-Memorial ¶ 201.

109 Counter-Memorial ¶ 203; *citing* **R-022**, *Defensoría del Pueblo, Reporte Mensual de Conflictos Sociales No. 149*, July 2016, p. 10; **R-028**, *Defensoría del Pueblo, Reporte Mensual de Conflictos Sociales No. 167*, January 2018, p. 38; **R-055**, *Oficio No. 039-2017-MDA de la Municipalidad Distrital de Ayo (A. Vega) a la Gobernadora Regional de Arequipa (Y. Osorio Delgado)*, 18 October 2017 attaching *Memorial Dirigido a las Autoridades Regionales y Nacionales*, pp. 4-9. *See also* Counter-Memorial ¶¶ 204-205.

110 **R-063**, "*Instalan mesa de trabajo por construcción de hidroeléctrica Laguna Azul*", La República, 27 April 2016; **R-064**, "*Acuerdan paralizar trabajos mientras resuelven controversia por Laguna Azul*", Diario Correo, 27 April 2016; Sillen First Statement ¶ 104; Bartrina First Statement ¶¶ 56-59; Diez First Statement ¶¶ 36-43. *See* Memorial ¶ 81; Counter-Memorial ¶ 206.

111 **C-130**, *Carta de HLA (C. Diez) a la Gobernadora Regional de Arequipa (Y. Osorio)*, 13 June 2016. *See* Counter-Memorial ¶ 206.

Plant Environmental Certification and Transmission Line Environmental Certification (see ¶ 109(ii) above).[112]

125. In an undated report, the Regional Investigative Commission concluded that there were a series of irregularities with respect to the Environmental Certifications obtained by Second Claimant. The Regional Investigative Commission recommended that the RGA Public Prosecutor's Office initiate legal action to obtain a declaration of nullity of the resolutions approving the environmental impact statements for the generation plant and transmission line of the Project.[113]

126. Among other things, in its report the Regional Investigative Commission found: (i) the Mamacocha Lagoon is the habitat of the Pacific otter (a species at risk of extinction) and river shrimp, and is an environmentally fragile area; (ii) the initial environmental evaluation of the Project concluded that it should be classified as Category III; (iii) the re-categorisation to Category I following the request of Second Claimant was based only on a legal report, without a technical evaluation; and (iv) the office within ARMA that issued the permits lacked legal authority.[114]

127. On 21 October 2016, the RGA Council approved the findings of the Regional Investigative Commission.[115]

128. On 12 December 2016, ARMA issued a resolution stating that the resolutions linked to the approval of the environmental impact statements for the generation plant and transmission line violated administrative legality (*la legalidad administrativa*) and the public interest. It

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112 **R-136**, *Acuerdo Regional No. 059-2016-GRA/CR-AREQUIPA*, 19 July 2016. *See* Counter-Memorial ¶ 208.

113 **R-137**, *Informe final de la Comisión Especial Investigadora encargada de fiscalizar la emisión de las Resoluciones Sub Gerenciales No. 1102014-GRA/ARMA-SG y No. 158-2014-GRA/ARMA-SG y otras, emitidas por la Autoridad Regional Ambiental-ARMA*, p. 88. *See* Counter-Memorial ¶ 209.

114 **R-137**, *Informe final de la Comisión Especial Investigadora encargada de fiscalizar la emisión de las Resoluciones Sub Gerenciales No. 1102014-GRA/ARMA-SG y No. 158-2014-GRA/ARMA-SG y otras, emitidas por la Autoridad Regional Ambiental-ARMA*, pp. 83-88. *See also* **C-049**, *Acta de Sesión Ordinaria del Consejo Regional de Arequipa*, 21 October 2016, pp. 19-20, 23-24.

115 **C-049**, *Acta de Sesión Ordinaria del Consejo Regional de Arequipa*, 21 October 2016, p. 24.

was further resolved that since the time for filing an administrative proceeding for nullity had expired, it would be necessary to do so in a judicial proceeding.[116]

L. AMPARO ACTION

129. On 13 September 2016, a private citizen filed a constitutional action of *amparo* against the RGA, the Public Prosecutor of the RGA, the *Fiscalía Especializada en Materia Ambiental de Arequipa* ("**AEP**"), MINEM, and the Public Prosecutor of MINEM ("**Amparo Action**"). The individual invoked the right to due process and to enjoy a balanced environment under the Constitution of Peru, requesting a declaration of nullity and ineffectiveness of: (i) the Generation Plant Environmental Certification and Transmission Line Environmental Certification; (ii) the other orders and resolutions of ARMA that led to the issuance of the Environmental Certifications; and (iii) the final concession granted to the generation plant.[117]

130. On 26 September 2016, the Constitutional Court of Arequipa declared the Amparo Action inadmissible, on the basis that a contentious-administrative proceeding was the appropriate means to protect the petitioner's rights.[118] On 7 December 2016, this finding was suspended,[119] and on 27 February 2017 it was annulled and returned to the Constitutional Court of Arequipa.[120]

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116 **C-085**, *Resolución Gerencial Regional No. 033-2016-GRA/ARMA*, 12 December 2016. *See* Counter-Memorial ¶ 211.

117 **R-071**, *Demanda de Acción de Amparo de Pablo Julián Begazo López, Corte Superior de Justicia de Arequipa*, 22 August 2016. *See* Counter-Memorial ¶ 231; Reply ¶ 292.

118 **R-072**, *Resolución No. 01, Juzgado Especializado Constitucional de Arequipa*, 26 September 2016. *See* Counter-Memorial ¶ 232; Reply ¶ 292.

119 **R-074**, *Resolución No. 02, Juzgado Especializado Constitucional de Arequipa*, 7 December 2016; **R-073**, *Reporte de Expedientes Judiciales No. 00530-2016-0-0401-JR-DC-01*, last accessed on 22 January 2021. *See* Counter-Memorial ¶¶ 232-233.

120 **R-075**, *Resolución No. 03 (UNO-1SC), Juzgado Especializado Constitucional de Arequipa*, 27 February 2017; Counter-Memorial ¶ 233. *See also* **R-076**, *Resolución No. 05 (TRES-1SC), Corte Superior de Justicia de Arequipa, Primera Sala Civil*, 28 March 2017.

131. On 22 May 2017, the Amparo Action was admitted following observations from the private citizen who had brought the action.[121]

132. On 30 January 2020, the Constitutional Court of Arequipa declared the Amparo Action well-founded, and declared the nullity of the Environmental Certifications of the Mamacocha Project and the final concession of the generation plant ("**Amparo Judgment**").[122]

133. On 4 February 2021, the First Civil Chamber of the Superior Court of Justice of Arequipa rejected Second Claimant's appeal of the Amparo Judgment.[123]

134. On 2 June 2021, Second Claimant filed a petition for *amparo* against the judgments of 30 January 2020 and 4 February 2021, requesting that both be declared null and void, *inter alia*, for violation of its constitutional rights.[124] On 5 July 2021, this action was declared inadmissible by the Superior Court of Lima.[125] On 14 July 2021, Second Claimant filed an appeal of this decision.[126] At the stage of the Hearing, this proceeding remained pending and the Tribunal has not been informed of any result.[127]

135. In the Amparo Action, both MINEM and ARMA were defendants and opposed the complaint. MINEM argued, *inter alia*, that the environmental reports by ARMA for the Project were:[128]

> …issued by the competent environmental authority; consequently, it is completely illegal for the lower court to annul a final electricity generation concession granted on the basis of an environmental management instrument –

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121 **R-078**, *Resolución No. 07, Juzgado Especializado Constitucional de Arequipa*, 22 May 2017. *See also* **R-077**, *Resolución No. 06, Juzgado Especializado Constitucional de Arequipa*, 28 April 2017; Counter-Memorial ¶ 234.

122 **R-070**, *Sentencia No. 29-2020, Resolución No. 33, Juzgado Especializado Constitucional de Arequipa*, 30 January 2020, pp. 62-63. *See* Reply ¶ 297; Rejoinder ¶ 162.

123 **C-295**, Judgment No. 72-2021 from the Superior Court of Arequipa, First Civil Chamber, 4 February 2021, Whereas 3.2. *See* Reply ¶ 299; Rejoinder ¶ 163.

124 **C-296**, *Demanda de Amparo archivada por CH Mamacocha S.R.L.,* 2 June 2021, p. 3. *See* Reply ¶ 301.

125 **R-182**, *Resolución No. 1: Proceso de Amparo*, Exp. No. 2059-2021, 5 July 2021.

126 *See* **CD-01**, Claimants' Opening Presentation, slide 48; Rejoinder ¶ 166.

127 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1961:14-20.

128 **C-295**, Judgment No. 72-2021 from the Superior Court of Arequipa, First Civil Chamber, 4 February 2021, p. 7. *See* **CD-01**, Claimants' Opening Presentation, slide 49.

> environmental impact statement approved pursuant to the Law, without there being any technical report issued by a competent environmental authority rebutting the favorable technical opinion[.]

136. MINEM further argued:[129]

> Claimant's claims are based only on his own allegations and are not supported by any specific technical report on the potential impact of the project, according to the evidence offered by Claimant in his Complaint, and has therefore failed to concretely and specifically assess the potential environmental impacts of the challenged project, which is backed by concrete and specific favorable technical opinions under Reports No. 060-201-GR/ARMA-SG-EA-E and No. 126-2016-MEM/DGE-DCE. For these reasons, Respondent requests that the complained [sic.] be dismissed.

M. ADDENDUM 2

137. On 1 July 2016, Second Claimant applied for a further modification of the Works Execution Schedule and certain clauses of the RER Contract on the basis of delays which it stated were "*un incumplimiento del Estado Peruano de las obligaciones asumidas en el Contrato de Concesión*."[130] In its letter, Second Claimant made a number of requests:[131]

(i) A modification of the Works Execution Schedule, to extend the period of construction and COS by 393 calendar days plus a term equivalent to the days counted from 24 June 2016 to the date on which MINEM makes available to Second Claimant the documents necessary to contractually formalise the amendment to the RER Contract Works Execution Schedule. Second Claimant's request was to move the deadline for Actual COS from 8 December 2018 to 14 March 2020.[132]

(ii) Modify Clause 1.4.22 of the RER Contract concerning the termination date, i.e., 31 December 2036, taking into account the new proposed Actual COS date of 14 March 2020, and that the time between the Actual COS date and the date of

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129 **C-305**, English translation of Exhibit R-0070, Decision No. 29-2020, Resolution N. 33, Specialized Constitutional Court of Arequipa, 30 January 2020, ¶ 1.2.5.

130 **C-157**, *Carta de Hidroeléctrica Laguna Azul (C. Diez) al MINEM (R. María)*, 1 July 2016, p. 1. *See* Counter-Memorial ¶ 187.

131 **C-157**, *Carta de Hidroeléctrica Laguna Azul (C. Diez) al MINEM (R. María)*, 1 July 2016, p. 29.

132 Memorial ¶ 83.

termination of the contract should be at least 20 years. (This request would result in a new termination date of 14 March 2040).

(iii) Modify Clause 8.4 of the RER Contract to specify that the Republic of Peru cannot terminate the RER Contract in the event that the Actual COS date falls after 31 December 2018 for causes attributable to it.

(iv) Add a clause stating that in case of inconsistency between the RER Contract and the consolidated terms and conditions of the third international tender for the supply of electric power to the SEIN using renewable energy resources, the provisions of the RER Contract shall prevail.

138. On 6 October 2016, MINEM issued a report to Ms. Carla Paola Sosa Vela, the Director General of Electricity, which was subsequently endorsed by her on 22 November 2016 ("**Sosa Report**").[133] The Sosa Report found that the delay attributable to MINEM for the Project was 449 calendar days.[134] Accordingly, the requested extension of 393 calendar days for financial closing was granted.[135] The other remaining milestones in the schedule were extended by 449 calendar days, for which the report states that Second Claimant had requested 860 days.[136] The other three requests set out at (ii), (iii) and (iv) of ¶ 137 above were not granted.[137]

139. The Sosa Report provided an interpretation of Clause 8.4 of the RER Contract, which states that the RER Contract will be terminated by operation of the law if the Actual COS has not been completed by 31 December 2018 "for any reason" (see ¶ 98 above). In the view of MINEM, "the expression 'for any reason' must be interpreted as excluding the delay

133 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016.

134 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.1.

135 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.6.

136 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.6.

137 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.6.

attributable to MINEM (contracting Public Administration), as the issuer of the operating permits necessary for the provision of economic activity."[138]

140. The Sosa Report's conclusion was reached having provided analysis that: (i) Second Claimant's obligation does not include the assumption of risk resulting from an act of God or event of force majeure, including the so-called *factum principis*; (ii) under the principle of good faith, it is not appropriate to obtain advantages arising from the own actions of the administration; and (iii) delay in obtaining the operating permit can be understood as unreasonable treatment afforded to the investor, making reference to the ICSID Award in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*.[139]

141. An OSINERGMIN Report dated 3 November 2016 commenting on Second Claimant's requests opined, *inter alia*, that: (i) Clause 1.4.22 of the RER Contract states that the date of termination of the RER Contract is not modifiable for any reason; and (ii) Clause 8.4 of the RER Contract was an obligatory provision for all participants in the Third Auction, and, as such, to alter it would modify the basic conditions of the Third Auction, so accordingly it should be maintained.[140]

142. On 29 December 2016, MINEM approved the text of the second Addendum to the RER Contract, stating:[141]

> That, by extending the CCO term four hundred and sixty-two (462) calendar days, the new date for this milestone would be March 14, 2020, exceeding the deadline of December 31, 2018 contained in number 8.4 of Clause Eight of the RER Agreement, the same which stipulates that said date cannot be exceeded "*for any reason*", which must be understood, excluding the scope of responsibility of the Concessionaire, non-performance or late or defective performance, directly caused by acts of the contracting Public Administration (Ministry of Energy and Mines) in its role as grantor of qualifying licenses (definitive generation and transmission concessions); therefore, effectually including an interpretation oriented in the criteria of reasonableness, good faith

138 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 3.1. *See* Memorial ¶ 85.

139 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.5. *See* Memorial ¶¶ 86-88.

140 **CLC-025**, *Informe OSINERGMIN No. DSE-USPP-148-2016*, 3 November 2016, p. 2.

141 MINEM Ministerial Resolution No. 559-2016-MEM/DM, in **C-009**, Addendum 2 to the RER Contract, 3 January 2017, pp. 9-10.

> and fairness, in accordance with the provisions of Article 1362 of the Civil Code, because there are delays in the processing of the definitive generation and transmission concessions originated by the Administration itself[.]

143. In the Resolution of 29 December 2016 MINEM further stated:[142]

> …the deadline for the Project CCO, December 31, 2018, does not constitute an essential term, because if the Project is not delivered on the scheduled date for the CCO milestone, the impact caused to the SEIN would not be relevant because currently the system reserve is around 54%…Therefore, if the Project CCO does not occur on December 31, 2018, the SEIN will not be affected nor will the local system where the Project is being developed, since at that time, the relevant area has access to electricity supply through three (3) different projects. The delay not attributable to the Concessionaire creates a delay in the temporary obligation, which afterwards, allows (at a material level) the performance of the obligation[.]

144. On 3 January 2017, the second modification to the RER Contract between MINEM and Second Claimant was registered ("**Addendum 2**"), extending the Works Execution Schedule by 393 days for the financial closing milestone, and 462 days for the other milestones, resulting in a new Actual COS date of 14 March 2020.[143] According to Respondent, Addendum 2 was contrary to the RER Regulations and the *Bases Consolidadas*.[144]

145. Clause 2.3 of Addendum 2 provides as follows:[145]

> The Parties declare that the remaining provisions in the Concession Agreement not specifically considered in this Minute remain fully valid as long as they do not contradict what is stated herein.

N. THE RGA LAWSUIT

146. On 14 March 2017, the RGA Public Prosecutor's Office filed an administrative litigation claim seeking to annul the Generation Plant Environmental Certification and Transmission Line Environmental Certification granted in 2014 ("**RGA Lawsuit**"). The challenge

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142 MINEM Ministerial Resolution No. 559-2016-MEM/DM, in **C-009**, Addendum 2 to the RER Contract, 3 January 2017, p. 10.

143 **C-009**, Addendum 2 to the RER Contract, 3 January 2017. *See* Memorial ¶ 88; Counter-Memorial ¶ 193.

144 Counter-Memorial ¶ 195.

145 **C-009**, Addendum 2 to the RER Contract, 3 January 2017, Clause 2.3.

related, among other things, to the re-classification of the generation plant from the initial Category III to Category I (see ¶ 109(ii) above). It also alleged that the ARMA official who signed the permits was on vacation the day they were issued by his office.[146]

147. According to Claimants: (i) they became aware of the RGA Lawsuit on 17 March 2017; (ii) they had not been notified of the investigation or the authorisation to commence the RGA Lawsuit; and (iii) they were not given an opportunity to rebut the allegations which they consider to be false.[147] Respondent submits that the RGA Lawsuit was not frivolous and was sufficiently well-founded.[148]

O. INITIATION OF CRIMINAL INVESTIGATION

148. On 8 March 2017, two private citizens (neither of them being the citizen who had filed the Amparo Action, see ¶ 129 above) filed a complaint against the Mamacocha Project with the prosecutor of Arequipa's environmental criminal laws (*Fiscalía Especializada en Materia Ambiental de Arequipa*).[149]

149. On 24 March 2017, the AEP initiated an investigation into a number of ARMA officials who were involved in the reclassification and approval of the environmental permits to investigate whether the officials committed the crime of "illegal granting of rights" under Article 314 of the Penal Code, to the detriment of the environment and the State and the benefit of Second Claimant ("**Criminal Investigation**").[150] In this regard, the AEP referred to the reclassification of the generation plant from Category III to Category I for the purposes of the Generation Plant Environmental Certification, and alleged irregularities by officials of ARMA in that procedure, as investigated by the RGA Council.[151]

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146 **C-087**, *Demanda Contencioso-Administrativa del Gobierno Regional de Arequipa*, 14 March 2017, ¶¶ 4.5, 4.9. *See* Memorial ¶ 103; Counter-Memorial ¶ 212.

147 **C-112**, Email from C. Diez Canseco to S. Sillen, 17 March 2017; Bartrina First Statement ¶ 60; Jacobson First Statement ¶ 49; Sillen First Statement ¶¶ 125-126. *See* Memorial ¶¶ 100-101.

148 Counter-Memorial ¶ 54; Rejoinder ¶ 159.

149 **R-066**, *Oficio No. 001-2017, Denuncia presentada por Roberto Nieves Molina Llerena y Flavio W. Mejía Begazo ante la Fiscalía Ambiental de Arequipa*, 8 March 2017. *See* Counter-Memorial ¶ 217.

150 **C-188**, *Disposición Fiscal No. 01-2017-0-FPEMA-MP, Fiscalía Ambiental de Arequipa*, 24 March 2017. *See* Memorial ¶ 105; Counter-Memorial ¶ 219.

151 **C-188**, *Disposición Fiscal No. 01-2017-0-FPEMA-MP, Fiscalía Ambiental de Arequipa*, 24 March 2017, pp. 3-4.

150. The Criminal Investigation was subsequently expanded to include an additional public official.[152]

P. CIVIL WORKS AUTHORISATION

151. On 16 May 2017, the AAA denied Second Claimant's application for the CWA (see ¶ 109(vi) above). In the denial, it was stated that certain information necessary to make relevant assessments was missing from the application.[153]

152. On 29 May 2017, Second Claimant applied to the AAA for reconsideration of the denial, submitting an additional technical report in support.[154]

153. On 5 July 2017, the AAA granted Second Claimant's application for reconsideration and issued the CWA.[155]

154. On 18 July 2017, Second Claimant requested a rectification of the CWA on the basis that the granted permit contained material errors regarding the term date and physical structures.[156]

155. On 11 August 2017, the AAA issued an internal report recommending that the CWA be rectified as requested by Second Claimant.[157]

156. Also on 11 August 2017, two individual citizens filed an application with the AAA requesting the nullity of Second Claimant's CWA, as evidenced by the AAA's letter to those individuals regarding their request dated 24 August 2017.[158]

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152 **R-067**, *Disposición Fiscal No. 03-2017-FPEMA-MP-AR, Fiscalía Ambiental de Arequipa*, 5 September 2017. *See* Counter-Memorial ¶ 219.

153 **C-121**, *Resolución Directoral Nro. 1480-2017-ANA-AAA I C-O*, 16 May 2017. *See* Memorial ¶ 107.

154 **R-053**, *Recurso de Reconsideración*, 29 May 2017, p. 6.

155 **C-122**, *Resolución Directoral Nro. 1928-2017-ANA/AAA I C-O*, 5 July 2017, p. 5.

156 **R-056**, *Carta de HLA a la Autoridad Administrativa del Agua*, 18 July 2017, p. 1.

157 **R-088**, *Informe Técnico No. 062-2017-ANA-AAA I C-O*, 11 August 2017, p. 2.

158 **R-057**, *Carta No. 381-2017-ANA/AAA I C-O de la Autoridad Nacional del Agua a C. Vera y Á. Chacabana*, 24 August 2017. *See also* **C-126**, *Resolución No. 053-2018-ANA/TNRCH*, 24 January 2018, ¶ 4.8, referencing the date of the request as 11 August 2017.

157. On 24 January 2018, the Water Tribunal rejected the request for nullity of the CWA.[159]

158. On 25 January 2018, the AAA approved Second Claimant's request for rectification of the CWA.[160]

Q. REQUEST FOR SUSPENSION

159. On 21 April 2017, Second Claimant addressed a letter to MINEM requesting the suspension of the performance of the RER Contract until resolution of the RGA Lawsuit.[161]

160. On 14 July 2017, MINEM denied Second Claimant's suspension request in relation to the RER Contract.[162] MINEM stated that Second Claimant was responsible for the management of the permits and authorisations for the Project. In addition, MINEM indicated that:[163]

> *El proceso contencioso administrativo, según el marco legal vigente, se gestiona bajo el Principio de Igualdad Procesal…y no supone un ejercicio directo de autotutela declarativa que haga ineficaz los instrumentos de gestión ambiental otorgados en su oportunidad, salvo decisión judicial en tal sentido.*

R. FIRST NOTICE OF INTENT; ADDENDUM 3

161. On 19 June 2017, Claimants filed a notice of intent to submit a dispute to consultation and negotiation under Article 10.15 of the TPA and the RER Contract against Respondent arising from the RGA Lawsuit and Respondent's alleged interferences with the Project ("**First Notice of Intent**").[164]

162. On 17 July 2017, Second Claimant expressed its disagreement with MINEM's decision of 14 July 2017 (see ¶ 160 above), and identified it as a dispute under Clause 11 of the RER

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159 **C-126**, *Resolución No. 053-2018-ANA/TNRCH*, 24 January 2018, p. 1.

160 **HKA-035**, *Resolución Directoral Nro. 151-2018-ANA/AAA*, 25 January 2018, p. 5.

161 **C-092/MQ-016**, Letter from C.H. Mamacocha to Ministry of Energy and Mines, 21 April 2017, p. 3.

162 **C-093/MQ-019**, *Oficio No. 121-2017-MEM/VME del MINEM a HLA*, 13 July 2017, attaching *Informe No. 122-2017-MEM/DGE*, 28 July 2017. *See* Memorial ¶ 113; Counter-Memorial ¶ 254.

163 **C-093/MQ-019**, *Oficio No. 121-2017-MEM/VME del MINEM a HLA*, 13 July 2017, attaching *Informe No. 122-2017-MEM/DGE*, 28 July 2017, p. 7 (p. 9 of the pdf). *See* Counter-Memorial ¶ 254.

164 **C-252/MQ-018**, Latam Hydro LLC and CH Mamacocha S.R.L.'s First Notice of Intent, 19 June 2017. *See* Memorial ¶ 111; Counter-Memorial ¶¶ 214, 254.

Contract (entitled "dispute resolution"). Second Claimant requested a *trato directo* process, i.e., settlement discussions to resolve the dispute.[165]

163. The *trato directo* process is handled on behalf of Peru by a special commission that provides a coordination and response system of the State for international investment disputes ("**Special Commission**").[166]

164. On 21 July 2017, Second Claimant and MINEM executed a "direct negotiation record" (*Acta de Trato Directo*) referring to the request to suspend the RER Contract and MINEM's denial thereof (see ¶¶ 159-160 above). Second Claimant and MINEM recorded their agreement to arrange a suspension of the RER Contract from 21 April 2017 to 31 December 2017: [167]

> …[MINEM] unilaterally declare[d] that the provisions of this document do not entail the recognition of contractual and/or tort liability of any type by [MINEM] itself and, in general, by the State of the Republic of Peru…[b]oth parties reserve their rights in relation to this matter.

165. On 28 August 2017, MINEM issued a resolution approving the *Acta de Trato Directo*, resolving:[168]

> To provide the suspension of the RER Concession Agreement for the period covering from April 21, 2017, to December 31, 2017, in the framework of the agreements contained in the Direct Negotiation Record of July 21, 2017, signed by the General Director of Electricity and CH Mamacocha S.R.L.

166. On 8 September 2017, MINEM and Second Claimant agreed to a third addendum of the RER Contract, being "the suspension of the [RER Contract] for the [Mamacocha Project], including the obligations, rights and the Works Execution Schedule…previously modified by Addendum No. 1 and Addendum No. 2" from 21 April 2017 to 31 December 2017

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165 **C-142**/**MQ-020**, *Carta de HLA (C. Diez) al MINEM (A. Vásquez)*, 17 July 2017. *See* Counter-Memorial ¶ 255.

166 *See* **C-094**, Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), 21 July 2017, ¶ 1.6.

167 **C-094**, Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Victor Carlos Estrella (MINEM), 21 July 2017, ¶¶ 2.1, 2.2. *See* Counter-Memorial ¶¶ 255, 259; Memorial ¶ 112.

168 MINEM Resolution No. 356-2017-MED/DM, in **C-014**, Addendum 3 to the RER Contract, 8 September 2017, p. 17.

("**Addendum 3**").[169] The interpretation and effect of Addendum 3 is disputed between the Parties, and will be addressed at ¶¶ 848 *et seq.* below.

S. CONFIDENTIALITY AGREEMENT

167. On 5 December 2017, the Special Commission and Claimants entered into a confidentiality agreement with respect to their consultation and negotiation ("**Confidentiality Agreement**").[170]

168. The Confidentiality Agreement will be further addressed in Section X below.

T. WITHDRAWAL OF THE RGA LAWSUIT

169. Around November 2017, the Special Commission hired a Peruvian law firm, Estudio Echecopar, to advise Respondent on the legal merit of the RGA Lawsuit.[171] As set out at ¶ 146 above, the RGA Lawsuit was an administrative litigation claim brought by the RGA Public Prosecutor's Office seeking to annul the Generation Plant Environmental Certification and the Transmission Line Environmental Certification.

170. On 5 December 2017, Mr. Juan Carlos Morón Urbina of Estudio Echecopar addressed his legal opinion to the Special Commission that, *inter alia*, the RGA Lawsuit had little chance of success ("**Morón Report**").[172]

171. On 13 December 2017, the Special Commission convened to discuss the Morón Report. The Minutes of that meeting record that:[173]

> …the members of the Special Commission exchanged opinions on the conclusions arrived at in the aforementioned [Morón] Report, and unanimously agreed to submit an official letter to the RGA, together with the [Morón] Report containing the opinion of [Mr. Morón], suggesting that the complaint filed by the RGA would be unlikely to succeed. The intention of the members of the

169 **C-014**, Addendum 3 to the RER Contract, 8 September 2017, Clause 2.1. *See* Memorial ¶ 113; Counter-Memorial ¶¶ 255, 258.

170 **C-028**, Confidentiality Agreement, 5 December 2017. *See* Counter-Memorial ¶¶ 240-242.

171 **C-010**, Regional Executive Resolution No. 665-2017-GRA/GR, 27 December 2017, p. 3. *See* Memorial ¶ 119.

172 **R-140/C-229**, Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), 5 December 2017, p. 1. *See* Counter-Memorial ¶ 243.

173 **C-230**, Dr. Moron Urbina's presentation of his legal report's conclusions, 13 December 2017, p. 7.

> Special Commission is to bring such Report to the attention of the RGA and recommend that any further steps to be taken be properly reassessed, considering such Report.

172. On 14 December 2017, the Special Commission shared the Morón Report with the RGA, summarising its conclusions and mentioning risks associated with international arbitration proceedings. The Special Commission "expressly classified as confidential" the document and referred to the Parties' Confidentiality Agreement.[174] The Special Commission further stated, among other things, that:[175]

> …the [Morón Report] was requested in the context of the Special Commission's discussion and consultation process at the direct negotiations stage and qualifies as attorney work product and is therefore confidential by law and does not entail the existence, or the State of Peru's acceptance, of any violation of the Treaty or the claims alleged by the [Claimants]; it therefore does not harm the State's future defense in a potential arbitration against it.
>
> …
>
> …in [Mr. Morón's] opinion, the complaint filed by the Arequipa Regional Government would be unlikely to succeed. Having identified the above-described risks and without this document entailing a ruling or qualification as to the legitimacy of the Arequipa Regional Government's actions that led to the court action being filed, the Special Commission is in a position to bring these to the Arequipa Regional Government's attention and recommend that the next steps be reassessed in light of the above.

173. On 18 December 2017, the RGA Governor Osorio addressed a letter to the Chair of the RGA Council, Mr. Abelino Roncalla, advising of the First Notice of Intent, and stating that the Special Commission had sent an official notice to the RGA that, *inter alia*: (i) based on the Morón Report, it is highly unlikely that the RGA Lawsuit will succeed; (ii) in addition to the reputational harm to a State, the economic consequences of an investment arbitration should be considered; and (iii) pursuant to Article 14(3) of Peruvian Law No. 28933, the entity responsible for the act or omission that gave rise to the investor's claim shall bear all costs required to comply with an arbitration award or direct negotiation agreement. RGA

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174 **R-131**, *Oficio No. 274-2017-EF/CE-36, del MEF (R. Ampuero) al Gobierno Regional de Arequipa (Y. Osorio)*, 14 December 2017, pp. 2, 4, 5; **C-306**, English translation of **R-131**. *See* Counter-Memorial ¶ 247.

175 **R-131**, *Oficio No. 274-2017-EF/CE-36, del MEF (R. Ampuero) al Gobierno Regional de Arequipa (Y. Osorio)*, 14 December 2017, pp. 1, 3; **C-306**, English translation of **R-131**. *See* Counter-Memorial ¶ 246.

Governor Osorio attached a draft resolution for approval by the RGA Council, which would authorise the Regional Executive to take action to safeguard the interests of the RGA and the Peruvian State.[176]

174. On 19 December 2017, the Chair of the RGA Council replied to the letter of RGA Governor Osorio at ¶ 173 above, stating that "the Regional Executive has the obligation to take such measures as may be necessary to safeguard and protect the [RGA's] interests," and that approval of the draft resolution by the RGA Council was not necessary under applicable law.[177]

175. On 21 December 2017, the RGA Deputy Regional Attorney General sent Governor Osorio an opinion on the potential contingencies against the RGA in the event of an international dispute. The report stated, *inter alia*, that the Office of the RGA Attorney General shared the view of the Morón Report regarding the chances of success of the RGA Lawsuit, which the Attorney General's Office had already pointed out.[178] The RGA Attorney General's office stated that the RGA authorities "should issue the necessary resolution authorizing a withdrawal of the complaint for a declaration that the resolutions are harmful to the public interest."[179]

176. The RGA Deputy Attorney General further made reference to the report of the Regional Investigative Commission of the RGA Council which had recommended the filing of the RGA Lawsuit (see ¶¶ 125-126 above), stating:[180]

> …it is our view that it is the Regional Council that should provide support for and defend the validity of its Report, which it has not done thus far and, as is evident from previous documents (Official Notice No. 1630- 2017-GRA/CR), such Council has merely stated that it is a duty of the Regional Executive to take

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176 **C-232**, Official Notice No. 1135-2017-GRA/GR from Y. Osorio (Regional Governor of Arequipa) to A. Roncalla (Chairman of the Regional Council), 18 December 2017.

177 **C-191**, *Oficio No. 1630-2017-GRA/CR*, 19 December 2017. *See* Memorial ¶ 122.

178 **C-095**, Report No. 287-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, 21 December 2017, p. 5 (of the pdf). *See* Memorial ¶ 123.

179 **C-095**, Report No. 287-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, 21 December 2017, p. 5 (of the pdf). *See* Memorial ¶ 123.

180 **C-095**, Report No. 287-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, p. 5 (of the pdf). *See* Memorial ¶ 124.

> any necessary measures; SUCH EVASIVE POSITION SHOULD BE ASSESSED BY YOUR OFFICE IN DUE COURSE. (emphasis in original)

177. On 26 December 2017, the Director of ARMA, Mr. Benigno Sanz, sent Governor Osorio a report, referring to the background of the RGA Lawsuit and the potential for costs of any arbitration to be charged to the RGA budget. The report stated, *inter alia*, that:[181]

> …the Regional Executive has the obligation to take all measures necessary to safeguard and protect the entity's interests, without approval of a Regional Agreement being therefore required, as per the applicable legislation.

178. On 27 December 2017, RGA Governor Osorio issued a Regional Executive Resolution taking into account the matters referred to in ¶¶ 170, 175 and 177 above, and authorised the RGA Attorney General to withdraw the RGA Lawsuit.[182]

179. On 8 March 2018, the court accepted the withdrawal of the RGA Lawsuit.[183]

180. In Respondent's view, the withdrawal of the RGA Lawsuit took place in the context of the Parties' ongoing settlement discussions.[184]

181. On 17 April 2018, Claimants referred to the withdrawal of the RGA Lawsuit and withdrew their First Notice of Intent, stating:[185]

> *En consecuencia, el principal acto estatal que originó nuestra* [First Notice of Intent] *bajo el* [TPA] *ha cesado. Por lo tanto, mediante la presente comunicación procedemos a retirar nuestra* [First Notice of Intent].

182. In the same letter, Claimants stated that the time taken to resolve the First Notice of Intent had caused significant delay to the Project and a "de facto" reduction of the concession term, which in their view should be compensated by an extension of the termination date

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181 **C-190**, Report No. 77-GRA_ARMA, 26 December 2017, p. 2. *See* Memorial ¶ 126.

182 **C-010**, Regional Executive Resolution No. 665-2017-GRA/GR, 27 December 2017, p. 3. *See* Memorial ¶¶ 127-129; Counter-Memorial ¶ 215.

183 **C-192**, *Resolución No. 12 Expediente No. 1554-2017-0-0401-JR-CI-04, Corte Superior de Justicia Arequipa*, 8 March 2018. *See* Memorial ¶ 131.

184 Counter-Memorial ¶¶ 245-248; *quoting* Ampuero First Statement ¶ 31.

185 **MQ-022**, *Carta de las Demandantes (S. Sillen y C. Diez Canseco) a la Comisión Especial (R. Ampuero)*, 17 April 2018. *See* Counter-Memorial ¶ 250.

under the RER Contract. This request is the subject of Claimants' Second Notice of Intent (see ¶ 195 below).[186]

U. CRIMINAL PROCEEDINGS

183. On 2 February 2018, the AEP announced that its Criminal Investigation (see ¶ 149 above) would continue against three ARMA officials who had granted Second Claimant's environmental permit in September 2014, with Second Claimant's outside counsel ("**Second Claimant's External Counsel**") named as a suspect as a secondary accomplice, accused of having fraudulently collaborated with the other defendants to obtain the environmental certifications for the Mamacocha Project.[187]

184. Claimants have previously sought redaction of the name of Second Claimant's External Counsel from material to be published in relation to this case, which redactions Respondent had agreed to. For the purposes of this Award, the Tribunal does not consider it necessary to identify the individual by name, and will refrain from doing so.

185. In a document dated 29 March 2019 and received on 13 June 2019, the AEP notified Second Claimant's External Counsel that he was under investigation for signing the application for reconsideration that Second Claimant had submitted to ARMA in 2013, requesting ARMA to reconsider its initial "Category III" determination in relation to the Project (see ¶ 109(ii) above).[188]

> *El investigado…es parte de todo el proceso administrativo cuestionado en la presente investigación y resulta ser cómplice de cada uno de los investigados respecto a los pronunciamientos y autorizaciones emitidos por estos…[cuya colaboración] evidencia dolo por el contenido irregular de los documentos presentados ante el ARMA*.

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186 **MQ-022**, *Carta de las Demandantes (S. Sillen y C. Diez Canseco) a la Comisión Especial (R. Ampuero)*, 17 April 2018. *See* Counter-Memorial ¶ 251.

187 **C-193**, *Disposición No. 04-2018-O-FPEMA-MP-AR, Fiscalía Provincial Especializada en Materia Ambiental, Distrito Fiscal de Arequipa*, 2 February 2018, pp. 9, 13.

188 **C-284**, *Disposición No. 06-2019-FPEMAMP-AR, Fiscalía Provincial Especializada en Materia Ambiental, Distrito Fiscal de Arequipa*, 29 March 2019; **R-068**, *Disposición No. 07-2019-FPEMA-MP-AR, Fiscalía Ambiental de Arequipa*, 29 March 2019.

186. According to Second Claimant's External Counsel, he was denied the opportunity to make a statement or declaration in his defence.[189]

187. On 2 May 2019, the AEP declared that it had finished the Criminal Investigation and was ready to bring formal charges.[190]

188. On 18 October 2019 (presented to a judge on 25 October 2019), the AEP brought criminal charges ("**Criminal Proceedings**") against the ARMA officials under Article 314 of the Peruvian Criminal Code, which prohibits a public official from granting a permit in an illegal manner. Second Claimant's External Counsel was charged under Article 25, third paragraph, of the Peruvian Criminal Code which permits criminal charges against private individuals as accomplices of a public official crime. The crime alleged was for acting as ARMA officials' accomplice by signing the application which they later approved. The AEP recommended a three-year prison sentence for Second Claimant's External Counsel.[191]

189. On 13 November 2019, Second Claimant's External Counsel filed a request for dismissal of the procedure, among other things on the basis that the AEP sought to apply Article 25, third paragraph, of the Peruvian Criminal Code retroactively (see ¶ 188 above). According to Claimants, that provision was added in January 2017, three years after the signature of the petition for the reclassification of the environmental permit.[192]

190. A hearing on the motion of Second Claimant's External Counsel was due to take place on 7 April 2020, but was postponed due to COVID-19 until 25 September 2020.[193] On 25 September 2020 and 16 November 2020, a control hearing (*audiencia de control*) took place which addressed whether there was "probable cause" justifying an evidentiary

189 Second Claimant's External Counsel First Statement ¶ 58. *See* Memorial ¶ 135.

190 **R-113**, *Disposición Fiscal No. 08-2018-FPEMA-MP-AR, Fiscalía Ambiental de Arequipa*, 2 May 2019; Second Claimant's External Counsel First Statement ¶ 58. *See* Memorial ¶ 135; Counter-Memorial ¶ 227.

191 **R-069**, *Acusación Fiscal*, *Fiscalía Ambiental de Arequipa*, 18 October 2019. Second Claimant's External Counsel First Statement ¶¶ 59-60. *See* Memorial ¶ 136; Counter-Memorial ¶¶ 228-229.

192 Second Claimant's External Counsel First Statement ¶¶ 60-61. *See* Memorial ¶¶ 137-138.

193 Second Claimant's External Counsel First Statement ¶ 62. *See* Memorial ¶ 138.

hearing. At the conclusion of the control hearing, the Judge of the Fifth Preparatory Investigation Court of Arequipa issued an indictment against all accused.[194]

V. EXTENSIONS OF *TRATO DIRECTO*; ADDENDUM 4; THIRD EXTENSION REQUEST; SECOND NOTICE OF INTENT

191. On 26 December 2017, the Special Commission extended the *trato directo* period until 28 February 2018.[195]

192. On 17 January 2018, MINEM and Second Claimant executed a fourth addendum to the RER Contract that extended the suspension period until 28 February 2018 ("**Addendum 4**").[196] Addendum 4 contains the same declaration by MINEM as in Addendum 3 disclaiming any acknowledgment of liability (see ¶ 164 above). It further provides:[197]

> 3.2 The clauses and points of the RER Concession Agreement, which have not been modified or invalidated through this Addendum, remain unchanged, and are effective and enforceable in accordance with the terms of the Agreement. Nothing indicated or contained in this Addendum may be interpreted or considered as a waiver, discontinuance, consent or modification of any position or statement by the Parties with respect to any subject or matter of the Agreement, unless expressly stated in this Modification.
>
> 3.3 The present Addendum shall take effect on the calendar day following its signing. Specifically and not exhaustively, the provisions of the Eighth Clause of the [RER Contract] maintain their full validity and effectiveness.

193. By letter dated 1 February 2018, Second Claimant requested an extension under the RER Contract to the date by which the Actual COS must be achieved (to 28 February 2021) and the termination date (to 31 December 2041) ("**Third Extension Request**").[198] The Third Extension Request referred to delays in granting permits and delays resulting from Addenda 1 to 4, which in its view caused a reduction of the term of validity of the Award

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194 **R-119**, *Resolución No. 18-2020, Quinto Juzgado de la Investigación Preparatoria de Arequipa*, 4 November 2020, p. 38. *See* Counter-Memorial ¶ 230.

195 **C-194**, *Acuerdo de Extensión de Plazo entre la Comisión Especial*, Latam Hydro LLC y CH Mamacocha SRL, 26 December 2017. *See* Memorial ¶ 143.

196 **C-015**, Addendum 4 to the RER Contract, 17 January 2018. *See* Memorial ¶ 143; Counter-Memorial ¶ 260.

197 **C-015**, Addendum 4 to the RER Contract, 17 January 2018, ¶¶ 2.2, 3.2, 3.3. *See* Counter-Memorial ¶¶ 261, 262.

198 **C-127**, Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, 1 February 2018. *See* Memorial ¶ 142; Counter-Memorial ¶ 268.

Tariff. Second Claimant requested a modification of the Works Execution Schedule and the date of termination of the contract in recognition of the 1480 calendar days of delay, which it argued were not caused by Second Claimant.[199]

194. On 27 February 2018, the Special Commission extended the *trato directo* period until 30 June 2018.[200]

195. On 8 March 2018, Claimants served Respondent with a second notice of intent under TPA Article 10.15, with the intention to "initiate friendly negotiations" ("**Second Notice of Intent**").[201] The Second Notice of Intent referred to the Third Extension Request (see ¶ 193 above), and submitted:[202]

> To date, said application has not been settled. However, certain previous statements and informal exchanges of [MINEM] lead to think that, invoking certain provisions of the [RER] Contract and the regulations of the sector, the State would be inclined to deny it. As discussed below, a refusal to grant the requested extension would be contrary to national law and would violate the protections defined by the Agreement.

196. On 26 March 2018, MINEM and Second Claimant executed a further addendum to the RER Contract retroactively extending the suspension period until 30 June 2018 or until the termination of negotiations with the Special Commission ("**Addendum 5**").[203] Addendum 5 contains the same declaration by MINEM as in Addenda 3 and 4, i.e., disclaiming any acknowledgment of liability (see ¶¶ 164, 192 above).[204] It also contains the same clauses as Addendum 4 regarding the non-amendment of other clauses of the RER Contract, including Clause 8 (see ¶ 192 above).[205]

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199 **C-127**, Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, 1 February 2018, pp. 4-5. *See* Counter-Memorial ¶¶ 269-270.

200 **C-195**, *Acuerdo de Extensión de Plazo entre la Comisión Especial, Latam Hydro LLC y CH Mamacocha SRL*, 27 February 2018. *See* Memorial ¶ 143.

201 **C-170**, Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, 8 March 2018, ¶ 4.

202 **C-170**, Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, 8 March 2018, ¶ 27.

203 **C-016**, Addendum 5 to the RER Contract, 26 March 2018. *See* Memorial ¶ 143; Counter-Memorial ¶ 260.

204 **C-016**, Addendum 5 to the RER Contract, 26 March 2018, ¶ 2.2.

205 **C-016**, Addendum 5 to the RER Contract, 26 March 2018, ¶¶ 3.2, 3.3. *See* Counter-Memorial ¶ 261, 262.

W. ECHECOPAR REPORTS

197. On 5 April 2018, MINEM's outside counsel Estudio Echecopar issued advice to MINEM in relation to the potential to grant an extension to the Actual COS deadline and termination date under the existing legal framework ("**Echecopar First Report**").[206] Following inquiries from MINEM, a second advice was issued on 17 April 2018 ("**Echecopar Second Report**").[207]

198. The Echecopar First Report concludes as follows:[208]

> The MEM [i.e., MINEM] must extend the COS term beyond two (2) years after the Actual Date set forth in the Tender Requirements and change the Termination Date of the RER Concession Contract in order to recognize the Guaranteed Premium for twenty (20) years as initially contemplated where RER Awardees show that the COS delay is not attributable to them but, rather, to unavoidable force majeure events, such as the Administration's delay in granting the required permits. This extension must be agreed upon in an Addendum to the RER Concession Contract signed by both parties.

199. The Echecopar First Report further recommended as follows:[209]

> We suggest amending the provisions of the RER Regulations reviewed herein to eliminate any possibility of an interpretation that runs counter to the goal of the RER Act, which would render it unlawful and unconstitutional, pursuant to Articles 1 and 118 of the Political Constitution.

X. ONGOING DISCUSSIONS; ADDENDUM 6

200. According to an email from Mr. Sillen of First Claimant to Mr. Jacobson and others dated 15 June 2018:[210]

> I spoke to Ricardo Ampuero and the commission had a working meeting with the minister of energy and mines yesterday. He said it was a constructive meeting and that the minister had suggested a few changes to the solution. Without disclosing any details, Ampuero said the changes improved the solution and will benefit the project[.]

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206 **C-235**, First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), 5 April 2018.

207 **C-236**, Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), 17 April 2018.

208 **C-235**, First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm) 5 April 2018, p. 1.

209 **C-235**, First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), 5 April 2018, p. 2.

210 **C-238**, Email from S. Sillen to M. Jacobson, et al., June 15, 2018.

201. On 28 June 2018, the Special Commission extended the TPA *trato directo* period until 30 September 2018.[211]

202. According to Claimants' witness Mr. Sillen, in a meeting of 19 July 2018 between MINEM and Claimants MINEM indicated that it was willing to partially grant the Third Extension Request, to result in an 18-year term of validity under the RER Contract.[212] Claimants submit that they rejected the offer "because the RER Contract guaranteed [Second Claimant] a 20-year term of validity as long as [Second Claimant] acted diligently and was not responsible for delays to the Project as was the case here."[213]

203. On 23 July 2018, MINEM and Second Claimant executed a further addendum to the RER Contract, extending the suspension of the RER Contract until 30 September 2018 or until completion of the negotiations with the Special Commission ("**Addendum 6**").[214] Addendum 6 contains the same declaration by MINEM as in Addenda 3, 4 and 5 disclaiming any acknowledgment of liability (see ¶¶ 164, 192, 196 above).[215] It also contains the same clauses as Addenda 4 and 5 regarding the non-amendment of other clauses of the RER Contract, including Clause 8 (see ¶ 192 above).[216]

204. According to Claimants, they could not make substantial progress on the development of the Project during most of calendar year 2018 because of MINEM's failure to grant the Third Extension Request (see ¶ 193 above).[217]

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211 **R-130/C-196**, *Acuerdo de Extensión de Plazo entre la Comisión Especial, Latam Hydro LLC y CH Mamacocha SRL*, 28 June 2018. *See* Memorial ¶ 146.

212 Sillen Second Statement ¶ 82; *see* Reply ¶ 86. *See also* **C-242**, Email from S. Sillen to M. Jacobson, et al., 28 August 2018; **C-243**, Email from S. Sillen to E. Powers, 23 October 2018.

213 Reply ¶ 87.

214 **C-017**, Addendum 6 to the RER Contract, 23 July 2018. *See* Memorial ¶ 146; Counter-Memorial ¶ 260.

215 **C-017**, Addendum 6 to the RER Contract, 23 July 2018, ¶ 2.2.

216 **C-017**, Addendum 6 to the RER Contract, 23 July 2018, ¶¶ 3.2, 3.3. *See* Counter-Memorial ¶¶ 261, 262.

217 Memorial ¶ 147; *citing* Bartrina First Statement ¶ 74.

205. On 21 September 2018, the Special Commission extended the *trato directo* period until 1 April 2019.[218]

206. On 25 September 2018, Second Claimant requested from MINEM an extension of the suspension period under the RER Contract corresponding to the extension of the *trato directo* period, i.e. until 1 April 2019.[219] According to Mr. Sillen, this request went unanswered.[220]

Y. DRAFT SUPREME DECREE

207. In October 2018, Minister Francisco Ísmodes of MINEM stated at an energy industry conference that a new decree would establish a procedure for extensions of time for the COS and termination date of small-hydro projects "*por causas debidamente sustentadas*."[221]

208. On 11 November 2018, MINEM published a draft Supreme Decree for public notice and comment, which would amend the RER Regulations ("**Draft Supreme Decree**").[222] The Statement of Reasons of the Draft Supreme Decree stated that the proposal was to allow the deadline for Actual COS to be extended in cases of force majeure and unjustified actions or omissions attributable to an entity belonging to the Peruvian State. The extension of the termination date of the contract would only be allowed for unjustified actions or omissions attributable to a governmental authority.[223] These provisions would apply to

218 **C-062**, Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), 21 September 2018. *See* Memorial ¶ 151.

219 **C-171**, *Carta de CH Mamacocha SRL (C. Diez) al MINEM (V. Carlos)*, 25 September 2018. *See* Memorial ¶ 151.

220 Sillen First Statement ¶ 158; Jacobson First Statement ¶ 72.

221 **C-172**, *Presentación de F. Ísmodes (Ministro de Energía y Minas) titulada "Avances y Retos del Sector Energético: Competitividad y Sostenibilidad*", October 2018, slide 21. *See* Memorial ¶ 152.

222 **RL-131**, *Resolución Ministerial No. 143-2018-MEM/DM*, 9 November 2018; **C-018**, Proposed Supreme Decree No. 453-2018-MEM/DM, 11 November 2018. *See* Memorial ¶ 153; Counter-Memorial ¶ 275.

223 **C-018**, Proposed Supreme Decree No. 453-2018-MEM/DM, 11 November 2018, p. 3.

future public auctions, and potentially to projects under the Third and Fourth Auctions which had not entered into commercial operation.[224]

209. Also on 11 November 2018, OSINERGMIN issued comments opposing the Draft Supreme Decree. OSINERGMIN stated, among other things, that the Draft Supreme Decree sought to modify the scheme of incentives and penalties contained in the contracts under the Third and Fourth Auctions, distorting the object and purpose of the agreements that had been freely entered into.[225] OSINERGMIN further mentioned that under the new regime in the Draft Supreme Decree, the State would not collect the amount of the performance bonds:[226]

> *...debe hacerse mención que los Concesionarios cuyos proyectos aún no han sido concluidos y que pertenecen a la tercera y cuarta Subasta, actualmente, mantienen a favor del Concedente (Ministerio de Energía y Minas) Garantías de Fiel Cumplimiento, a través de Cartas Fianzas Bancarias vigentes, las cuales garantizan la POC de sus proyectos en los plazos contractualmente acordados. El monto de dichas garantías, a la fecha, asciende a USD 55 897 500 (Cincuentaicinco Millones Ochocientos Noventaisiete Mil Quinientos dólares americanos) que, de modificarse el Reglamento RER, monto que no será recaudado por el Estado*.

210. In the view of OSINERGMIN, the regime proposed under the Draft Supreme Decree would also raise energy costs to consumers by as much as 2.3%.[227]

211. Other comments opposing the Draft Supreme Decree were received from companies which objected to changing the terms and commercial risks that were the basis of the Third and Fourth Auctions.[228]

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224 **RL-131**, *Resolución Ministerial No. 143-2018-MEM/DM*, 9 November 2018, p. 9. *See* Counter-Memorial ¶¶ 276-277.

225 **C-174**, *Correo de S. Buenalaya a TEMP_DGE72, et al. con el adjunto OSINERGMIN "Comentarios a la Propuesta de Modificación del Reglamento RER, Publicada el 11 de Noviembre de 2018, Mediante Resolución Ministerial No. 453-2018-MEM/DM"*, 23 November 2018, p. 5 (of the pdf).

226 **C-174**, *Correo de S. Buenalaya a TEMP_DGE72, et al. con el adjunto OSINERGMIN "Comentarios a la Propuesta de Modificación del Reglamento RER, Publicada el 11 de Noviembre de 2018, Mediante Resolución Ministerial No. 453-2018-MEM/DM"*, 23 November 2018, p. 6 (of the pdf). *See* Memorial ¶ 155.

227 **C-174**, *Correo de S. Buenalaya a TEMP_DGE72, et al. con el adjunto OSINERGMIN "Comentarios a la Propuesta de Modificación del Reglamento RER, Publicada el 11 de Noviembre de 2018, Mediante Resolución Ministerial No. 453-2018-MEM/DM"*, 23 November 2018, p. 7 (of the pdf). *See* Memorial ¶ 156.

228 **R-133,** *Observaciones remitidas por Inland Energy, Registro No. 2874802*, 23 November 2018; **R-108**, *Observaciones remitidas por Kallpa Generación S.A*. *See* Counter-Memorial ¶¶ 279-282.

212. On 27 December 2018, MINEM decided not to proceed with the Draft Supreme Decree.[229]

Z. THE LIMA ARBITRATION

213. On 27 December 2018, MINEM commenced an arbitration against Second Claimant with the Lima Chamber of Commerce under Clause 11.3(b) of the RER Contract relating to disputes under USD 20 million in value, or which cannot be quantified or assessed in money ("**Lima Arbitration**").[230] Second Claimant contested the jurisdiction of the tribunal to hear the dispute in the Lima Arbitration.[231]

214. According to Claimants, the Lima Arbitration completely overlaps with the dispute in this ICSID arbitration, and was an attempt to circumvent the international arbitration that Claimants could not bring until 1 April 2019, when the *trato directo* period would expire (see ¶ 205 above).[232]

215. On 24 January 2020, the tribunal in the Lima Arbitration issued procedural order no. 3, bifurcating the case with respect to Second Claimant's jurisdictional objections.[233]

216. On 24 December 2020, the tribunal in the Lima Arbitration issued its award on jurisdiction, declaring that it had no jurisdiction to resolve the claims made by MINEM against Second Claimant.[234] This finding was made on the basis that, if granted, MINEM's claims "might potentially have an impact on [Second Claimant] in excess of USD 20M," and:[235]

> Accordingly, and solely for the purposes of determining its own jurisdiction under the Arbitration Agreement, the Tribunal has verified that the amount of the dispute exceeds USD 20M. Therefore, the dispute is to be settled through

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229 **C-175/R-104**, MINEM Report No. 505-2018-MEM/DGE, 27 December 2018. *See* Memorial ¶ 162; Counter-Memorial ¶¶ 278, 284.

230 *See* **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶18; Sillen First Statement ¶¶ 165-169; Benzaquén First Statement ¶¶ 28-29, 35; Memorial ¶ 163.

231 Memorial ¶¶ 164-165.

232 Memorial ¶¶ 165, 168, 169.

233 **C-198**, *MINEM v. CH Mamacocha S.R.L., Procedimiento Arbitral No. 0669-2018-CCLOrden Procesal No. 3*, 24 January 2020. *See* Memorial ¶ 165.

234 **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶ 141.

235 **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶¶ 137-138.

international arbitration proceedings administered by ICSID, pursuant to Clause 11.3 a) of the Arbitration Agreement.

AA. DENIAL OF THIRD EXTENSION REQUEST AND COMMENCEMENT OF ICSID ARBITRATION

217. On 31 December 2018, MINEM formally rejected Second Claimant's Third Extension Request (see ¶ 193 above).[236]

218. According to Claimants, without extensions to the RER Contract, the Project could not achieve commercial operation under the amended works schedule in Addendum 2.[237] From January to May 2019, Claimants wound down their operations in Peru, and closed their offices in Lima, Arequipa, Ayo and Andagua.[238]

219. On 28 May 2019, Claimants served Respondent with a notice of intent to submit claims to arbitration under TPA Article 10.16 ("**Third Notice of Intent**").[239]

220. On 30 August 2019, Claimants filed their Request for Arbitration (see ¶ 13 above).

BB. CONSEQUENCES FOR THE RER CONTRACT

221. According to Claimants, the Lima Arbitration and the denial of the Third Extension Request made it impossible for the Project to proceed.[240] Claimants claim that the RER Contract terminated as a matter of law on 31 December 2018 when Respondent "consummated a series of measures that collectively made it impossible for [Second Claimant] to perform its contractual obligations."[241]

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236 **MQ-026/CLC-038**, *Oficio No. 2312-2018-MEM/DGE del MINEM (V. Carlos) a Mamacocha (C. Diez)*, 31 December 2018, attaching *Informe No. 511-2018-MEM/DGE*, 31 December 2018. *See* Memorial ¶ 170.

237 Memorial ¶ 171; *citing* HKA First Report, ¶¶ 180-186.

238 Sillen First Statement ¶¶ 170-171; Jacobson First Statement ¶¶ 79-80; Bartrina First Statement ¶¶ 74-76. *See* Memorial ¶ 172.

239 **C-023**, Latam Hydro LLC and CH Mamacocha, S.R.L.'s Notice of Intent to Submit a Claim to Arbitration, 28 May 2019. *See* Memorial ¶ 173; Counter-Memorial ¶ 252.

240 Memorial ¶ 171.

241 Reply ¶ 914. *See also* Memorial ¶ 499.

222. Respondent submits, on the other hand, that the RER Contract terminated as a matter of law on 31 December 2018 because Second Claimant failed to achieve COS by the Actual COS deadline.[242]

223. The Tribunal will give further consideration to this issue in the course of this Award.

CC. OTHER ARBITRATION PROCEEDINGS

224. Other investors have brought arbitration proceedings in relation to RER projects in Peru under contracts with the same terms as the RER Contract. Those proceedings referred to by the Parties in this arbitration are briefly outlined below. The findings of the respective tribunals will be considered in further detail, as appropriate, in the course of this Award.

(1) Electro Zaña

225. The *Electro Zaña* arbitration was initiated on 28 December 2018 by a RER concessionaire in the Third Auction. The tribunal's award was rendered on 21 December 2020.[243]

226. The concessionaire achieved Actual COS on 15 February 2019, i.e., after 31 December 2018. It suffered delays in obtaining easements necessary for construction, and while its generation units were installed by the time of a test for COS on 28 December 2018, one of the generation units encountered a technical issue and its certification did not become valid until 15 February 2019.[244]

227. The tribunal dismissed all of the claims made by *Electro Zaña*, save for its request for return of the performance bond, which was granted.[245] The counterclaim of the State of

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242 Rejoinder ¶ 1164.

243 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, p.1, ¶ 4.

244 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 45.

245 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, § XI, ¶ 349.

Peru was granted insofar as it requested a declaration that the RER Contract terminated automatically when *Electro Zaña* failed to achieve Actual COS by 31 December 2018.[246]

(2) Santa Lorenza

228. The *Santa Lorenza* arbitration was brought by a RER concessionaire awarded a RER contract in the Third Auction. The tribunal rendered its award on 28 October 2019.[247]

229. The tribunal was called upon to decide whether MINEM should have extended the Actual COS due to the existence of force majeure events. It found that the RER contract in that case had terminated automatically when Actual COS was not achieved by 31 December 2018 due to reasons of force majeure.[248] All of the concessionaire's claims were rejected. MINEM's counterclaim was partially accepted, granting a declaration that the RER contract in question had automatically terminated ("*resuelto de pleno derecho y de forma automática*") on 31 December 2018.[249]

(3) Egecolca

230. This arbitration was brought by *Egecolca*, a concessionaire with a RER contract dated 18 February 2014. The tribunal issued its procedural order no. 1 on 26 November 2019, and rendered an award dated 10 March 2021.[250]

231. The tribunal rejected almost all of *Egecolca*'s claims, including its requests to order MINEM to grant an extension of time under the RER contract or to order MINEM to modify the termination date of the RER contract in question.[251] Finding that the concessionaire's request for an extension was based on reasons attributable to the

246 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 271.

247 **CLC-101**, *Empresa de Generación Eléctrica Santa Lorenza S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0672-2018-CCL, Laudo, 28 October 2019, p. 1.

248 **CLC-101**, *Empresa de Generación Eléctrica Santa Lorenza S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0672-2018-CCL, Laudo, 28 October 2019, ¶¶ 175-176.

249 **CLC-101**, *Empresa de Generación Eléctrica Santa Lorenza S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0672-2018-CCL, Laudo, 28 October 2019, pp. 73-74.

250 **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, p. 1, ¶ 1.

251 **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, p. 111.

concessionaire, the tribunal recognised the right of MINEM to execute the performance bond.[252]

(4) Sur Medio

232. This case concerned an arbitration brought by a concessionaire in the Fourth Auction. The arbitration was initiated by *Sur Medio* on 27 May 2019, and the tribunal rendered its award on 31 May 2021.[253]

233. The tribunal held, *inter alia*, that: (i) the RER contract entered into in 2016 terminated automatically when the deadline for the Actual COS was not met; and (ii) ordered the Peruvian State to return the performance bond.[254]

V. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT

A. CLAIMANTS' POSITION AND RELIEF SOUGHT

234. Claimants submit that Respondent has breached the TPA by: (i) undermining Claimants' legitimate investment-backed expectations; (ii) failing to accord its investments fair and equitable treatment in violation of Article 10.5 thereof; (iii) indirectly expropriating Claimants' investments in violation of Article 10.7 thereof; and (iv) treating Claimants' investments less favourably than it treats investors and investments from other States, contrary to Article 10.4 thereof. Claimants further submit that Respondent breached its obligations under the RER Contract and Peruvian law.[255]

235. At ¶ 547 of the Memorial, Claimants seek the following relief:

> On the basis of the foregoing, without limitation and reserving their right to supplement or revise these prayers for relief, including any further actions taken by Peru against Claimants, Claimants respectfully request that the Tribunal:

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252 **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, p. 112, ¶ 7.

253 **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, p. 1, ¶ 5.

254 **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, ¶ 464.

255 Memorial ¶ 18.

a. DECLARE that Peru has breached Articles 10.4, 10.5 and 10.7 of the TPA;

b. DECLARE that Peru has breached its obligations under the RER Contract, including Peru's obligations: (i) under Clauses 1.4.26, 1.4.37, 2.2.1, 4.3, 6.3, and 11.3; (ii) to adhere to the review periods under the GLAP and TUPA, which form part of the governing law under the RER Contract; and (iii) to execute the RER Contract in accordance with the doctrines of good faith, *actos propios*, and *confianza legitima*;

c. DECLARE that the RER Contract is terminated and, with it, all of CHM's obligations and duties owed thereunder;

d. DECLARE that all bonds put up by either Claimant as part of the Mamacocha and Upstream Projects be returned to CHM, including the US $5 million performance bond under the RER Contract;

e. ORDER Peru to compensate Claimants for their losses resulting from Peru's breaches under the TPA, the RER Contract, Peruvian law, and international law, which, as of the date of this Memorial, amount to at least **US $47,049,000** but continue to increase due to the ongoing nature of Peru's unlawful breaches;

f. ORDER Peru to pay all costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs;

g. RECOMMEND that Peru cease and desist its harassment of CHM and its lawyer, [Second Claimant's External Counsel], by terminating the AEP's criminal proceeding concerning CHM's environmental permit for the Mamacocha Project.

h. ORDER the parties to protect the status quo and not aggravate the dispute pending resolution of the ICSID arbitration;

i. ORDER Peru to cease its pursuit of the Lima Arbitration pending resolution of the ICSID arbitration;

j. ORDER that Peru may not call or collect any bond put up by either Claimant in relation to the Mamacocha and Upstream Projects, including the performance bond under the RER Contract;

k. ORDER further relief as counsel may advise or the Tribunal may deem just and appropriate; and

l. AWARD such other relief as the Tribunal considers appropriate.

236. At ¶ 1045 of their Reply, Claimants seek the following relief:

Based on the foregoing, without limitation and reserving their right to supplement or revise these prayers for relief, including any further actions taken by Peru against Claimants, Claimants respectfully request that the Tribunal:

a. DECLARE that Peru has breached Articles 10.4, 10.5 and 10.7 of the TPA;

b. DECLARE that Peru has breached its obligations under the RER Contract, including Peru's obligations: (i) under Clauses 1.4.26, 1.4.37, 2.2.1, 4.3, 6.3, 11.3, and Addenda 3-6 of the RER Contract; (ii) to execute the RER Contract in accordance with the Peruvian law doctrines of good faith, *actos propios*, and *confianza legítima*; and (iii) to adhere to the review periods under the GLAP and TUPA, which form part of the governing law under the RER Contract;

c. DECLARE that the RER Contract is terminated and, with it, all of CHM's obligations and duties owed thereunder;

d. DECLARE that the Confidentiality Agreement is terminated and, with it, all of CHM's obligations and duties owed thereunder;

e. ORDER Peru to compensate Claimants for their losses resulting from Peru's breaches under the TPA, the RER Contract, Peruvian law, and international law, which, as of the date of this Memorial, amount to at least **US $45,620,000** but continue to increase due to the ongoing nature of Peru's unlawful breaches;

f. ORDER Peru to pay all costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs;

g. RECOMMEND that Peru cease and desist its harassment of CHM and its lawyer, [Second Claimant's External Counsel], by terminating the AEP's criminal proceeding concerning CHM's environmental permit for the Mamacocha Project.

h. ORDER the parties to protect the *status quo* and not aggravate the dispute pending resolution of the ICSID arbitration;

i. ORDER that Peru may not call or collect any bond put up by either Claimant in relation to the Mamacocha and Upstream Projects, including the US $5 million bond under the RER Contract and the US $71,500 bond that CHM put up to obtain the final concession for the transmission line.

j. ORDER further relief as counsel may advise or the Tribunal may deem just and appropriate; and

k. AWARD such other relief as the Tribunal considers appropriate.

B. RESPONDENT'S POSITION AND RELIEF SOUGHT

237. Respondent objects to the jurisdiction of the Tribunal, including all claims put forward under the RER Contract, denies Claimants' allegations and requests that the Tribunal reject Claimants' claims.[256] At ¶ 1219 of the Counter-Memorial it requests as follows:

> *Por todas las razones expuestas en este Memorial de Contestación, la República del Perú respetuosamente le solicita a este Tribunal que emita un laudo que:*
>
> *a. declare con lugar las objeciones jurisdiccionales presentadas por el Perú;*
>
> *b. desestime todas las reclamaciones de las Demandantes en este arbitraje por falta de mérito;*
>
> *c. rechace todas las demás pretensiones accesorias de las Demandantes, incluyendo la relativa a la ejecución de la Garantía de Fiel Cumplimiento;*
>
> *d. rechace la solicitud de compensación de las Demandantes; y,*
>
> *e. condene a las Demandantes al pago de la totalidad de las costas procesales, así como de la totalidad de los honorarios profesionales y gastos de abogados del Perú, y cualesquiera otros gastos incurridos por el Perú en el presente arbitraje, más un interés compuesto sobre esos montos antes y después de emitido el laudo, hasta la fecha de pago, calculado con base en una tasa de interés razonable.*

238. At ¶ 1390 of the Rejoinder,[257] Respondent requests the following relief:

> *Por todas las razones expuestas en esta Dúplica, así como en el Memorial de Contestación, la República del Perú respetuosamente le solicita a este Tribunal que emita un laudo que:*
>
> *a. declare con lugar las objeciones jurisdiccionales presentadas por el Perú;*
>
> *b. (si el Tribunal determina que tiene jurisdicción con respecto a una o más de las reclamaciones de las Demandantes) rechace las reclamaciones de las Demandantes por falta de mérito;*
>
> *c. rechace todas las demás peticiones accesorias de las Demandantes, incluyendo aquella relativa a la ejecución de la Garantía de Fiel Cumplimiento;*

256 Counter-Memorial ¶ 7.

257 Reiterated at R-PHB ¶ 125.

d. en caso de que el Tribunal considere total o parcialmente improcedentes los petitorios (a), (b) y (c) arriba, rechace la solicitud de compensación de las Demandantes; y,

e. condene a las Demandantes al pago de la totalidad de las costas procesales, así como de la totalidad de los honorarios profesionales y gastos de abogados del Perú, y cualquier otro gasto incurrido por el Perú en el presente arbitraje, más un interés compuesto sobre esos montos antes y después de emitido el laudo, hasta la fecha de pago, calculado con base en una tasa de interés razonable.

VI. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS

A. OVERVIEW OF THIS AWARD

239. In the Sections that follow, the Tribunal sets out the Parties' positions with respect to the various aspects of the Parties' dispute, together with the Tribunal's analysis and determinations on each matter.

240. Within this introductory Section, in Section B below, the Tribunal shall address Claimants' request for adverse inferences.

241. In Section VII, the Tribunal deals with the issues raised in relation to the Tribunal's jurisdiction and the admissibility of Claimants' claims. Claimants' claims in relation to alleged breaches of the RER Contract and Peruvian law are determined in Section VIII. Section IX covers the alleged breaches of the TPA. In Section X, the Tribunal addresses the alleged termination of the Confidentiality Agreement. Section XI deals with costs, and Section XII summarises the Tribunal's conclusions. Section XIII contains the dispositive.

242. In the analysis below, the Tribunal has considered not only the positions of the Parties as summarised in this Award, but also the numerous detailed arguments made in the Parties' written submissions and during the Hearing. In this regard, the Tribunal has received lengthy written submissions from the Parties running to approximately 2000 pages in total (excluding witness statements, expert reports and documentary evidence). In order to maintain the usefulness of this Award as a document, not every argument made by the Parties will be reproduced herein. The Tribunal has generally incorporated the Parties' respective positions into its reasoning without reproducing them in separate sections. To

the extent that arguments are not referred to expressly, they have been subsumed into the Tribunal's analysis.

B. REQUEST FOR ADVERSE INFERENCES

243. The Tribunal's document production orders were issued with PO 3 (see ¶ 38 above). In PO 5, in response to an application from Claimants, the Tribunal issued further orders in relation to document production (see ¶ 42 above).

244. According to Claimants, Respondent largely failed to comply with their document requests, even when ordered to do so by the Tribunal.[258]

245. Claimants request that the Tribunal make a number of adverse inferences. Respondent opposes Claimants' requests, and submits that they have already been addressed by the Tribunal in PO 5.[259]

(1) The Legal Standard

246. ICSID Arbitration Rule 34(2) provides that the Tribunal may, *inter alia*, "call upon the parties to produce documents…" ICSID Arbitration Rule 34(3) provides:

> The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

247. PO 2 sets out the applicable rules for the document production phase. PO 2 ¶ 16.9 further provides:

> In all other matters regarding the receipt of evidence that are not covered by this Procedural Order or others issued by the Tribunal, this procedure may be guided by the IBA Rules on the Taking of Evidence in International Arbitration, approved on 29 May 2010 by Resolution of the IBA Council.

248. Article 9(5) of the IBA Rules on the Taking of Evidence sets out:

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258 Reply ¶ 303.

259 Rejoinder ¶¶ 366-367.

> If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

249. In Respondent's view, the standard for making an adverse inference is a high one, which is not met by a simple failure to produce a document.[260] To issue an adverse inference, Respondent submits that the following assumptions must be met: (i) the Tribunal is satisfied that the evidence requested exists and is in the possession, custody or control of the requested party; (ii) the party requesting the inference must have presented all relevant evidence in its possession that would support the inference; (iii) the requested inference is reasonable, consistent with the facts in the record, and logically related to the nature of the evidence; (iv) the party seeking the inference has presented sufficient evidence to satisfy a *prima facie* standard; and (v) the party against whom the inference would be drawn has been informed of its obligation to present evidence rebutting the adverse inference and has had adequate opportunity to present such evidence or explain the failure to present it.[261]

250. Claimants did not comment on Respondent's proposed criteria at the Hearing or in their post-hearing submissions.

251. The Tribunal generally agrees with Respondent's proposed criteria for drawing adverse inferences as set out in ¶ 249 above and will proceed to apply them to Claimants' requests in the present case.

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260 Rejoinder ¶ 369.

261 Rejoinder ¶ 369; *citing, inter alia*, **RL-214**, *George Edwards v. the Government of the Islamic Republic of Iran, the Ministry of Roads and Transportation, Oil Service Company of Iran*, Iran-US Claims Tribunal, IUSCT Case No. 251, Award No. 451-251-2, 5 December 1989; **RL-191**, *William J. Levitt v. Islamic Republic of Iran, Ministry of Agriculture and Natural Resources of the Islamic Republic of Iran, Moghan Agro-Industrial and Livestock Development Corp. and Bank Melli Iran, Iran-US Claims Tribunal*, IUSCT Case No. 210, Award No. 520-210-3, 29 August 1991; **RL-189**, *Frederica Lincoln Riahi v. The Government of the Islamic Republic of Iran, Iran-US Claims Tribunal*, IUSCT Case No. 485, Award No. 600-485-1, 27 February 2003; **RL-217**, *Rockwell International Systems, Inc. v. The Government of the Islamic Republic of Iran, Ministry of Defence, Iran-US Claims Tribunal*, IUSCT Case No. 430, Award No. 438-430-1, 5 September 1989; **RL-243**, *Mark Dallal v. Islamic Republic of Iran, Bank Mellat (Formerly International Bank of Iran), Iran-US Claims Tribunal*, IUSCT Case No. 149, Award No. 53-149-1, 8 June 1983.

(2) Analysis of Claimants' Requests

252. The Tribunal sets out each request below together with the Parties' respective views:

(i) Request No. 1 for the administrative file related to Respondent's decision to promulgate SD 24: Respondent produced two documents, but no legal reports, technical studies, resolutions and correspondence relating to SD 24 as had been requested. Claimants request the Tribunal to infer that additional documents were not produced because they do not support Respondent's interpretation of SD 24.[262] According to Respondent, the requested documents do not exist, Claimants have not provided *prima facie* evidence to justify the inference and the inference requested is unreasonable and inconsistent with the facts of the case.[263] Moreover, Respondent argues that Claimants seek to reverse the burden of proof as they cannot refute Respondent's interpretation of SD 24 based on the text of SD 24 and the witness testimony of Mr. Jaime Mendoza.[264]

(ii) Request No. 2 for MINEM or OSINERGMIN memoranda or reports showing Respondent's contemporaneous interpretation of SD 24: Respondent produced two documents containing MINEM responses to third party questions, but no reports from MINEM or OSINERGMIN about SD 24 and its effects on the RER Promotion. Claimants request the Tribunal to infer that additional documents were not produced because they do not support Respondent's interpretation of SD 24.[265] According to Respondent, in PO 5 the Tribunal already accepted its explanation that it had been unable to locate documents responsive to this request.[266]

(iii) Request No. 4 for technical and legal reports from MINEM on the permitting process for RER projects: Respondent produced no documents. Claimants request the Tribunal to infer that the documents were not produced because they do not support Respondent's interpretation of the allocation of risks between the

262 Reply ¶ 307.
263 Rejoinder ¶ 384.
264 Rejoinder ¶¶ 382-383.
265 Reply ¶ 308.
266 Rejoinder ¶ 375.

concessionaire and permitting agencies regarding timing, procedure and approvals of permits.[267] According to Respondent, in PO 5 the Tribunal already accepted its explanation that it had been unable to locate documents responsive to this request.[268]

(iv) Request No. 5 for documents from MINEM, OSINERGMIN or ARMA on the environmental classification process for RER projects: Respondent produced no documents. Claimants request the Tribunal to infer that the documents were not produced because they do not support Respondent's position that the RGA and the AEP had a justifiable reason to doubt ARMA's environmental classification of the Mamacocha Project.[269] According to Respondent, in PO 5 the Tribunal already accepted its explanation that it had been unable to locate documents responsive to this request.[270]

(v) Request No. 10 for different categories of documents relating to the RGA and the Project's environmental permits, including documents relied upon in the Regional Investigative Commission's report: Respondent produced four documents, being documents submitted by Second Claimant to ARMA in 2013. Claimants request the Tribunal to infer that additional documents were not produced because they do not support Respondent's position that the RGA and the AEP had a justifiable reason to doubt ARMA's environmental classification of the Mamacocha Project.[271] Respondent submits that there is no basis to draw an adverse inference, because it exhibited more than 30 documents that fit the description of this request, conducted a diligent search, and did not withhold any documents.[272]

(vi) Request No. 12 for documents regarding the RGA's decision to file the RGA Lawsuit: Respondent produced two documents, being the RGA Council's

267 Reply ¶ 309.
268 Rejoinder ¶ 375.
269 Reply ¶ 310.
270 Rejoinder ¶ 375.
271 Reply ¶ 311.
272 Rejoinder ¶¶ 377-378.

resolution recommending the RGA Lawsuit and correspondence between RGA officials transmitting the Regional Investigative Commission's report. Claimants request the Tribunal to infer that additional documents were not produced because they establish that the RGA Lawsuit was not commenced for *bona fide* administrative law purposes.[273] According to Respondent, this request was already addressed by the Tribunal's direction in PO 5 for Respondent to produce any further responsive documents.[274]

(vii) Request No. 22 for documents regarding MINEM's initial analysis of the Third Extension Request: Respondent produced no documents. Claimants request the Tribunal to infer that documents were not produced because they do not support Respondent's position that the Third Extension Request was effectively dead on arrival.[275] According to Respondent, in PO 5 the Tribunal already accepted its explanation that it had been unable to locate documents responsive to this request.[276]

253. Taking into account the Parties' respective views and the directions already issued in PO 5, the Tribunal is not persuaded that there is sufficient basis to draw adverse inferences as sought by Claimants. In particular, it is not clear in each case that the evidence exists and is in Respondent's possession, custody or control but has been withheld. Additionally, the Tribunal is not in a position to confirm the reasonability of the inferences sought independently of its full assessment of all the circumstances of the case and all evidence and arguments presented to the Tribunal. The Tribunal nevertheless notes Claimants' views on the strength and weight of the evidence that has or has not been provided, and shall take these views into account when weighing the evidence presented by the Parties to the Tribunal in support of their respective cases when reaching its determinations.

273 Reply ¶ 312.
274 Rejoinder ¶ 385.
275 Reply ¶ 313.
276 Rejoinder ¶ 375.

254. Noting that Respondent requests an order for costs against Claimants in relation to this issue,[277] the Tribunal reserves its decision on costs to be addressed together with the other costs in Section XI of this Award.

VII. JURISDICTION AND ADMISSIBILITY

255. Before deciding on the merits of the dispute before it, the Tribunal must be satisfied that it has jurisdiction over the claims put forward, and that those claims are admissible. In order to address jurisdiction and admissibility, the Tribunal will set out the relevant provisions of the relevant legal instruments in Section A below. In Section B, the Tribunal will summarise the Parties' respective positions on the issues of jurisdiction and admissibility, with the United States' Non-Disputing Party Submission and the Parties' comments thereon contained in Section C. Section D contains the Tribunal's analysis of jurisdiction and admissibility.

A. RELEVANT PROVISIONS

(1) The TPA

256. TPA Article 10.28 defines a "claimant" as "an investor of a Party that is a party to an investment dispute with another Party."[278]

257. TPA Article 10.28 defines a "respondent" as "the Party that is a party to an investment dispute."[279]

258. TPA Article 10.28 defines "investor of a Party" as follows:[280]

> …a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

277 Rejoinder ¶ 386.

278 **C-001/RL-051**, TPA, Art. 10.28.

279 **C-001/RL-051**, TPA, Art. 10.28.

280 **C-001/RL-051**, TPA, Art. 10.28.

259. TPA Article 10.28 defines "enterprise of a Party" as "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there."[281]

260. TPA Article 1.3 defines an "enterprise" as follows:[282]

> …any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.

261. TPA Article 10.28 defines "investment" as:[283]

> …every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;[284]
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
>
> (f) intellectual property rights;

281 **C-001/RL-051**, TPA, Art. 10.28.

282 **C-001/RL-051**, TPA, Art. 1.3.

283 **C-001/RL-051**, TPA, Art. 10.28.

284 Appearing as footnote 12 in this provision of the TPA: "Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics."

Appearing as footnote 13 in this provision of the TPA: "Loans issued by one Party to another Party are not investments."

> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[285] and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges[.]

262. TPA Article 10.28 defines "investment agreement" as:

> …a written agreement[286] between a national authority[287] of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:
>
> (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
>
> (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
>
> (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government[.]

263. TPA Article 10.15 is entitled "Consultation and Negotiation" and provides that:[288]

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285 Appearing as footnote 14 in this provision of the TPA: "Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit or similar instrument has the characteristics of an investment."

Appearing as footnote 15 in this provision of the TPA: "The term 'investment' does not include an order or judgment entered in a judicial or administrative action."

286 Appearing as footnote 16 in this provision of the TPA: "'Written agreement' refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement."

287 Appearing as footnote 17 in this provision of the TPA: "For purposes of this definition, 'national authority' means an authority at the central level of government."

288 **C-001/RL-051**, TPA, Art. 10.15.

> In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

264. TPA Article 10.16 is entitled "Submission of a Claim to Arbitration." TPA Article 10.16(1) sets out the circumstances for submission of a claim to arbitration as follows:[289]

> In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,
>
> provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment

[289] **C-001/RL-051**, TPA, Art. 10.16(1).

> that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

265. TPA Article 10.16(2) relates to the notice of intent, as follows:[290]

> At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:
>
> (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
>
> (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
>
> (c) the legal and factual basis for each claim; and
>
> (d) the relief sought and the approximate amount of damages claimed.

266. TPA Article 10.16(3) relates to the waiting requirement and submission of a claim:[291]

> Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:
>
> (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;
>
> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;
>
> (c) under the UNCITRAL Arbitration Rules; or
>
> (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

267. TPA Article 10.16(4) refers to when a claim shall be deemed submitted to arbitration:[292]

> A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

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290 **C-001/RL-051**, TPA, Art. 10.16(2).

291 **C-001/RL-051**, TPA, Art. 10.16(3).

292 **C-001/RL-051**, TPA, Art. 10.16(4).

> (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
>
> (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
>
> (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or
>
> (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.
>
> 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.

268. TPA Article 10.16(5) provides with respect to the arbitration rules:[293]

> The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

269. TPA Article 10.16(6) sets out in relation to the notice of arbitration that:

> The claimant shall provide with the notice of arbitration:
>
> (a) the name of the arbitrator that the claimant appoints; or
>
> (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

270. TPA Article 10.17 is entitled "Consent of Each Party to Arbitration" and provides as follows:[294]

> 1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
>
> 2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

293 **C-001/RL-051**, TPA, Art. 10.16(5).

294 **C-001/RL-051**, TPA, Art. 10.17.

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

(b) Article II of the New York Convention for an "agreement in writing;" and

(c) Article I of the Inter-American Convention for an "agreement."

271. TPA Article 10.18 is entitled "Conditions and Limitations on Consent of Each Party" and sets out as follows:

> 1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.
>
> 2. No claim may be submitted to arbitration under this Section unless:
>
> (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the notice of arbitration is accompanied,
>
> > (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
> >
> > (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
> >
> > of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.
>
> 3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16(a)) and the claimant or the enterprise (for claims brought under Article 10.16(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.[citation omitted]
>
> 4. (a) No claim may be submitted to arbitration:
>
> (i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or

(ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),

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

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

(2) The ICSID Convention

272. ICSID Convention Article 25 provides, in relevant part:

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

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

…

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

(3) The RER Contract

273. Clause 11 of the RER Contract is entitled "Dispute Resolution," and provides as follows, in relevant part:[295]

[295] **C-002**, RER Contract, Clause 11.

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

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

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

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

…

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

a) Disputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency shall be settled through international arbitration of law by means of a procedure carried out in accordance with the Rules for Conciliation and Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID) established in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States approved by Peru through Legislative Resolution No. 26210, to whose standards the Parties submit unconditionally. Where the Concessionaire Company does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rule referred to in subparagraph b) below.

The Arbitration shall be carried out in the city of Washington, D.C., or in the city of Lima, at the choice of the Concessionaire Company, and shall be conducted in Spanish. The relevant arbitral award shall be rendered within ninety (90) Days following the constitution of the Arbitral Tribunal.

The Arbitral Tribunal shall consist of three (3) members. Each party shall appoint one arbitrator and the third one shall be appointed by contract of the two arbitrators appointed by the Parties, who in turn shall serve as President of the Arbitral Tribunal. Where the two arbitrators fail to reach an agreement on the appointment of the third

arbitrator within fifteen (15) Days following the date of appointment of the second arbitrator, the third arbitrator shall be appointed by the ICSID at the request of any of the parties.

Where one of the parties fails to appoint the relevant arbitrator within fifteen (15) Days from the date of receipt of the relevant request for appointment, it shall be deemed that such party has waived its right and the arbitrator shall be appointed by the ICSID at the request of the other party.

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

The Arbitral Tribunal shall consist of three (3) members. Each party shall appoint one arbitrator and the third one shall be appointed by contract of the two arbitrators appointed by the Parties, who in turn shall serve as President of the Arbitral Tribunal. Where the two arbitrators fail to reach agreement on the appointment of the third arbitrator within ten (10) Days following the date of appointment of the second arbitrator, the third arbitrator shall be appointed by the Chamber of Commerce of Lima at the request of any of the Parties. Where one of the Parties fails to appoint the relevant arbitrator within ten (10) Days from the date of receipt of the relevant request for appointment made by the other party, it shall be deemed that such party has waived its right and the arbitrator shall be appointed by the Chamber of Commerce of Lima at the request of the other Party.

11.4 The Parties agree that the award issued by the Arbitral Tribunal shall be final and unappealable. Thus, the Parties waive their right to file an appeal proper, a cassation appeal or any other remedy challenging the arbitral award, and declare that the award shall be binding, immediately enforceable and shall be fully complied with.

11.5 While the arbitration is pending, the Parties shall continue fulfilling, to the extent possible, their contractual obligations, including those obligations that are the subject-matter of the arbitration.

11.6 Where the matter of arbitration involves the fulfillment of the obligations guaranteed by a bond pursuant to Clause 8, where applicable, said bond shall not be enforced and shall remain in effect during the arbitration procedure.

11.7 All the expenses incurred as a result of the settlement of the Technical or Non-Technical Dispute, including fees to be paid to the Expert or the Arbitrators taking part in the settlement of the Dispute, shall be borne by the losing Party, unless the Expert or the Arbitrators decide otherwise.

11.8 Costs and expenses such as advisors' fees, internal costs, or others that are attributable to a Party individually, are excluded from the provisions of this Clause.

11.9 The Concessionaire Company hereby expressly, unconditionally and irrevocably waives its right to file any diplomatic claim.

B. PARTIES' POSITIONS

(1) Respondent's Position

274. Respondent makes a number of objections and submissions with respect to jurisdiction and admissibility, as set out in the following subsections.

a. Principles Applicable to the Jurisdictional Analysis

275. Respondent argues that four legal principles should guide the Tribunal in its jurisdictional analysis. First, that consent by the State must be unequivocal and indisputable, and is the cornerstone of the jurisdiction of ICSID, and by extension the Tribunal.[296] Such consent, in Respondent's view, is often conditional upon certain requirements being fulfilled at the time of the request for arbitration to ICSID.[297]

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296 Counter-Memorial ¶¶ 485-486; *quoting*, *inter alia*, **RL-089**, *Informe de los Directores Ejecutivos acerca del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados*, 18 March 1965, ¶ 23; **RL-059**, *Daimler Financial Services AG v. Republic of Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 175; **RL-062,** *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ¶ 62.

297 Counter-Memorial ¶ 487; *citing*, *inter alia*, **RL-064**,*Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher (St. Kitts) and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, ¶ 6.16; **RL-056**, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, ¶ 90.

276. Second, Respondent submits that the jurisdictional requirements of both the ICSID Convention and the instrument containing the State's alleged consent must be met, i.e., in this case, the TPA and the RER Contract.[298]

277. Third, Respondent contends that Claimants have the burden of proof to demonstrate the existence of the Tribunal's jurisdiction, in accordance with the principle of *actori incumbit onus probandi*.[299] Respondent highlights, in this regard, the finding of the Tribunal in *National Gas v. Egypt* that "it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims."[300]

278. The types of factual premises that the investor bears the burden of proving include, in Respondent's view: (i) nationality of the claimant; (ii) the existence of an investment meeting the applicable treaty requirements; (iii) that the investor meets the requirements necessary to be protected by the applicable treaty; (iv) that both parties have consented to arbitrate; (v) that the dispute presented to the tribunal is different from a dispute submitted earlier to national courts; and (vi) that the dispute submitted to arbitration arose after the entry into force of the relevant investment treaty.[301]

279. Fourth, Respondent argues that the Tribunal must be fully satisfied that it has jurisdiction, and has the power and duty to determine its competence *ex officio* and *proprio motu*.[302]

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298 Counter-Memorial ¶ 488; *citing* **RL-065**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, ¶ 43; **RL-066**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 243. *See also* Counter-Memorial ¶¶ 489-490.

299 Counter-Memorial ¶ 491; *citing* **RL-067**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, ¶ 58; **RL-068**, *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 64; **RL-069**, *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, 15 September 2011, ¶ 277; **RL-070**, *Spence International Investments, LLC, et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Provisional Award, 30 May 2017, ¶ 239; *also quoting* **RL-071**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/20, Award, 26 April 2017, ¶ 66. *See also* Rejoinder ¶ 421.

300 Rejoinder ¶ 413; *quoting* **RL-072**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 118. *See also* Counter-Memorial ¶ 492.

301 Rejoinder ¶ 422; *citing* **RL-246**, Baiju Vasani et al, "*Part III Guide to Key Jurisdictional Issue, 13 Burden and Standard of Proof at the Jurisdictional Stage*", Arbitration Under International Investment Agreements: A Guide to the Key Issues, 19 July 2018, §§ IV.A-F.

302 Counter-Memorial ¶ 493; *quoting* **RL-074**, *Case on the Legality of the Use of Force*, Separate Opinion of Judge Kreca, 15 December 2004, ¶ 42; **RL-076***, The "Grand Prince" Case (Belize v. France)*, ITLOS, Judgment, 20 April 2001, ¶¶ 77, 79. *See also* Counter-Memorial ¶ 494; *quoting* **RL-174**, *Ioan Micula and*

b. Jurisdiction Ratione Personae*: Second Claimant*

280. Since CH Mamacocha is incorporated in Peru, Respondent submits that it *prima facie* does not satisfy the *ratione personae* jurisdiction requirement under Article 25(1) of the ICSID Convention.[303] Respondent also argues that Claimants have failed to prove that the nationality exception under Article 25(2)(b) of the ICSID Convention is met, since Respondent has not "*acordado atribuirle [a CH Mamacocha] el carácter de 'nacional de otro Estado Contratante*.'"[304]

281. In Respondent's view, the exception under Article 25(2)(b) of the ICSID Convention is a manifestation of consent to arbitrate, and as such must be unequivocal and indisputable.[305] In this way, Respondent submits that an attribution of the character of foreign nationality is normally explicit. Where it is implicit, Respondent submits that the expression of its intention should leave no doubt.[306]

282. In Respondent's view, Clause 11.3(a) of the RER Contract contemplates the possibility that Second Claimant would not meet the *ratione personae* requirement under Article 25 of the ICSID Convention.[307] For Respondent, Claimants' contrary interpretation is unsupported by the text of Clause 11.3(a) and inconsistent with a systematic interpretation of the Contract in accordance with the Peruvian Civil Code.[308]

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others v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 65.

303 Counter-Memorial ¶ 565.

304 Counter-Memorial ¶ 566; *quoting* **RL-092**, ICSID Convention, Art. 25(2)(b); *see* Request for Arbitration ¶ 81; Memorial ¶ 2.

305 Counter-Memorial ¶ 568; *citing* **RL-059**, *Daimler Financial Services AG v. Republic of Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 175; **RL-060**, Advisory Opinion on the Status of Eastern Caleria, PCIJ, 23 July 1923, p. 27; **RL-061**, *Ambatielos Case (Greece v. United Kingdom)*, Judgment, 19 May 1953, ICJ Reports 1953, pp. 10, 19; **RL-086**, *Monetary Gold Removed from Rome in 1943 (Italy v. France)*, Judgment, 15 June 1954, Preliminary Question, ICJ Reports 1954, pp. 19, 32. *See also* Counter-Memorial ¶ 571; *quoting* **RL-087**, Pierre Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, The British Yearbook of International Law, 1982, pp. 140-141.

306 Counter-Memorial ¶¶ 569-570; *quoting* **RL-064**, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher (St. Kitts) and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, ¶ 5.24; **CL-033**, *Klöckner Industrie-Anlagen GmbH et al. v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983, ¶ 16.

307 Rejoinder ¶ 525.

308 Rejoinder ¶¶ 526-528; *quoting* **C-002**, RER Contract, Clause 11.3(b); *also citing* **C-002**, RER Contract, Clause 1.2; **RL-048/CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 169.

c. Jurisdiction Ratione Voluntatis*: Waiver Requirement*

283. For Respondent, Claimants have not complied with the waiver requirement in TPA Article 10.18(2)(b). Respondent argues that in violation of this waiver requirement, Claimants have brought two types of proceeding before this Tribunal in respect of the same underlying measures: (i) First Claimant's claims under the TPA, on its own behalf and on behalf of Second Claimant; and (ii) Second Claimant's claims under the RER Contract.[309]

284. In Respondent's view, Claimants' formal compliance by way of its written waiver does not constitute effective material compliance with the requirement.[310] Respondent submits that Claimants' claims under the TPA and the RER Contract constitute multiple actions and should be dismissed for failure to comply with the waiver.[311]

285. Respondent submits that previous investment arbitration tribunals have found that a defect in the waiver (e.g., a partial, conditional or non-effective waiver) leads to a lack of jurisdiction of the tribunal, the waiver being a precondition to the State's consent to arbitrate.[312]

286. Respondent further argues that the admission of Claimants' multiple claims would: (i) be contrary to judicial economy; (ii) create a procedural imbalance in favour of Claimants, since Respondent has to rebut each of the claims and Claimants only have to succeed on one of them; and (iii) disregard the express terms of the TPA.[313]

d. Jurisdiction Ratione Voluntatis*: Criminal Investigation Claims*

287. Respondent contends that Claimants failed to comply with the jurisdictional notice and waiting requirement under TPA Article 10.16.2 with respect to their claims based on the initiation and formalisation of the criminal investigation by the Arequipa Environmental Prosecutor's Office ("**Criminal Investigation Claims**"), leading to the Tribunal's lack of

309 Counter-Memorial ¶ 497; Rejoinder ¶ 426.

310 Counter-Memorial ¶ 498; *citing* **RL-077**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, ¶¶ 20, 14. *See* Memorial ¶ 216(f).

311 Counter-Memorial ¶ 501.

312 Counter-Memorial ¶ 516; *citing*, *inter alia*, **RL-079**, *The Renco Group Inc. v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 142. *See also* Rejoinder ¶ 427.

313 Rejoinder ¶ 465.

jurisdiction over those claims.[314] This is because TPA Article 10.16.2 requires prior notification of "the legal and factual basis for each claim," in the absence of which, in the Respondent's view, its consent to arbitrate is not perfected.[315]

288. Respondent argues that 94 days after the Third Notice of Intent, on 30 August 2019 Claimants filed their Request for Arbitration, claiming for the first time that the Criminal Investigation Claims constitute a breach on the alleged basis of (i) Respondent's initiation and formalisation of the criminal investigation against Second Claimant's counsel; and (ii) Respondent's declared intention to bring criminal charges against Second Claimant.[316] Since these were not mentioned in the Third Notice of Intent, Respondent submits that they are outside the Tribunal's jurisdiction and must be dismissed.[317]

289. Respondent relies on the decisions of previous international tribunals which have recognised, in its view, that notice and waiting requirements are conditions of State consent, and failure to comply with them requires dismissal of the relevant claims.[318]

e. Jurisdiction Ratione Materiae*: Whether the RER Contract is an Investment Agreement*

290. Respondent contends that the RER Contract is not an "investment agreement" within the meaning of TPA Article 10.28, and the Tribunal accordingly lacks jurisdiction over Claimants' claims for alleged breach of contract.[319]

291. For Respondent, the RER Contract is a long-term power purchase and sale contract that guarantees Second Claimant the right to receive the Award Tariff for the contracted energy that Second Claimant agrees to inject in the SEIN. It does not, in Respondent's view, confer

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314 Counter-Memorial ¶¶ 518, 526; Rejoinder ¶ 467.

315 Counter-Memorial ¶¶ 519-520; *quoting* **RL-051/C-001**, TPA, Arts. 10.16.2, 10.17.1.

316 Counter-Memorial ¶ 521; *citing* **RL-051/C-001**, TPA, Art. 10.16(2)(c); **C-023**, Latam Hydro LLC and CH Mamacocha, S.R.L.'s Notice of Intent to Submit a Claim to Arbitration, 28 May 2019.

317 Counter-Memorial ¶ 526.

318 Counter-Memorial ¶¶ 522-523; *quoting* **RL-090**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶ 149; **RL-084**, *Grand River Enterprises Six Nations, Ltd. et al v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 94.

319 Counter-Memorial ¶ 529.

any right to generate energy, which is granted by the final concession rather than the RER Contract.[320]

f. Jurisdiction Ratione Materiae*: Claims Concerning the Upstream Projects*

292. Respondent argues that Claimants have not established a jurisdictional basis for their claim for USD 0.142 million in relation to the Upstream Projects or explained which measures attributable to Peru allegedly affected those Projects.[321]

293. On the basis of Prof. Schreuer's commentary that Article 25 of the ICSID Convention (see ¶ 272 above) does not cover investments that are merely planned, intended or attempted, Respondent submits that the Upstream Projects were merely aspirational and never went beyond the conceptual stage.[322]

294. Respondent argues that the Upstream Projects are not covered investments under TPA Article 10.28 either.[323] Respondent submits, in this regard, that costs relating to feasibility studies and the creation of a holding company, amounting to only USD 140,000, cannot by themselves constitute an investment covered by the TPA.[324] According to Respondent, Claimants' actions in relation to the Upstream Projects do not involve the "commitment of capital or other resources" or "the assumption of risk" as required by the text of TPA Article 10.28.[325]

(2) Claimants' Position

a. Principles Applicable to the Jurisdictional Analysis

295. Claimants do not dispute the principles proposed by Respondent with respect to the determination of jurisdiction that "consent of the Parties is the cornerstone of ICSID's jurisdiction," nor that "the Tribunal must be convinced that not only the jurisdictional

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320 Counter-Memorial ¶ 533; *citing* Mendoza First Statement ¶¶ 10, 13. *See also* Counter-Memorial ¶ 535; *quoting* Mendoza First Statement ¶ 14; Sillen First Statement fn 19; Rejoinder ¶¶ 548, 553, 557-561.

321 Counter-Memorial ¶ 543; *see* Memorial ¶¶ 14, 17, 144, 172, 177, 540-543, fn 965.

322 Counter-Memorial ¶ 544; *quoting* **RL-101**, Christoph H. Schreuer *et al*, The ICSID Convention: A Commentary, 23 July 2009, Art. 25, ¶ 181.

323 Counter-Memorial ¶ 560; *quoting* **RL-051/C-001**, TPA, Art. 10.28.

324 Counter-Memorial ¶ 562; *citing* Memorial ¶ 543.

325 Counter-Memorial ¶ 563; Rejoinder ¶ 582.

requirements under the ICSID Convention have been met," but also those established in the TPA and the RER Contract.[326]

296. Claimants deny, on the other hand, that they bear the burden of proving the Tribunal's jurisdiction, citing the *Fisheries Jurisdiction* case, where the ICJ held:[327]

> …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'.

297. This was confirmed, in their view, by the arbitral decisions of *Grand River v. United States* and *Itisaluna v. Iraq*, as well as in the expert opinion of their expert Professor Schreuer.[328]

b. Jurisdiction Ratione Personae

298. Claimants submit that the Tribunal has jurisdiction under the TPA and the ICSID Convention. In this respect, First Claimant brings claims: (i) on its own behalf under TPA Article 10.16(1)(a)(i)(A); and (ii) on behalf of Second Claimant under TPA Article 10.16(1)(b)(i)(C) for Peru's alleged breaches of an investment agreement.[329] With respect to their claims relating both to investment protection and the investment agreement, Claimants contend that they have "incurred loss or damage by reason of, or arising out of" these alleged breaches.[330]

299. According to Claimants, First Claimant is an "enterprise of" the United States of America within the meaning of TPA Articles 1.3 and 10.28 (see ¶¶ 259-260 above).[331] On the basis that First Claimant has "made an investment in the territory of another Party," i.e., Peru,

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326 Reply ¶ 318.

327 Reply ¶ 319; *quoting* **CL-140/RL-199**, *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 4 December 1998, ICJ Reports 1998, p. 432.

328 Reply ¶¶ 320-321; *quoting* **CL-144**, *Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB 17/10, Award, 3 April 2020, ¶ 151; Schreuer Report ¶ 14; also *citing* **RL-084**, *Grand River Enterprises Six Nations, Ltd et al v. United States of America*, UNCITRAL, Decision on Objection to Jurisdiction, 20 July 2006, ¶ 37.

329 Memorial ¶ 188; Reply ¶ 314.

330 Memorial ¶ 210; *quoting* **C-001/RL-051**, TPA, Arts. 10.16(1)(A)(ii), 10.16(2)(A)(ii) [sic.]. *See also* Reply ¶¶ 391-393.

331 Memorial ¶ 192.

Claimants argue that it is a United States "enterprise" and a protected investor under the TPA.[332]

300. First Claimant further invokes TPA Article 10.16(1)(b)(i)(C) as the basis for its claim on behalf of Second Claimant for Respondent's alleged breaches of the RER Contract.[333]

301. According to Claimants, at all relevant times Second Claimant has been 100% owned and controlled, directly or indirectly, by a US citizen or US entity.[334] In this respect, until May 2014 Second Claimant was controlled and beneficially owned by Mr. Jacobson. From May 2014 to 19 December 2016, Second Claimant was indirectly owned and controlled by First Claimant, through several levels of entities that First Claimant owned and controlled in the US, the British Virgin Islands, Cyprus, Belgium and Chile. On 19 December 2016, the intermediate corporate levels were collapsed, making First Claimant the 100% direct owner of Second Claimant on that date.[335]

302. Claimants argue that Respondent agreed to treat Second Claimant as a national of another Contracting State for purposes of Article 25(2)(b) of the ICSID Convention: (i) by entering into a dispute resolution clause requiring resolution of large disputes before ICSID; (ii) by including Second Claimant in its negotiations before the Special Commission; and (iii) through other course of dealing.[336]

303. Claimants further submit that the agreement to treat a company as a foreign national because of foreign control does not require any specific form.[337]

304. Claimants argue that an implied agreement to treat Second Claimant as a foreign national exists based on the RER Contract, RER Law, Peruvian law and the Parties' practice. In this respect, Claimants submit that the RER Contract incorporates by reference and was

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332 Memorial ¶ 193.

333 Memorial ¶ 194.

334 Memorial ¶ 197; *citing* Jacobson First Statement ¶ 88.

335 Memorial ¶ 196, § II.Q.

336 Reply ¶ 397.

337 Reply ¶ 404; *quoting* Schreuer Report ¶ 24. *See also* Reply ¶ 405; Reply ¶ 403; *quoting* **RL-064**, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher (St. Kitts) and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, ¶ 5.24.

designed to implement Legislative Decree No. 1002, which created Peru's renewable energy resources program, in part, "to facilitate the implementation of the United States-Peru Trade Promotion Agreement and its Protocol of Amendment" by attracting US investors to invest in RER concessions.[338] For Claimants, the RER Law, and by inference the RER Contract, were expressly designed to attract foreign investment, with the requirement that foreign investors under the RER Program invest and operate through local operating companies.[339]

c. Jurisdiction Ratione Voluntatis*: Waiver Requirement*

305. Claimants submit that they have expressly waived any right to initiate or continue legal proceedings with respect to the disputed measures, as required by TPA Article 10.18(2)(b).[340] According to Claimants, they have not submitted this dispute for resolution before Peru's administrative tribunals or courts, or to any other binding dispute settlement procedures. Nor did Second Claimant file any counterclaims against MINEM in the Lima Arbitration.[341]

306. Claimants disagree with Respondent's argument that they have failed to comply with the waiver requirement by virtue of having filed two categories of claims in this arbitration.[342] Relying on Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"), Claimants argue that the ordinary meaning of the waiver requirement does not apply to different claims brought in the same arbitration proceeding.[343] The requirement to waive recourse to "any" proceeding only encompasses, in their view, claims pursued in a "different" arbitration proceeding to the one in which it has brought the action.[344]

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338 Reply ¶ 412.

339 Reply ¶ 412 *citing* **C-002**, RER Contract, Clause 1.4.44.

340 Memorial ¶ 216(f); *citing* **C-003**, Resolution and Waiver of the Board of Directors of Latam Hydro LLC, 14 August 2019; **C-004**, Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., 16 August 2019. *See also* Reply ¶ 326.

341 Memorial ¶ 216(g). *See also* Reply ¶ 327.

342 Reply ¶ 328.

343 Reply ¶¶ 330-334.

344 Reply ¶ 335.

Moreover, for Claimants, the waiver does not contemplate proceedings before an ICSID tribunal, which is not "under the law of any Party" but rather under international law.[345]

307. Claimants further submit that read in the context of the entire treaty and TPA Article 10.16 which allows a claimant to pursue different types of claims, a claimant cannot reasonably be required to waive its contract claims in order to pursue treaty claims.[346]

308. In addition, Claimants deny that they have violated the waiver requirement by the fact that their different claims concern the same "measures."[347]

d. Jurisdiction Ratione Voluntatis*: Criminal Investigation Claims*

309. Claimants disagree with Respondent's argument that they have not complied with the notice and wait requirements with respect to the Criminal Investigation Claims, which were not mentioned in the Third Notice of Intent.[348] For Claimants, the notice and wait provisions are procedural in nature and do not affect the Tribunal's jurisdiction.[349]

310. According to Claimants, they provided Respondent with their Notice of Intent on 28 May 2019, more than 90 days before submitting their claims to ICSID arbitration.[350] In addition, Claimants submit that by the time they filed their Request for Arbitration on 30 August 2019, six months had elapsed since the events giving rise to the claims.[351] Likewise, according to Claimants, at the time of filing the Request for Arbitration, less than three years had elapsed since Claimants first acquired, or should have first acquired, knowledge of Respondent's breaches of the TPA and knowledge that they incurred loss or damage. In

345 Reply ¶ 337; *quoting* Schreuer Report ¶ 52.

346 Reply ¶ 340; *quoting* Schreuer Report ¶ 69.

347 Reply ¶ 342; *quoting* Schreuer Report ¶ 106.

348 Reply ¶ 350; *see* Counter-Memorial ¶¶ 518, 521.

349 Reply ¶¶ 351-355; *quoting* **RL-130**, *SGS Société Génerale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, ¶ 184; **RL-044**, *Bayindir Inşaat Turizm Tikaret Ve Sanayi A. Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 95, 99, 100; Schreuer Report ¶ 89; also *citing* Schreuer Report ¶¶ 84-86.

350 Memorial ¶ 216(b).

351 Memorial ¶ 216(c).

this respect, Claimants argue that the first measure by the Peruvian Government that caused damage to Claimants was the RGA Lawsuit, which they learned about in March 2017.[352]

311. Claimants argue that claims additional to those listed in the Notice of Intent are allowed provided they do not change the general character of the case and are related to the same dispute. Claimants argue that all that is required is a reasonable degree of specificity that allows adequate identification of the dispute.[353] Claimants invoke, in support, the decisions of (i) *RREEF v. Spain* ("…the core issue is whether the additional claims change the character of the case…"); and (ii) *Kappes v. Guatemala* (requiring a claimant to recommence the notice and waiting process for every new State measure "would provide the potential for disruption and duplication…").[354]

e. Jurisdiction Ratione Materiae*: Whether the RER Contract is an Investment Agreement*

312. Claimants submit that First Claimant's claims under the RER Contract are made in accordance with TPA Article 10.16(1)(b)(i)(C) for breach of an investment agreement, on the basis that (i) the RER Contract is an "investment agreement" as defined in TPA Article 10.28(b), since it "grants rights to the covered investment or investor…(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications" (see ¶ 262 above); and (ii) Second Claimant's claims and damages under TPA Article 10.16(1)(b)(i)(C) relate directly to the Mamacocha Project, being the covered investment that was established or acquired in reliance on the RER Contract.[355]

313. Claimants disagree with Respondent's characterisation of the RER Contract as a long-term power purchase agreement which does not confer any right to generate power.[356] They rely

352 Memorial ¶ 216(d); *citing* Benzaquén First Statement ¶ 15.

353 Reply ¶¶ 357-358; *citing* Schreuer Report ¶¶ 93, 95.

354 Reply ¶¶ 358-359; *quoting* **CL-173**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 226; **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 199.

355 Memorial ¶ 209; Reply ¶ 379.

356 Reply ¶ 379; *see* Counter-Memorial ¶ 532.

on the language of the title of the RER Contract ("Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System") and the definition of the Contract in Clause 1.4.12:[357]

> …Concession Contract for the Supply of Renewable Energy resulting from the Auction…which contains the commitments and conditions related to the construction, operation, supply of power and tariff regime of the RER power plants[.]

314. In any event, Claimants submit that a long-term power purchase agreement would also meet the definition of an investment agreement under the TPA, being: (i) an agreement to supply services to the public, as per TPA Article 10.28(b);[358] (ii) an agreement "with respect to natural resources that a national authority controls" under TPA Article 10.28(a); and (iii) an agreement "to undertake infrastructure projects" under TPA Article 10.28(c).[359]

f. Jurisdiction Ratione Materiae*: Claims Concerning the Upstream Projects*

315. Claimants submit that First Claimant's activities in Peru qualify as "investments" under TPA Article 10.28 (see ¶ 261 above), since First Claimant has at all times directly or indirectly held 100% ownership interest in Second Claimant and fully controlled Second Claimant and the Project. Specifically, Claimants argue that First Claimant's investment encompasses: (i) an enterprise (Second Claimant); (ii) ownership of shares in an enterprise (Second Claimant); (iii) loans to Second Claimant; (iv) concession contracts; (v) concessions; (vi) licenses; (vii) authorizations and permits; and (viii) tangible and intangible property rights, among others.[360]

316. According to Claimants, First Claimant began investing directly in Peru in 2012, and Mr. Jacobson and First Claimant have made contributions amounting to tens of millions of dollars since then towards the development of the Mamacocha Project.[361]

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357 Reply ¶ 380; *quoting* **C-002**, RER Contract, Clause 1.4.12. *See also* **C-002**, RER Contract, Clause 10.2(d).

358 Reply ¶ 382; *quoting* Schreuer Report ¶ 129.

359 Reply ¶ 383; *quoting* Schreuer Report ¶ 130.

360 Memorial ¶ 201; *citing* Jacobson First Statement ¶ 89.

361 Memorial ¶ 202; *quoting* Jacobson First Statement ¶¶ 82-85. *See also* Memorial ¶ 203.

317. According to Claimants, the Tribunal's jurisdiction *ratione materiae* includes the claims made with respect to the Upstream Projects, which were an integral part of the overall investment by Claimants. In accordance with the principle of the unity of the investment, Claimants argue that their investment must be examined as a whole.[362]

318. Claimants disagree with Respondent's argument that the Upstream Projects are "pre-investment activities" and have to be treated separately. According to Claimants, when they decided to invest in Peru they commissioned a feasibility study for the Mamacocha Project and a conceptual design for the Upstream Projects.[363] Moreover, Claimants argue that the Mamacocha and Upstream Projects were presented to prospective investors as a combined product, to be developed in phases starting with the Mamacocha Project first, and, once construction was underway, Second Claimant would transition from the development of the Mamacocha Project to the development of the Upstream Projects.[364]

g. Jurisdiction Under the RER Contract[365]

319. For Claimants, this Tribunal has jurisdiction to decide Second Claimant's claims under the RER Contract, as per Clause 11.3(a).[366] In their view, such jurisdiction arises directly from the RER Contract, in addition to arising under TPA Article 10.16(1)(b)(i)(C) as a claim for breach of an investment agreement thereunder.[367]

320. In reliance on Clause 11.1 of the RER Contract (see ¶ 273 above), Claimants submit that the dispute is "non-technical" in nature and is therefore to be resolved in accordance with Clause 11.3 of the RER Contract.[368] Pursuant to this provision, Claimants assert that the amount of the dispute exceeds USD 20 million and the requirements to resort to ICSID

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362 Reply ¶¶ 435, 437; *quoting* **CL-122**, *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶ 72.

363 Reply ¶ 433; *citing* Memorial ¶¶ 50-58; **C-102**, Email from A. Bartrina to S. Sillen attaching Pöyry's Memorandum titled "Upstream Addition Mamacocha II", 3 October 2013.

364 Reply ¶ 434; *citing* Jacobson First Statement, ¶ 15; **C-032**, Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014; Sillen First Statement ¶ 40; Bartrina First Statement ¶ 25.

365 *See* ¶¶ 560 *et seq*. below in relation to Respondent's position on the Tribunal's jurisdiction under the RER Contract.

366 Memorial ¶ 224. *See also* Memorial ¶ 250.

367 Memorial ¶ 225 and fn 521. *See also* Memorial ¶¶ 240, 242; Reply ¶ 314.

368 Memorial ¶¶ 234-235; *quoting* **C-002**, RER Contract, Clause 11.1. *See also* Memorial ¶¶ 251-252.

arbitration are met (see ¶ 273 above).[369] Second Claimant therefore brings claims on its own behalf for alleged breaches of the RER Contract and Peruvian law.[370]

321. For Claimants, the Government of Peru, as a single unit, is the counterparty of Second Claimant in the RER Contract. Claimants rely on the preamble to the RER Contract in this respect, as follows:[371]

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

322. In support of its argument that the Peruvian State (and not MINEM) is liable to Second Claimant for breaches of the RER Contract, Claimants rely on:

(i) Clause 1.4.31 of the RER Contract, defining MINEM as "the Ministry of Energy and Mines, which enters into this Contract on behalf of the Government";[372]

(ii) Ministerial Resolution No. 023-2014-MEM/DM of 17 January 2014 annexed to the RER Contract, which "authorized the General Director of Electricity, on behalf of the Ministry of Energy and Mines as the Grantor, to sign, on behalf of the Peruvian State, the Concession Agreements for the Supply of Renewable Energy to the National Interconnected Electric System (SEIN)…"[373]

(iii) The opinions of their experts Dr. Quiñones and Dr. Benavides;[374] and

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369 Memorial ¶¶ 237-240; *citing*, *inter alia*, Jacobson First Statement ¶ 89; **C-210**, Letter from K. Reisenfeld to A. Conover, 18 September 2019; **C-002**, RER Contract, Clause 11.3(a); **CL-076**, L. Reed, J. Paulsson et al, "Chapter 3: ICSID Investment Treaty Arbitration," *Guide to ICSID Arbitration* (Kluwer, 2010), p. 53. *See also* Memorial ¶¶ 254-257.

370 Memorial ¶ 241.

371 Memorial ¶ 226; *quoting* **C-002**, RER Contract, Preamble. *See also* Memorial ¶ 243.

372 Memorial ¶ 227; *quoting* **C-002**, RER Contract, Clause 1.4.31. *See also* Memorial ¶ 244.

373 Memorial ¶ 227; *quoting Resolución Ministerial No. 023-2014-MEM/DM*, 17 January 2014, in **C-002**, RER Contract.

374 Memorial ¶¶ 228-229; *quoting* Quiñones First Report ¶ 49; Benavides First Report ¶ 97. *See also* Benavides First Report ¶ 101; **C-002**, RER Contract, Clause 1.4.2. *See also* Memorial ¶¶ 245-246.

(iv) Article 43 of Peru's Political Constitution: "[t]he State is one and indivisible. Its form of government is unitary."[375]

C. NDP SUBMISSION

(1) The U.S. NDP Submission

323. In its NDP Submission, the United States provided its interpretation regarding the following three issues related to jurisdiction under the TPA: (i) the burden of proof in the context of jurisdictional objections (Article 10.22.1); (ii) the requirement for claimants to waive other dispute settlement procedures (Article 10.18.2(b)); and (iii) the requirement of delivery of a notice of intent prior to the commencement of the arbitration (Article 10.16.2).

324. With respect to item (i) of ¶ 323 above, the United States submits that, under general principles of international law, in the context of a jurisdictional objection in international arbitration, the claimant must prove the necessary and relevant facts to establish the tribunal's jurisdiction, while the respondent has the burden to prove the affirmative defenses it raises, if any.[376]

325. With respect to item (ii) of ¶ 323 above, the United States sets out its interpretation on the scope of the waiver requirement provided in TPA Article 10.18.2(b). After emphasizing that the purpose of this provision is to avoid concurrent and overlapping proceedings, the United States submits that this article requires investors to "definitively and irrevocably" waive all rights to pursue claims in another forum. Such waiver includes administrative tribunals or courts under the law of any Party or any other binding dispute settlement procedure, but it does not impede investors to submit concurrent treaty and contract claims pursuant to TPA Article 10.16.1 before one tribunal, insofar as issues such as potential double-recovery and inconsistent findings are otherwise addressed.[377]

326. With respect to item (iii) of ¶ 323 above, the United States refers to the notice of intent and "cooling-off" prerequisites to arbitration provided in TPA Article 10.16.2. It argues that

375 Memorial ¶ 230; *quoting* Quiñones First Report ¶ 49. *See also* Memorial ¶¶ 247-248.

376 NDP Submission ¶¶ 2-4.

377 NDP Submission ¶¶ 5-10.

under TPA Article 10.17 the Contracting Parties only consented to arbitrate investment disputes "in accordance with this [Treaty]." According to the United States, such consent to arbitrate is not perfected if the investor does not deliver a valid notice of intent 90 days prior to arbitration pursuant to the procedural requirements of Article 10.16.2. The United States further qualify these requirements as "mandatory" and "explicit" ones which serve substantial functions.[378]

(2) Claimants' Comments on the U.S. NDP Submission

327. On 8 December 2021, Claimants filed their observations on the NDP Submission ("**Claimants' NDP Observations**") in which they addressed the issues of interpretation of the TPA put forward by the United States, as briefly summarized below.

328. First, Claimants submit that the United States' comments on the burden of proof fail to distinguish between proof on jurisdiction and proof of specific facts. Although they do not oppose the United States' submission that a claimant has the burden of proving its claims, Claimants consider that such concept is not useful to the question of jurisdiction in which the weight of legal arguments and the interpretation of the relevant treaty are decisive. Moreover, in Claimants' view, the United States fail to acknowledge the differentiations made by prior tribunals regarding issues of jurisdiction and the burden of proof on issues of merits, including the application of burden-shifting rules once a party has provided enough *prima facie* evidence regarding a fact to raise a presumption.[379]

329. Second, Claimants submit that the NDP Submission contains an "unambiguous endorsement" of Claimants' argument that the waiver requirement of TPA Article 10.18.2(b) does not preclude Claimants from submitting concurrent treaty and contract claims before the Tribunal.[380] They highlight that the United States' position is in line with Claimants' prior submissions and expert report which were also based on "the ordinary meaning" of the terms and "textual context" of TPA Article 10.18.2(b). Based on the

378 NDP Submission ¶¶ 11-16.

379 Claimants' NDP Observations ¶¶ 20-24.

380 Claimants' NDP Observations ¶¶ 2, 8.

foregoing, Claimants conclude that the Tribunal has jurisdiction both over Claimants' treaty and contractual claims in this arbitration.[381]

330. Third, Claimants address the United States' comments concerning the notice of intent requirement stipulated in TPA Article 10.16.2. Claimants agree with the NDP's position that such prerequisite to arbitration serves "important functions" in the dispute and assert that such functions have been served in the present case.[382]

331. Claimants further point out that the NDP Submission has not addressed Respondent's argument that the specifics of every claim must be included in a notice of intent to be submitted to arbitration. According to Claimants, such interpretation of TPA Article 10.16(2) would be "unworkable" and would offer the States the "obvious moral hazard" of allowing and promoting breaches after the notice of intent. Moreover, in their view, Respondent's position would be contrary to a contextual reading of the TPA, the ICSID Convention and Arbitration Rules, and to related prior case law.[383]

(3) Respondent's Comments on the U.S. NDP Submission

332. On 8 December 2021, Respondent filed its observations on the NDP Submission ("**Respondent's NDP Observations**") addressing the issues of interpretation of the TPA raised by the United States, as briefly summarized below in relation to jurisdiction.

333. As a preliminary matter, Respondent submits that the common interpretation of the TPA by the United States and Peru − as reflected in their written submissions – must be taken into account by the Tribunal as it constitutes a "subsequent agreement" and "subsequent practice" of the Treaty parties concerning the interpretation of certain provisions of the Treaty under Article 31 of the VCLT. Thus, in its view, the Tribunal must give it authoritative weight as an unequivocal manifestation of their will and intention on the interpretation of the TPA.[384]

381 Claimants' NDP Observations ¶¶ 8-10.

382 Claimants' NDP Observations ¶¶ 11-12.

383 Claimants' NDP Observations ¶¶ 13-19.

384 Respondent's NDP Observations ¶¶ 4-14.

334. In this regard, Respondent argues that under the general rule of interpretation provided by Article 31 of the VCLT, a subsequent agreement or practice of Respondent and the United States must be considered for the purpose of interpreting the TPA.[385] Furthermore, Respondent clarifies that such "subsequent agreement" may result from separate acts or statements by each party as long as it manifests an undertaking by each party and reflects a common understanding of one or more treaty provisions.[386]

335. After establishing its position on the significance that must be given to the Treaty Parties' submissions, Respondent argues that both the United States and Respondent agree on the interpretation of the TPA.[387]

336. First, Respondent submits that the NDP Submission confirms Respondent's position that Claimants have the burden to prove the necessary and relevant facts to establish the Tribunal's jurisdiction. In particular, Respondent emphasises that TPA Article 10.22.1 provides that the Tribunal must decide the issues in dispute in accordance with the Treaty and "applicable rules of international law." According to Respondent, the United States acknowledges that this reference includes the general principle that a claimant has the burden of proving its claims, including questions of jurisdiction. Since Claimants failed to meet this burden, in its view their case should be dismissed.[388]

337. Second, Respondent argues that the United States' interpretation regarding the waiver requirement contained in TPA Article 10.18.2(b) also supports Respondent's position that such waiver prevents Claimants from submitting to international arbitration parallel or duplicative claims that are not based on the TPA.[389]

338. In this regard, Respondent argues that: (i) the NDP Submission has endorsed that the waiver requirement encompasses parallel proceedings "under any *other* binding dispute settlement procedure," which includes international arbitration proceedings such as the

385 Respondent's NDP Observations ¶¶ 4-5.
386 Respondent's NDP Observations ¶¶ 6-8.
387 Respondent's NDP Observations ¶¶ 15-55.
388 Respondent's NDP Observations ¶¶ 15-17.
389 Respondent's NDP Observations ¶¶ 18-23.

present arbitration;[390] and (ii) although the United States noted that treaty and contract claims could proceed concurrently before one tribunal when both types of claims are submitted "under Article 10.16.1," Claimants' contract claims do not meet this standard as they are also brought "under Clause 11.3(a) of the RER Contract" and refer to the same measures underlying Claimants' claims under TPA Article 10.16.1.[391]

339. Third, Respondent asserts that the NDP Submission has supported Peru's interpretation that, under the notice of intent prerequisite to arbitration set out in Article 10.16.2 of the TPA, tribunals lack jurisdiction over claims that were not notified in accordance with such provision.[392]

340. In particular, Respondent submits that: (i) the NDP Submission confirms that the notice requirement constitutes a jurisdictional condition and not a procedural rule as alleged by Claimants, and thus failure to comply with this pre-arbitral requisite affects the Parties' consent to arbitrate and precludes the Tribunal's jurisdiction;[393] and (ii) as recognized by the United States, the notice of intent serves "important functions" that cannot be achieved if it merely identifies the overall dispute and, therefore, to achieve its purpose such notice must provide detailed information regarding each claim following the "explicit and mandatory" requirements set out in TPA Article 10.16.2.[394]

D. TRIBUNAL'S ANALYSIS

341. Claimants raise three types of claims in this arbitration, being: (i) claims brought by First Claimant on its own behalf under the TPA and the ICSID Convention; (ii) claims brought by First Claimant on behalf of Second Claimant under the TPA and the ICSID Convention; and (iii) claims brought by Second Claimant on its own behalf under the RER Contract and the ICSID Rules under the ICSID Convention.[395] The claims in items (i) and (ii) are First Claimant's claims under the TPA and the ICSID Convention, even if those in item (ii) are

390 Respondent's NDP Observations ¶¶ 19-20 (emphasis in original).
391 Respondent's NDP Observations ¶¶ 21-22.
392 Respondent's NDP Observations ¶¶ 24-30.
393 Respondent's NDP Observations ¶ 25.
394 Respondent's NDP Observations ¶ 26-30.
395 Memorial ¶¶ 188, 224; Reply ¶ 314; **CD-01**, Claimants' Opening Presentation, slide 54.

made on behalf of Second Claimant. The claims in item (iii) are Second Claimant's claims under the RER Contract.

342. In this Section, the Tribunal first addresses the guiding principles relevant to the determination of its jurisdiction. Thereafter, the Tribunal shall first analyse various aspects of its jurisdiction under the TPA and the ICSID Convention (i.e., jurisdiction *ratione personae*, jurisdiction *ratione voluntatis*, jurisdiction *ratione materiae*) before turning to its jurisdiction under the RER Contract.

(1) Guiding Principles for the Determination of Jurisdiction

343. Since Claimants have raised claims both under the TPA and the RER Contract, the Tribunal first addresses its jurisdiction under the TPA and the ICSID Convention, before turning to the RER Contract.

a. Jurisdiction and Admissibility under the TPA and the ICSID Convention

344. In order for the Tribunal to establish whether it has jurisdiction under the TPA and the ICSID Convention, it is necessary to consider the Tribunal's jurisdiction *ratione personae*, *ratione voluntatis*, *ratione materiae,* and *ratione temporis* which are covered by several provisions of the TPA and the ICSID Convention, as outlined below (see ¶¶ 256 to 272 above setting out a number of relevant treaty provisions). These provisions set the outer limits to the Tribunal's jurisdiction, as well as conditions upon the exercise of that jurisdiction. As explained in relation to the jurisdiction *ratione voluntatis*, there is a dispute between the Parties as to which requirements are a matter of jurisdiction, or are procedural requirements only. The Tribunal shall address these matters in its reasoning below.

345. There is no dispute that the requirements under the TPA and the ICSID Convention are cumulative, in that the provisions of both must be satisfied in order for the Tribunal to have jurisdiction in this matter.[396] It is likewise uncontroversial between the Parties that consent of the Parties is the cornerstone of ICSID's jurisdiction.[397] The Tribunal considers that such

396 Counter-Memorial ¶ 488; Reply ¶ 318.

397 Counter-Memorial ¶ 485; Reply ¶ 318.

consent should be clear and unambiguous, or in the terminology used by Respondent, unequivocal and indisputable.[398]

b. Jurisdiction Under RER Contract

346. The requirements to establish the Tribunal's jurisdiction under the RER Contract are set out in Clause 11.3(a) thereof (see ¶ 273 above). The Tribunal will consider whether the requirements of Clause 11.3(a) of the RER Contract are met in ¶¶ 560 *et seq.* below.

347. The Tribunal observes, for present purposes, that the Parties' respective submissions presuppose that the requirements of the ICSID Convention, together with the ICSID Arbitration Rules, apply to the Tribunal's jurisdiction under the RER Contract.[399] This not being a disputed issue before it, the Tribunal proceeds on the basis of the Parties' shared understanding.

c. Burden of Proof

348. In their pleadings, the Parties disagree on the burden of proof for the establishment of the Tribunal's jurisdiction. In this regard, Claimants submit, relying in support on the opinion of Prof. Schreuer, that a focus on burden of proof in relation to jurisdiction is not correct. In their view, it has been established by the International Court of Justice and investment tribunals that it is for the court or tribunal to weigh the legal arguments to establish jurisdiction.[400]

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398 *See* Counter-Memorial ¶¶ 485-486; *quoting*, *inter alia*, **RL-089**, *Informe de los Directores Ejecutivos acerca del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados*, 18 March 1965, ¶ 23; **RL-059**, *Daimler Financial Services AG v. Republic of Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 175; **RL-062,** *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ¶ 62.

399 *See* Memorial ¶¶ 237 and 254 (duplicated text) regarding the Tribunal's jurisdiction under the RER Contract: "CHM need only satisfy two criteria: …second, the Concessionaire company needs to comply with the requirements to resort to ICSID."; Memorial ¶¶ 239, 256: "…CHM satisfies the second limb of Article 25(2)(b) of the ICSID Convention and qualifies as a 'National of another Contracting State' for purposes of the ICSID Convention."; **RD-01**, Respondent's Opening Presentation, slide 15: "No jurisdiction over CHM's claims: CHM is not a 'national of another Contracting State' under ICSID Convention Art. 25(2)(b)."; Counter-Memorial ¶ 567; Rejoinder ¶ 520.

400 *See* Reply ¶ 319; *quoting* **CL-140/RL-199**, *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 4 December 1998, ICJ Reports 1998, p. 432. *See also* Reply ¶¶ 320-321; *quoting* **CL-144**, *Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB 17/10, Award, 3 April 2020, ¶ 151;

349. Respondent refutes this position, drawing a distinction between: (i) the burden of proving factual issues relevant to whether the Tribunal has jurisdiction (burden on Claimants); and (ii) contentions of international law (can be interpreted by the Tribunal without the assistance of the Parties).[401] Respondent partially agrees with Claimants to the following extent:[402]

> *…cuando la existencia de la jurisdicción de un tribunal no depende de determinaciones sobre hechos controvertidos, sino meramente de temas de interpretación legal, es evidente que la discusión sobre la asignación de la carga de la prueba con respecto a los hechos carece de relevancia.*

350. Respondent argues that the distinction between factual and legal bases for jurisdiction is supported by the cases relied on by Claimants, which it argues are incorrectly analysed by Prof. Schreuer.[403] According to Respondent, the cases referred to by Prof. Schreuer are not relevant because they did not depend on findings of disputed facts, but only on legal interpretation.[404]

351. The question of the Tribunal's power to examine its own jurisdiction *proprio motu* is not a question of the burden of proof, and will be addressed at ¶ 356 below. To the extent that the Parties' submissions mix these issues, the Tribunal finds it helpful to address them separately.

352. In respect of the burden of proof, by the Hearing, it appeared that the respective positions of the Parties on this issue were not far apart. Claimants accepted that "*en la medida en que se cuestionen hechos que hacen a la jurisdicción, resultan de aplicación las reglas*

Schreuer Report ¶ 14; *also citing* **RL-084**, *Grand River Enterprises Six Nations, Ltd et al v. United States of America*, UNCITRAL, Decision on Objection to Jurisdiction, 20 July 2006, ¶ 37.

401 Rejoinder ¶ 416.

402 Rejoinder ¶ 419.

403 Rejoinder ¶¶ 414-418; *quoting* **RL-199/CL-140**, *Fisheries Jurisdiction Case (Spain v. Canada),* Jurisdiction of the Court, Judgment, 4 December 1998, ICJ Reports 1998, ¶ 37; **CL-144**, *Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB 17/10, Award, 3 April 2020, ¶ 151; Schreuer Report ¶¶ 12, 14; *see* Reply ¶ 319.

404 Rejoinder ¶ 419.

habituales […] *La carga de la prueba recae en la parte que afirma un hecho, sea ella la parte demandante o la demandada*."[405]

353. The Tribunal affirms the distinction drawn by Respondent, and accepted by Claimants, between the proof of factual assertions relevant to the Tribunal's jurisdiction and the interpretation of legal instruments providing for such jurisdiction. Where the Tribunal's jurisdiction depends on the existence of certain facts, such as the nationality of a claimant or the existence of an investment, Claimants bear the burden of establishing those facts. Respondent likewise bears, in principle, the burden of proving any factual assertions underlying its jurisdictional objections.

354. With respect to the law, it is for the Tribunal to determine whether and the extent to which it has jurisdiction on the basis of the relevant legal instruments, taking into account the materials presented by the Parties. In the context of that legal determination, it may not be useful to speak of a burden of proof with respect to jurisdiction.

355. The Tribunal proceeds to decide upon its jurisdiction in this matter on the basis of the relevant legal instruments, noting that each Party bears the burden of proving its factual assertions made to establish or refute that jurisdiction.

d. Power to Determine Jurisdiction

356. The separate question of the Tribunal's power to examine the basis of its jurisdiction *proprio motu* is not of direct relevance in the present case. Since it has been raised by the Parties in the context of the burden of proof, the Tribunal observes that, in principle, there is no general obligation on the Tribunal to address a matter of jurisdiction on its own motion. A tribunal may be required to determine a matter of jurisdiction in certain situations, such as when: (i) an objection to jurisdiction is raised by the responding party; or (ii) the responding party does not appear (in which case, the tribunal would raise

405 Claimants' Opening Presentation, Transcript (Day 1), 7 March 2022, 53:6-11; *see* **CD-01**, Claimants' Opening Presentation, slide 57; *quoting* **RL-070**, *Spence International Investments, LLC, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 30 May 2017, ¶ 239.

jurisdiction *proprio motu*). In other situations, it may be prudent to examine and make a determination on a jurisdictional issue, but the tribunal is not required to do so.

(2) TPA and ICSID Convention: Jurisdiction *Ratione Personae*

357. For the purposes of First Claimant's claims under the TPA, in this Section the Tribunal addresses its jurisdiction over First Claimant, Second Claimant and Respondent under the TPA and under the ICSID Convention, which requirements are to be applied cumulatively (see ¶ 345 above).

a. First Claimant

358. TPA Article 10.16 refers to the right of "the claimant" to submit a claim to arbitration. The claimant is defined in TPA Article 10.28 as "an investor of a Party that is a party to an investment dispute with another Party" (see ¶ 256 above). The definition of "investor" under TPA Article 10.28 includes "an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party…" (see ¶ 258 above). In turn, as per TPA Article 1.3, an "enterprise" is "any entity constituted or organized under applicable law…including any corporation…" (see ¶ 260 above).

359. For the purposes of its jurisdiction *ratione personae* under the TPA, the Tribunal must therefore be satisfied that First Claimant: (i) is an enterprise of a TPA Party (in this case, the United States); that (ii) has attempted to make, is making or has made an investment in the territory of Peru. Claimants submit that these criteria are fulfilled.[406]

360. Respondent has not objected to the Tribunal's jurisdiction *ratione personae* over First Claimant. The Tribunal nevertheless finds it prudent to satisfy itself of its jurisdiction over First Claimant.

361. As regards item (i) of ¶ 359 above, according to Claimants, First Claimant is an "enterprise of" the United States of America, being a limited liability company constituted under the laws of the State of Delaware in May 2014, with Delaware File Number 5527780, and

406 Memorial ¶¶ 192-193.

principal place of business at 1865 Brickell Avenue, A-1603, Miami, Florida 33129-1645, United States.[407]

362. Based on the Certificate of Formation filed by Claimants, the Tribunal is satisfied that First Claimant is a United States limited liability company, and therefore an "enterprise of a Party" under TPA Articles 1.3 and 10.28.

363. As regards item (ii) ¶ 359 above, Claimants submit that First Claimant's investment under TPA Article 10.28 encompasses, *inter alia*:[408]

> …an enterprise [Second Claimant]; ownership of shares in an enterprise [Second Claimant]; loans to [Second Claimant]; concession contracts; concessions, licenses, authorizations and permits; tangible and intangible property rights…

364. Under TPA Article 10.28, an "investment" is defined as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment," which includes "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" (see ¶ 261 above). This provision also gives examples of several forms that an investment may take, including "an enterprise," "shares…in an enterprise," "concessions…and other similar contracts" (see ¶ 261 above).

365. The Tribunal shall give further consideration to the precise scope of Claimants' investments in Peru below, since it is also relevant to Respondent's objection that the Tribunal lacks jurisdiction *ratione materiae* over claims made with respect to the existence of an investment agreement (see ¶¶ 496 *et seq.* below) and the Upstream Projects (see ¶¶ 529 *et seq.* below). For present purposes, the Tribunal is satisfied that First Claimant made an investment in the territory of Peru, among other things in the form of its 100% direct and indirect ownership of Second Claimant, effected through different corporate structures in the period 2014-2019.[409]

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407 Memorial ¶ 192; *citing* **C-019**, Latam Hydro LLC, Certificate of Formation, 5 May 2014.

408 Memorial ¶ 201.

409 *See*, *inter alia*, **C-070**, *Registro de la Transferencia de Participaciones de Latam Energy Chile SpA y Latam Energy Chile SpA II a Latam Hydro LLC y Modificación del Estatuto*, 26 December 2016; **C-072**, *Registro*

366. Leaving aside the disputed issue of the Upstream Projects, the Tribunal is also satisfied that First Claimant committed cash, expected gain or profit, and assumed risk in relation to the Mamacocha Project on the territory of Peru, by making loans and equity contributions to Second Claimant to finance its operations, specifically in relation to the performance of the RER Contract (see also ¶¶ 517 to 521 below in relation to investments made in reliance on the RER Contract).[410]

367. In light of the foregoing, the Tribunal concludes that First Claimant is an investor of a TPA Party, i.e., the United States, within the meaning of TPA Article 10.28, fulfilling the *ratione personae* requirements of the TPA.

368. Under the ICSID Convention, Article 25(1) provides with respect to jurisdiction *ratione personae* that the Centre's jurisdiction extends to a dispute between "a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State" (see ¶ 272 above).

369. Article 25(2) of the ICSID Convention sets out the definition of "national of another Contracting State" (see ¶ 272 above). For present purposes, Article 25(2)(b) is relevant, which refers to "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration."

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del Aumento de Capital y Modificación del Estatuto de CH Mamacocha, 22 June 2017; in addition to the chain of ownership in the period January 2014 to December 2016 reflected in exhibits **C-065**, Greinvest Latin America Ltd. - Board Resolution Transfer of Shares to Latam Hydro LLC, 7 May 2014; **C-066**, Greinvest Latin America Ltd - Jacobson Instrument of Transfer of shares to Latam Hydro LLC, 7 May 2014; **C-067**, Greinvest Latin America Ltd Share Certificate (owner Latam Hydro LLC), 7 May 2014; **C-068**, Greinvest Americas LLC - Jacobson Instrument of Transfer of membership units to Latam Hydro LLC, 7 May 2014; **C-077**, Transfer of Ownership Savrocorp Solutions Ltd shares to Greinvest Latin America Ltd., 24 October 2013; **C-078**, Certificate of Change of Name, Savrocorp Solutions Ltd to Latam Energy Cyprus Ltd., 14 November 2013; **C-079**, Latam Energy Belgium BVBA, Extract of Articles of Association, 12 September 2013; **C-025**, Publication of Abstracts of Constitution of Latam Energy Chile SpA and Latam Energy Chile SpA II, 5 October 2013; **C-024**, Registration of Transfer of Participations to Latam Energy Chile SpA and Latam Energy Chile SpA II and Modification of Statutes, 13 December 2013; **C-080**, Certificate of Change of Name Greinvest Latin America Ltd., 14 October 2015; **C-081**, *Escritura de Constitución de Ayo Transmission S.R.L.*, 17 July 2014; Jacobson First Statement ¶¶ 81-90; *see also* Memorial ¶¶ 177-187.

410 *See*, *e.g.*, **C-265**, Latam Hydro LLC's invoices, audited and unaudited financial statements and tax returns; **BRG-004**, BRG Investment Value Calculations; BRG First Report ¶¶ 161-162, Table 8; **BRG-081**, BRG Updated Investment Value Calculations, tab "Investment Value Mamacocha"; **BRG-100**, Claimants' Accounting Records of Actual Expenses; BRG Second Report ¶¶ 167-171, Table 8.

370. As noted at ¶ 362 above, First Claimant is a United States limited liability company created in 2014. First Claimant continued to hold US nationality on 30 August 2019, being the date that Claimants' Notice of Arbitration was received by the Secretary-General of ICSID and therefore the date their claim is "deemed submitted to arbitration" under TPA Article 10.16(4) (see ¶ 264 above). The date of submission to arbitration is also the "date on which the parties consented" under Article 25(2)(b) of the ICSID Convention, by virtue of TPA Article 10.17 (see ¶ 270 above).

371. First Claimant therefore also fulfils the requirements of jurisdiction *ratione personae* under the ICSID Convention.

b. Second Claimant

372. Second Claimant is a legal entity constituted under Peruvian law on 15 November 2012.[411]

(i) TPA

373. Being a Peruvian entity, Second Claimant is not a "claimant" or an "investor" within the definitions in TPA Article 10.28, because it is not in a dispute with "another Party" (i.e., other than Peru) and is not claimed to have made an investment in the territory of another TPA Party (i.e., other than Peru) (see ¶¶ 256 and 258 above).

374. Under TPA Article 10.16(1)(b), a claimant may also submit a claim "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly" (see ¶ 264 above).

375. As already noted at ¶ 372 above, as a Peruvian legal entity Second Claimant is an "enterprise of the respondent" referred to in TPA Article 10.16(1)(b). It is also controlled directly or indirectly by First Claimant, as noted in ¶ 365 above.

376. Second Claimant therefore meets the requirements under the TPA for the purposes of a claim made by First Claimant under TPA Article 10.16(1)(b).

411 **C-021**, Registration of Hidroeléctrica Laguna Azul S.R.L's (today CH Mamacocha S.R.L.) Articles of Incorporation, 23 November 2012. *See* **C-020**, Registration of Hidroeléctrica Laguna Azul S.R.L.'s name changed to CH Mamacocha S.R.L., 22 February 2017.

377. As an enterprise owned directly or indirectly by First Claimant, Second Claimant is also an investment within the meaning of TPA Article 10.28 definition of "investment" (see ¶ 261 above).

(ii) ICSID Convention

378. For the purposes of the ICSID Convention, Claimants assert that a dispute has arisen between Respondent and First Claimant, on its own behalf and on behalf of Second Claimant.[412]

379. Respondent objects to the Tribunal's jurisdiction *ratione personae* over Second Claimant, on the basis of its assertion that Second Claimant does not fulfil the requirements of Article 25(1) or 25(2)(b) of the ICSID Convention.[413] This objection also relates to the Tribunal's jurisdiction under the RER Contract (see ¶ 282 above).

380. The Tribunal notes that the Parties have proceeded on the basis that Second Claimant must satisfy the nationality requirements of the ICSID Convention for the purposes of First Claimant's claims made under the TPA and the ICSID Convention.[414] The Tribunal therefore proceeds on the basis of the Parties' shared understanding.

(a) Test for Agreement to Treat as Foreign National

381. Second Claimant is not a national of another Contracting State under the first option of Article 25(2)(b) of the ICSID Convention, since it has the same nationality as the State party to the dispute ("any juridical person which had the nationality of a Contracting State other than the State party to the dispute..."). The question is therefore whether it satisfies

412 Memorial ¶¶ 220(c), 222.

413 Counter-Memorial ¶¶ 565-581.

414 *See* Memorial ¶ 220(e) (appearing under § III.A.4 entitled "Peru Has Consented to Arbitration under the Treaty and the ICSID Convention"): "CHM has been at all relevant times foreign-controlled and qualifies as a 'national of another Contracting State' for purposes of the ICSID Convention…"; Counter-Memorial ¶ 488 (appearing under § IV.A entitled "*Principios legales aplicables a la determinación de la jurisdicción del Tribunal*"): "… [E]*l Tribunal solo tendrá jurisdicción si las Demandantes han cumplido los requisitos jurisdiccionales bajo el Convenio CIADI, El Tratado, y el Contrato RER*"; Counter-Memorial ¶ 581 (appearing under § IV.F entitled "*El Tribunal carece de jurisdicción* ratione personae *porque el Perú no ha atribuido en ningún momento a CH Mamacocha el carácter de 'nacional de otro Estado Contratante' de conformidad con el Artículo 25(2) del Convenio CIADI*"): "*…las Demandantes no han probado que este Tribunal tenga jurisdicción* ratione personae *bajo el artículo 25 del Convenio CIADI sobre ninguna de las reclamaciones de CH Mamacocha*."

the second option in Article 25(2)(b), i.e., a juridical person which has the same nationality as the State party to the dispute, and which, "because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

382. It is common ground between the Parties that an agreement to treat an entity as a national of another Contracting State may be explicit or implicit, although Respondent emphasises that an implicit attribution still must be indisputable and unequivocal.[415] Respondent further submits that Claimants must not merely prove that it is plausible or theoretically possible that Respondent implicitly attributed to Second Claimant the character of a national of another Contracting State, but that their interpretation excludes any other interpretation of the intention of the Parties.[416]

383. The Tribunal accepts that any implied agreement to treat Second Claimant as a national of another Contracting State must be clear and unambiguous, leaving no doubt as to the Parties' intentions. This is consistent with the ordinary meaning of the term "agreed" in the ICSID Convention Article 25(2)(b), in its context, and in light of the purpose of the ICSID Convention. In this regard, the "agreement" in question provides a limited exception to the foreign nationality requirement of an entity for the purposes of recourse to the international method of dispute settlement set out therein. No specific requirements as to the form of the agreement are set out. According to its ordinary meaning, an agreement, and in particular a legal agreement, may in many situations be concluded either expressly or implicitly. On the other hand, in light of the significance of sovereign consent to such an international proceeding, such consent is not to be assumed, and as held by the Tribunal must be clear and unambiguous.

415 Reply ¶¶ 405, 409; Counter-Memorial ¶ 573.

416 Counter-Memorial ¶ 580; *citing* **RL-064**, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher (St. Kitts) and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, ¶ 5.24.

(b) Whether Respondent Agreed to Treat Second Claimant as Foreign National

384. Respondent does not dispute the fact of Second Claimant's foreign control, but submits that it never agreed to treat Second Claimant as a national of another Contracting State for the purposes of the ICSID Convention.[417] In this respect, Respondent argues that the option of recourse to ICSID arbitration in Clause 11.3(a) of the RER Contract does not constitute clear and unequivocal attribution of such status, because it allows for different kinds of dispute resolution, and because that contractual clause provides, in part, as follows (see ¶ 273 above):[418]

> Where the Concessionaire Company [i.e., Second Claimant] does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rules referred to in subparagraph b) below [i.e., arbitration before the Lima Chamber of Commerce].

385. According to Respondent, where it wished to attribute foreign nationality to an enterprise it did so expressly in the contract.[419]

386. Respondent further asserts that none of its actions invoked by Claimants prove that Second Claimant has been attributed the status of a foreign national. In this respect, Respondent argues, *inter alia*, that: (i) Peru did not waive its jurisdictional objection by failing to object on this basis to the Notices of Intent;[420] (ii) the inclusion of Second Claimant in negotiations with the Special Commission only demonstrates Respondent's good faith attempt to resolve the dispute with Claimants, with Respondent's right to any jurisdictional defence reserved by Clause 7 of the Confidentiality Agreement;[421] (iii) the press conference of the Governor of Arequipa did not contain an acknowledgement as argued by Claimants, but only a statement that Second Claimant has foreign capital, and any statements would only reflect her own views and not an attribution of status by

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417 Counter-Memorial ¶¶ 566, 573.

418 Counter-Memorial ¶ 577; *quoting* **C-002**, RER Contract, Clause 11.3(a).

419 Counter-Memorial ¶¶ 574-575; *quoting* **R-125**, *Contrato de Compromiso de Inversión Central Hidroeléctrica Molloco*, 17 October 2013, Clause 9.5(b). *See also* Rejoinder ¶¶ 531-533.

420 Rejoinder ¶ 539; *see* Reply ¶ 426.

421 Rejoinder ¶ 540; *quoting* **C-028**, Confidentiality Agreement, 5 December 2017, Clause 7. *See also* Rejoinder ¶ 541; *quoting* **CL-170**, *Quiborax S.A., et al v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 257.

Respondent;[422] and (iv) Claimants have failed to prove any estoppel, which in any event cannot create a tribunal's jurisdiction.[423]

387. Claimants argue that Second Claimant is a national of another Contracting State under Article 25(2)(b) of the ICSID Convention due to its foreign control by a US person or entity. An agreement to treat Second Claimant as a national of another Contracting State is evident, in Claimants' view, throughout the Parties' course of conduct, due to the inclusion of an ICSID arbitration clause in the RER Contract (see ¶ 273 above), as well as from the RER Law and Peruvian law.[424]

388. Specifically, the conduct relied upon by Claimants in support of the existence of an implied agreement is: (i) Respondent knew that Second Claimant was owned and controlled, directly or indirectly, by a US investor at the time the RER Contract was executed in 2014 and amended on six occasions thereafter;[425] (ii) Claimants notified Respondent in each of their Notices of Intent that they intended to bring a case on behalf of First and Second Claimants in the event of non-resolution of the dispute;[426] (iii) the Special Commission voluntarily and knowingly included representatives from Second Claimant, in addition to representatives from First Claimant, to attend the direct negotiations to resolve this dispute;[427] and (iv) in December 2017, the Governor of Arequipa acknowledged in her press conference that Second Claimant was a foreign-controlled entity with rights under

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422 Rejoinder ¶ 543; *quoting* **C-011**, Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, 30 December 2017; *see* Reply ¶ 428.

423 Rejoinder ¶ 544; *quoting* **RL-242**, *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 219; *see* Reply ¶ 429. *See also* Rejoinder ¶ 545; *quoting* **CL-083**, *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, ¶ 408.

424 Memorial ¶ 221; *quoting* **CL-084**, Christoph Schreuer, ICSID Convention: A Commentary (2009), p. 304; *also citing*, *inter alia*, **CL-106**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, ¶¶ 12-14; **CL-033**, *Klöckner Industrie-Anlagen GmbH et al. v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983. *See also* Reply ¶¶ 412, 422-423.

425 Reply ¶ 425.

426 Reply ¶ 426; *citing* **C-252/MQ-018**, Latam Hydro LLC and CH Mamacocha S.R.L's First Notice of Intent, 19 June 2017; **C-170**, Latam Hydro LLC and CH Mamacocha S.R.L's Second Notice of Intent, 8 March 2018; **C-023**, Latam Hydro LLC and CH Mamacocha S.R.L's Notice of Intent to Submit a Claim to Arbitration, 28 May 2019; *also quoting* **C-014**, Addendum 3 to the RER Contract, 8 September 2017, Annex A, ¶ 2.1.

427 Reply ¶ 427; *citing* Benzaquén Second Statement ¶ 45.

the TPA.[428] As a result of this conduct, Claimants contend that Respondent is estopped from arguing that the ICSID clause in the RER Contract did not constitute an implicit agreement to treat it as a foreign investor.[429]

389. The fact that Respondent cites an example of another MINEM contract which apparently expressly recognised the investor as qualifying for status as a "national of another Contracting State" is irrelevant, in Claimants' view, since an implied agreement on foreign nationality is increasingly recognised in addition to an explicit agreement.[430] To accept otherwise, according to Claimants and Prof. Schreuer, would amount to imputing bad faith to Respondent that it had never intended to honour the ICSID clause.[431]

390. The Tribunal considers that the inclusion of an ICSID arbitration clause in Clause 11.3(a) of the RER Contract constitutes a clear and unambiguous agreement to treat Second Claimant as a national of another Contracting State for the purposes of the ICSID Convention. In that clause, the parties agreed:[432]

> …Disputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency shall be settled through international arbitration of law by means of a procedure carried out in accordance with the Rules for Conciliation and Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID) established in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States approved by Peru through Legislative Resolution No. 26210, to whose standards the Parties submit unconditionally. Where the Concessionaire Company does not meet the requirement to resort to the ICSID, such dispute shall be subject to the rule referred to in subparagraph b) below.

391. Whether the above agreement is classified as an express or at a minimum an implied agreement is of lesser import, noting as the tribunal in *Amco Asia Corp v. Indonesia* did that there is "no formal or ritual clause being provided for in the Convention, nor needed

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428 Reply ¶ 428; *quoting* **C-011**, Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, 30 December 2017.

429 Reply ¶ 429; *citing* Schreuer Report ¶¶ 42-44.

430 Reply ¶¶ 418-419; *quoting* Schreuer Report ¶ 41; *see* Counter-Memorial ¶¶ 574-575.

431 Reply ¶ 420; *quoting* Schreuer Report ¶ 41.

432 **C-002**, RER Contract, Clause 11.3(a).

in order for such an agreement to be binding on the parties."[433] The ICSID Convention does not impose a particular requirement of form or content of the agreement in question.

392. Respondent thereby agreed to arbitrate higher value disputes with Second Claimant in ICSID arbitration, while Clause 11.3(b) of the RER Contract provides that disputes involving amounts lower than USD 20 million were to be resolved by arbitration under the Arbitration Rules of the National and International Arbitration Center of the Chamber of Commerce of Lima, seated in Lima (see ¶ 273 above). The necessary implication of this clause is that for the purposes of any such ICISD arbitration, Second Claimant would be treated as a national of another Contracting State under Article 25(2)(b) of the ICSID Convention.

393. To hold otherwise would be to render meaningless the option of pursuing ICSID arbitration under the RER Contract, which cannot be presumed to be the intention of the parties to the RER Contract. On the other hand, this understanding does not leave the final sentence of Clause 11.3(a) without meaning, which would direct the parties to domestic arbitration "[w]here the Concessionaire Company does not meet the requirement to resort to ICSID," since there may be other reasons why the entity does not meet the ICSID requirements. This could include, for example, a circumstance where the entity in question does not satisfy the requirement of foreign control at the date of consent to arbitration.

394. Respondent attempts to distinguish the RER Contract from other cases in which ICSID arbitration is the sole exclusive forum for the resolution of disputes.[434] The fact that the RER Contract provides for two avenues of dispute resolution does not assist Respondent. The two types of arbitration possible under RER Contract are clearly demarcated based on the amount in dispute, subject to any reason that it may be necessary to resort to the Lima Chamber of Commerce arbitration in the event that Second Claimant does not meet the requirement to resort to ICSID. It remains clear that Respondent contemplated and

433 **CL-106**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, ¶ 14.

434 Counter-Memorial ¶ 570; Rejoinder ¶¶ 529-530; *quoting* **CL-106**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, ¶¶ 10, 14.

consented to ICSID arbitration with Second Claimant for higher value disputes, for which it necessarily agreed to treat Second Claimant as a national of another Contracting State.

395. In addition, it is of relevance that Respondent required First Claimant to establish a local operating company, as all concessionaires under the RER regime were required to be Peruvian entities.[435] The fact of Second Claimant's Peruvian nationality is therefore a formality required by Respondent itself, which should not be used to undermine the clear agreement to treat Second Claimant as a foreign national.

(c) The Parties' Other Conduct

396. While the Tribunal does not consider the Parties' other conduct relied upon by Claimants to be decisive for its analysis on this question, it does not contradict the existence of an agreement to confer on Second Claimant such status.

397. The Tribunal notes that on other occasions, it was Respondent's practice to include an express attribution of the character of a national of another State to investors being parties to other contracts with MINEM, including during the same period that the RER Contract was concluded.[436] The Tribunal does not find the absence of such a provision in the RER Contract to detract from the unambiguous offer made in Clause 11.3(a) of the RER Contract to pursue ICSID arbitration for certain types of disputes.

398. Nor is the Tribunal persuaded that the absence of any express statement in the RER Contract with respect to Second Claimant's foreign nationality must be presumed to reflect the Parties' common intention not to attribute that character to Second Claimant, or that Claimants must prove that there was an omission or mistake in that respect.[437] Even if Clause 11.3(a) would not be considered an express agreement, the Tribunal has already accepted that an implied agreement to treat Second Claimant as a national of another

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435 **C-002**, RER Contract, Clause 1.4.44: "'Concessionaire Company' means the legal entity organized in accordance with the General Corporation Law and with the provisions of section 6.1.1 of the Tender Requirements…"

436 *See* Counter-Memorial ¶¶ 574-575; *quoting* **R-125**, *Contrato de Compromiso de Inversión Central Hidroeléctrica Molloco*, 17 October 2013, Clause 9.5(b). *See also* Rejoinder ¶¶ 531-533.

437 Rejoinder ¶ 535-536; *quoting* **RL-048/CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Arts. 168, 1361.

Contracting State will suffice, provided that it is clear and unambiguous, leaving no doubt as to the Parties' intentions (see ¶ 382 above).

399. The Tribunal considers its decision to be in line with the decisions of other arbitral tribunals relied on by the Parties. The tribunal in *Cable Television of Nevis v. St Kitts and Nevis* held that an implied agreement to confer status under Article 25(2)(b) "would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties."[438] The parties' explicit agreement to ICSID arbitration in the RER Contract, where other requirements are met (i.e., an amount in dispute above USD 20 million), excludes an interpretation that Respondent had not agreed to treat Second Claimant as a foreign national.

400. Findings by the tribunals in in *Klöckner v. Cameroon*[439] and *LETCO v. Liberia*[440] likewise support a view that the insertion of an ICSID arbitration clause in a contract presupposes and implies an agreement to treat a claimant as a foreign national for the purposes of the ICSID Convention.

401. For the above reasons, the Tribunal concludes that it has jurisdiction *ratione personae* over Second Claimant for the purposes of Article 25 of the ICSID Convention. This finding is also relevant to the Tribunal's jurisdiction under the RER Contract (see ¶ 561 below).

c. Respondent

402. Claimants argue that Peru has consented to arbitrate investment disputes under the TPA and is an ICSID Contracting State.[441] Respondent has not denied that it is a TPA Party or a Contracting State to the ICSID Convention.

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438 **RL-064**, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher (St. Kitts) and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, ¶ 5.24.

439 **CL-033**, *Klöckner Industrie-Anlagen GmbH et al. v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983, ¶ 16 (original in French).

440 **CL-083**, *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, ¶ 16.10.

441 Memorial ¶ 220(c)-(d).

403. The Tribunal is satisfied that Respondent is a TPA Party and a Contracting State to the ICSID Convention.[442]

404. The Tribunal is therefore satisfied that it has jurisdiction *ratione personae* over Respondent under the TPA and the ICSID Convention, subject to its further considerations with respect to the other aspects of its jurisdiction addressed below.

(3) TPA Jurisdiction *Ratione Voluntatis*

405. The Tribunal's jurisdiction *ratione voluntatis* relates to the Parties' consent to arbitrate First Claimant's claims under the TPA, being necessary for the Tribunal to exercise jurisdiction over the Parties.

406. TPA Article 10.17(1) (see ¶ 270 above) contains Respondent's consent to arbitration under the TPA, subject to the fulfilment of the other requirements of the Treaty.

407. TPA Article 10.17(2) further provides that the consent under TPA Article 10.17(1), together with the submission of a claim to arbitration under the Treaty, "shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute."

408. As per TPA Articles 10.17(2) and 10.18(2)(a) (see ¶¶ 270 and 271 above), First Claimant provided its consent to arbitration by submitting its claim to arbitration under the TPA.[443]

409. TPA Article 10.16 addresses the submission of a claim to arbitration (see ¶¶ 264-269 above), while TPA Article 10.18 sets out conditions and limitations on the consent of each TPA Party (see ¶ 271 above).

410. The Tribunal further notes that pursuant to TPA Article 10.15, "the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures." (see ¶ 263 above).

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442 The ICSID Convention entered into force for Peru on 8 September 1993.

443 *See* Request for Arbitration ¶ 259; **C-003**, Resolution and Waiver of the Board of Directors of Latam Hydro, LLC, 14 August 2019; **C-004**, Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., 16 August 2019.

While they were not successful, it is evident from the record that the Parties have engaged in such consultations and negotiations prior to Claimants commencing this arbitration (see, *inter alia*, ¶¶ 164-167, 191-196, 200-203 above).

411. Respondent raises two objections with respect to the Tribunal's jurisdiction *ratione voluntatis*. Respondent's objections relate to requirements under the TPA, specifically as to the waiver of multiple actions and the requirement to provide notice of claims. The Tribunal shall address each of these objections in turn.

a. Waiver Requirement: Multiple Actions

412. TPA Article 10.18(2) provides that a claim cannot be submitted to arbitration unless, *inter alia*, the notice of arbitration is accompanied by written waivers by the claimant and the relevant enterprise (i.e., Second Claimant), of:[444]

> …any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

413. This waiver requirement falls under TPA Article 10.18 entitled "Conditions and Limitations on Consent of Each Party." The Tribunal understands the waiver requirement to be a condition on Respondent's consent to arbitrate under the TPA, in the absence of which "[n]o claim may be submitted to arbitration under this Section [of the TPA]."[445]

(i) The Parties' Views on the Waiver Requirement

414. Respondent contends that the waiver requirement includes a requirement for Claimants to waive initiation of any proceeding or action before any tribunal, whether the same tribunal or separate tribunals, for the purpose of challenging a measure that is the subject of an action under the TPA.[446]

444 *See* full text at ¶ 271 above.

445 **C-001/RL-051**, TPA, Art. 10.18(2).

446 Rejoinder ¶ 443.

415. Respondent argues, in this respect, that the claims based on the TPA and on the RER Contract constitute multiple proceedings contrary to the waiver requirement, because they are brought by different claimants and derive from different instruments with different consent and arbitrator selection requirements.[447] In Respondent's view, Claimants' attempt to obtain compensation for the same alleged damage based on the same measures is the type of duplication of remedies that the waiver requirement seeks to avoid.[448]

416. Contrary to Claimants' argument that the waiver requirement only prohibits multiple actions in separate proceedings, Respondent submits that the waiver requirement prohibits duplicative proceedings against the same State measures, regardless of whether those proceedings are brought before the same tribunal or before different tribunals.[449]

417. In support of its argument that the waiver requirement is breached, Respondent relies on: (i) Claimants' conduct in initiating two parallel direct dealings in relation to the dispute with MINEM and the Special Commission; (ii) the broad wording of the waiver requirement in the TPA without qualification, which refers to "any right" to initiate or continue before "any administrative tribunal or court…or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach…," which in Respondent's view covers international arbitrations;[450] (iii) the decision in *Renco v. Peru*, which adopted a broad interpretation of the TPA waiver requirement as prohibiting future as well as simultaneous parallel proceedings;[451] (iv) the object and purpose of the waiver requirement, namely to prevent a claimant from bringing multiple actions against the same measures and to reduce costs associated with defending claims under various legal instruments;[452] and (v) the context of the waiver requirement in the TPA, being one

447 Counter-Memorial ¶ 502; *citing* **C-002**, RER Contract, Clause 11.3(a) and (b).

448 Counter-Memorial ¶ 509.

449 Rejoinder ¶ 430.

450 Counter-Memorial ¶¶ 504-505; *citing* **RL-078**, Vienna Convention on the Law of Treaties; *also quoting* **RL-051/C-001**, TPA, Art. 10.18(2)(b).

451 Counter-Memorial ¶ 506; *quoting* **RL-079**, *The Renco Group Inc. v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 83.

452 Counter-Memorial ¶ 508; *quoting* **RL-078**, Vienna Convention on the Law of Treaties, Art. 31(1); **RL-080**, *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/98/2, Non-Disputing Party Submission of Canada, 17 December 1999, ¶ 8.

of the "Conditions and Limitations on Consent of Each Party," which seeks to provide legal certainty for the State and impose limitations on proceedings of a claimant investor.[453]

418. Claimants disagree with Respondent's argument that they have failed to comply with the waiver requirement by virtue of having filed two categories of claims in this arbitration.[454] They argue that the ordinary meaning of the waiver requirement does not apply to different claims brought in the same arbitration proceeding.[455]

419. Claimants further deny that they have violated the waiver requirement by the fact that their different claims concern the same "measures."[456]

(ii) VCLT Interpretation of the Waiver Requirement

420. In order to decide upon this objection, both Parties propose,[457] and the Tribunal agrees, that the waiver requirement in TPA Article 10.18(2)(b) should be interpreted in accordance with the rules set out in the VCLT.

421. Article 31(1) of the VCLT provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[458] The Tribunal shall first consider the ordinary meaning of TPA Article 10.18(2)(b), before turning to its context, followed by its object and purpose.

(a) Ordinary meaning of TPA Article 10.18(2)(b)

422. In respect of the ordinary meaning of the terms of TPA Article 10.18.2(b), Respondent argues that the language is categorical in prohibiting claims contrary to its requirement and is broad in scope (see ¶ 417 above).[459]

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453 Counter-Memorial ¶ 510; *citing* **RL-051/C-001**, TPA, Art. 10.18(4)(b). *See also* Counter-Memorial ¶¶ 511-512.

454 Reply ¶ 328.

455 Reply ¶¶ 333-334.

456 Reply ¶ 342; *quoting* Schreuer Report ¶ 106.

457 Reply ¶ 330; Rejoinder ¶ 431; *quoting* **RL-078**, Vienna Convention on the Law of Treaties, Art. 31(1).

458 **RL-078**, Vienna Convention on the Law of Treaties, Art. 31(1).

459 Rejoinder ¶ 433.

423. Having carefully reviewed the text of TPA Article 10.18(2)(b) and the Parties' positions with respect thereto, the Tribunal agrees with Respondent that the wording "any right," "any administrative tribunal or court," "any proceeding" and "any measure" gives breadth to the required waiver. The specific wording must still be given effect in accordance with its terms.

424. In Respondent's view, Claimants' interpretation of the waiver requirement and the term "proceeding" therein ("any proceeding with respect to any measure," see ¶ 412 above) requires adding the term "separate" which does not appear in the TPA, and ignores the meaning of the term "*actuación*" (procedure) appearing in the Spanish version, as well as the meaning of "proceeding" in the English version.[460]

425. Respondent submits that the Spanish term "*actuación*" covers both the entire set of steps in a proceeding as well as specific steps that make up only part of the same proceeding.[461] This is confirmed, it argues, by the use of the term "*actuación*" in TPA Articles 10.20(4)(b) and 10.20(5), both of which refer to the suspension of "*cualquier actuación*" in the sense of proceedings in the same arbitration. The same meaning is given, Respondent submits, to "*actuaciones*" in ICSID Arbitration Rule 29.[462] Accordingly, it says, the reference to "*cualquier actuación*" in the waiver requirement is not limited exclusively to proceedings in separate or distinct proceedings.[463]

426. Respondent further relies on the references to "any proceedings on the merits" in the English version of TPA Articles 10.20.4(b) (addressing certain objections as a preliminary question) and 10.20.5 (expedited decision on certain objections) which in the Spanish version of those Articles is "*cualquier actuación.*" On the basis that the English and Spanish versions are equally authentic, and that the terms of a treaty are presumed to have

460 Rejoinder ¶ 437.

461 Rejoinder ¶ 438.

462 Rejoinder ¶ 442.

463 Rejoinder ¶¶ 439-441; *quoting* **RL-051/C-001**, TPA, Arts. 10.20.4(b), 10.20.5. *See also* Rejoinder ¶ 444; *quoting* **RL-051/C-001**, TPA, Arts. 10.20.4(b), 10.20.5.

the same meaning in each authentic text, Respondent argues that the same meaning in English and Spanish must apply.[464]

427. Claimants, on the other hand, contend that the requirement to waive recourse to "any" proceeding only encompasses claims pursued in a "different" arbitration proceeding to the one in which it has brought the action.[465] Moreover, in Claimants' view, the waiver does not contemplate proceedings before an ICSID tribunal, which is not "under the law of any Party" but rather under international law.[466]

428. The Tribunal is not persuaded that the waiver requirement is inapplicable to proceedings before an ICSID tribunal *per se*. The text of the provision distinguishes between any proceeding "before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures." There is no qualification that such "other dispute settlement procedures" must be one "under the law of any Party" as is contemplated in relation to the court or administrative tribunal proceedings.

429. However, the Tribunal does not agree with Respondent that the waiver requirement obliges Claimants to waive Second Claimant's right to bring its claims under the RER Contract in the same arbitration commenced for First Claimant's claims under the TPA (which comprise both alleged breaches of the TPA, and alleged breaches of an "investment agreement" covered by the TPA).[467] The words "other dispute settlement procedures" in TPA Article 10.18 are the only language which could conceivably apply to arbitration proceedings. The ordinary meaning of the word "other" necessarily entails proceedings other than the one in which the waiver is being given. As Claimants point out, it means "not the same" and "different."[468] The addition of the word "separate" is not necessary to give this meaning.

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464 Rejoinder ¶¶ 444-445; *quoting* **RL-051/C-001**, TPA, Arts. 10.20.4(b), 10.20.5; *also citing* **RL-078**, Vienna Convention on the Law of Treaties, Art. 33; **RL-051/C-001**, TPA, Art. 23.6.

465 Reply ¶ 335.

466 Reply ¶ 337; *quoting* Schreuer Report ¶ 52.

467 Memorial ¶¶ 188, 224; Reply ¶ 314; **CD-01**, Claimants' Opening Presentation, slide 54.

468 Reply ¶ 334.

430. Respondent argues that the word "other" is not opposed to proceedings under the TPA but refers to proceedings based on a different legal instrument, in this case being the RER Contract.[469] However, TPA Article 10.18(2)(b) refers to a "proceeding", and not to the legal instrument under which a claim is brought.

431. TPA Articles 10.20.4(b) and 10.20.5 do not assist Respondent, since they refer not to "any proceedings" in general but to "any proceedings on the merits" ("*cualquier actuación sobre el fondo*").[470] This qualification confirms the distinction from the more general "any proceeding" ("*cualquier actuación*") referred to in TPA Article 10.18(2), and there is no inconsistency between the English and Spanish authentic texts of the TPA.

432. In a situation where Claimants have concurrent rights to bring a claim based on the RER Contract and a claim under the TPA which are compatible to be brought in a single arbitration proceeding under the ICSID Convention, the claim based on the RER Contract is not a relevant "other dispute settlement procedure" to be waived.

433. Respondent further alleges that the TPA and the RER Contract contain different and even contradictory requirements for consent to arbitration, and contradictory methods for the selection of the presiding arbitrator, citing the RER Contract's: (i) Spanish language requirement; (ii) time limit for the rendering of an award; (iii) and the USD 20 million threshold for submitting disputes under the ICSID Convention. [471]

434. However, Respondent has not identified how the differences between the two instruments of consent are incompatible. Specifically, the fact that the RER Contract contains a USD 20 million threshold (which is reached for Claimants' claims in the present case) is not incompatible with the TPA simply because it contains no such threshold. In the same way, the specification in the RER Contract that the arbitration will be conducted in Spanish and that the award will be rendered within an identified time limit is not inconsistent with the

469 Rejoinder ¶ 446; *see* Reply ¶ 334.

470 **RL-051/C-001**, TPA, Arts. 10.20.4(b), 10.20.5.

471 Counter-Memorial ¶ 502.

TPA which includes no such requirements. Nor has any issue been raised with respect to the method for the selection of the presiding arbitrator.

435. The Tribunal observes, in this respect, that Respondent merely alleges an incompatibility but does not actually object to the language arrangements, procedural timetable or selection of the presiding arbitrator that have been adopted in this arbitration, and could hardly do so in light of its procedural agreements with Claimants and its conduct in carrying out those agreements in the course of these proceedings.

436. This includes the Parties' agreement to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention (see ¶ 15 above). Further agreements are recorded in Respondent's correspondence of 23 April 2020 and incorporated in PO 2 dated 13 May 2020 (see ¶ 28 above), i.e., (i) on a joint proposed procedural calendar exceeding the time limit for rendering an award identified in the RER Contract;[472] (ii) specifying that the Tribunal "will draft all rulings, including the award, within a reasonable time period";[473] (iii) that both English and Spanish shall be the procedural languages of the arbitration (with the Tribunal adopting Respondent's preferred text in relation to the language of written requests and applications);[474] and (iv) confirming "that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal."[475]

437. As for Respondent's argument based on the term "*actuación*" used in the equally authentic Spanish version of the TPA, as Respondent acknowledges (see ¶ 425 above), this term can cover both the entire set of steps in a proceeding as well as only specific steps that make up only part of the same proceeding. This is of no assistance to Respondent as the "proceeding" or "*actuación*" referred to must still be "other" than the present one, as is clear from the first part of the sentence.

472 Respondent's Email of 23 April 2020, second attachment, "Annex A – Procedural Order No. 2."

473 PO 2, ¶ 5.3.

474 PO 2, ¶¶ 11.1, 11.3.

475 PO 2, ¶ 2.1.

438. Moreover, Respondent's proposed interpretation of the waiver provision focuses on whether the measures underlying the proceedings are the same, rather than having the same claims or proceedings.[476] If the focus is on the identity of the measures, as Respondent asserts, it is unclear on what basis Second Claimant's claims under the RER Contract are to be understood as "other" proceedings, but First Claimant's claims on behalf of Second Claimant under the TPA (for alleged breach of the RER Contract) are not.

439. In reaching this conclusion on the ordinary meaning of the terms in the waiver, the Tribunal has taken into account the opinion of Prof. Reisman in *Pac Rim v. El Salvador* relied on by Respondent, in which he was asked by the respondent State to opine on an identical clause, and commented that the waiver:[477]

> …must apply to proceedings brought before the same tribunal. Had the drafters wished to create an exception to the waiver, they would have qualified the breadth of the language used and included restrictive language.

440. This opinion was ultimately not affirmed by the decision of the tribunal in that case (see ¶ 454 below), and is also not a view adopted by the present Tribunal. The Tribunal does not consider the waiver to require an "exception" for proceedings brought before the same tribunal, since the ordinary meaning and full effect of the terms does not cover proceedings before the same tribunal.

441. As for Respondent's argument that its proposed interpretation is confirmed because the RER Contract does not fulfil the requirements to be considered an "investment agreement" under TPA Article 10.16,[478] the Tribunal considers this to be a separate matter that shall be addressed at ¶¶ 496 *et seq.* below.

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476 Counter-Memorial ¶ 513; *quoting* **RL-051/C-001**, TPA, Art. 10.18(2)(b); Counter-Memorial ¶¶ 513-515; *citing* Request for Arbitration ¶¶ 238-241; Memorial ¶¶ 260, 284-307, 309-320, 321-333, 334-344, 345-355, 368, 372, 373, 375, 391, 392, 393, 394, 439, 451, 453, 454, 455, 474, 475, 476, 477, 478.

477 Rejoinder ¶ 436; *quoting* **RL-200**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on the International Legal Interpretation of the Waiver Provision in Chapter 10 of DR-CAFTA, 22 March 2010, ¶ 30.

478 Rejoinder ¶ 455; *see also* Rejoinder § III.E.

(b) Context of TPA Article 10.18(2)(b)

442. The Tribunal finds nothing in the context of the waiver requirement in the TPA that would indicate a different meaning than that conveyed by the ordinary meaning of its terms.

443. TPA Article 10.18(4) uses the term "other binding dispute settlement procedure," which is relied on by Respondent to assert that the Treaty prohibits duplicative proceedings, regardless of the forums before which they are brought.[479] However, this does not add to the analysis above, since it also refers to "other" dispute settlement procedures, which has already been interpreted above.

444. As for the other clauses in TPA Article 10.18, which relate to conditions and limitations on the consent to arbitrate, in Respondent's view these serve to confirm that the waiver requirement is designed to protect Treaty parties from abusive situations including facing multiple proceedings against the same measures, such as the situation created by Claimants.[480] Relying on the Opinion of Prof. Reisman in *Pac Rim*, Respondent argues that Claimants must choose which type of claim to bring.[481]

445. The Tribunal does not agree that the other conditions and limitations on consent set out in TPA Article 10.18 confirm Respondent's interpretation of the waiver requirement, which presupposes that the present (single) arbitration proceeding is in fact "multiple" proceedings by virtue of Claimants having more than one legal basis for their claims. The conditions and limitations set out in TPA Article 10.18 are each to be given full effect in accordance with their terms, including the waiver requirement.

446. Respondent further contends that the allowance in TPA Article 10.16 that a claimant may bring a claim alleging that a respondent has breached: "(A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement," confirms that the claims

479 Rejoinder ¶ 447(d).

480 Rejoinder ¶ 448; *quoting* **RL-200**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on the International Legal Interpretation of the Waiver Provision in Chapter 10 of DR-CAFTA, 22 March 2010, ¶ 28.

481 Rejoinder ¶ 454; *quoting* **RL-200**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on the International Legal Interpretation of the Waiver Provision in Chapter 10 of DR-CAFTA, 22 March 2010, ¶ 44.

can only concern one of these three types of breaches.[482] Claimants rely on the same provision to argue, to the contrary, that the TPA allows a claimant to pursue different types of claims, and as such a claimant cannot reasonably be required to waive its contract claims in order to pursue treaty claims.[483]

447. The Tribunal does not find the context of Article 10.18(2)(b) to add significantly to its interpretation of the waiver provision. The different types of claims set out under TPA Article 10.16 relate to those that may be brought under the Treaty, and neither confirm nor exclude the possibility that contractual claims may be brought in the same arbitration proceedings in relation to the same measures.

(c) Object and Purpose of TPA Article 10.18(2)(b)

448. Respondent submits that Claimants' interpretation of TPA Article 10.18(2)(b) is contrary to its object and purpose. Respondent argues that the purpose of the waiver requirement is not only to eliminate double recovery or inconsistent decisions from multiple decisions in different forums, but also multiple claims against the same measures, under different instruments.[484] In Respondent's view, relying on the opinion of Prof. Reisman in *Pac Rim*, the jurisdictional requirement of the TPA intends to preclude the costs and inequities associated with multiple claims based on the same measures, which bring an unavoidable imbalance in procedural rights.[485]

449. In this regard, Respondent argues that the investor has full discretion to choose to exercise its rights under an investment agreement, or under the TPA. However, if it chooses the TPA, Respondent argues that it must comply with the Treaty's requirements, including

482 Rejoinder ¶¶ 450-451; *quoting* **RL-051/C-001**, TPA, Arts. 10.16.1(a), 10.16.1(b).

483 Reply ¶ 340; *quoting* Schreuer Report ¶ 69.

484 Rejoinder ¶ 461; *see* Reply ¶ 345.

485 Rejoinder ¶¶ 462-463; *quoting* **RL-200**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion on the International Legal Interpretation of the Waiver Provision in Chapter 10 of DR-CAFTA, 22 March 2010, ¶¶ 32, 38.

waiver of simultaneous or consecutive dispute resolution mechanisms relating to the same State measures.[486]

450. Claimants contend, on the other hand, that their claims are in line with the purpose of the waiver requirement, i.e.: (i) avoidance of potentially inconsistent determinations in fact and law; (ii) minimisation of the risk of double recovery; and (iii) avoidance of multiple proceedings in different fora.[487] The purpose to avoid duplication of proceedings between international arbitration and domestic courts is confirmed, according to Claimants, by several arbitral tribunals and by the opinion of Professor Schreuer.[488]

451. For Claimants, the *Renco v. Peru* case relied on by Respondent is inapposite since: (i) the claimant had reserved its right to resort to domestic courts, which Claimants have not done; and (ii) unlike the present case, the dispute related to separate proceedings, i.e., the ICSID case and potential domestic litigation.[489]

452. The Tribunal concurs with Claimants that the purpose of the waiver requirement includes to avoid inconsistent determinations, to minimise the risk of double recovery, and to avoid the time and cost inefficiencies and legal uncertainty of multiple proceedings in different forums.

453. The Tribunal finds no basis for Respondent's asserted additional purpose of avoiding multiple claims against the same measures under different instruments (see ¶ 448 above), in circumstances where such multiple claims are brought in the same arbitration proceeding. To the contrary, the TPA clearly contemplates multiple claims against the same measures by allowing a claimant to submit claims both on its own behalf and

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486 Rejoinder ¶¶ 456-457; *quoting* **RL-201**, *The Renco Group Inc. v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Second Submission of the United States of America, 1 September 2015, ¶ 4.

487 Reply ¶ 341; *citing* Schreuer Report ¶ 69. *See also* Reply ¶ 344; *quoting* Schreuer Report ¶ 55; *also citing* **RL-079**, *The Renco Group Inc. v. the Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 84.

488 Reply ¶¶ 345-346; *quoting* Schreuer Report ¶ 61; **CL-192**, *Waste Management Inc. v. The United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 31; **CL-043**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶ 5.45.

489 Reply ¶ 339; *citing* **RL-079**, *The Renco Group Inc. v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 58.

(separately) on behalf of an entity it owns or controls, giving a choice of legal instrument on which each such claim may be based (i.e., the TPA, an "investment authorization" or an "investment agreement," see ¶ 264 above).

454. The Tribunal subscribes to the determination of the *Pac Rim v. El Salvador* tribunal, in this respect, that there is "no juridical difficulty in having an ICSID arbitration based on different claims arising from separate investment protections and separate but identical arbitration provisions" and that this solution is in fact in line with "fairness, consistency and procedural efficiency in international arbitration."[490]

(iii) Conclusion on the Waiver Requirement

455. For the above reasons, the Tribunal considers that Claimants have complied with the waiver requirement in TPA Article 10.18(2)(b) by submitting their written waivers together with the Request for Arbitration. Even if they are brought under different legal instruments, Claimants' claims made in these proceedings are not inconsistent with the waiver, since they are made in the same arbitration proceeding before the same Tribunal.

456. With respect to the different legal instruments, the Tribunal's jurisdiction must be established according to the applicable law relevant to each. Contrary to Respondent's submission,[491] Second Claimant's claims made directly under the RER Contract do not seek to evade in an illegitimate manner the limitations on consent under the TPA, but are subject to any requirements under the RER Contract and the ICSID Convention, as shall be addressed at ¶¶ 560 *et seq.* below.

b. Notice Requirement: Criminal Investigation Claims

457. Respondent objects to the Tribunal's jurisdiction over one part of First Claimant's claims for alleged failure to comply with the notice requirement under the TPA. This concerns the claims relating to the Criminal Investigation and Criminal Proceedings.[492] According to Respondent, without giving prior notice, in their Request for Arbitration Claimants alleged

490 **CL-043**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, ¶ 5.45.

491 Rejoinder ¶¶ 452-453; *quoting* Schreuer Report ¶ 69; **RL-051/C-001**, TPA, Art. 10.18.1.

492 Counter-Memorial ¶¶ 518, 526; Rejoinder ¶ 467.

for the first time a breach of the TPA on the basis of: (i) Respondent's initiation and formalisation of the Criminal Investigation against Second Claimant's External Counsel; and (ii) Respondent's declared intention to bring the Criminal Proceedings against Second Claimant.[493]

458. TPA Article 10.16(2) provides, with respect to notice, as follows:[494]

> At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:
>
> (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
>
> (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
>
> (c) the legal and factual basis for each claim; and
>
> (d) the relief sought and the approximate amount of damages claimed.

(i) Nature of the Notice Requirement

459. The Parties disagree as to whether the notice requirement is a jurisdictional rule or a procedural requirement only, and therefore whether failure to comply with the notice requirement means that the Tribunal has no jurisdiction over the Criminal Investigation Claims. While Claimants do not explicitly classify the notice and wait requirement as going to the admissibility of their claim, the Tribunal understands their reference to a "procedural requirement only" to mean an admissibility requirement.

460. For Respondent, the requirement is a jurisdictional one going to its consent to arbitrate, citing recent decisions in support of this view.[495] Respondent further submits that the

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493 Counter-Memorial ¶ 521; *citing* **RL-051/C-001**, TPA, Art. 10.16(2)(c); **C-023**, Latam Hydro LLC and CH Mamacocha, S.R.L.'s Notice of Intent to Submit a Claim to Arbitration, 28 May 2019.

494 **C-001/RL-051**, TPA, Art. 10.16(2).

495 Rejoinder ¶¶ 470, 483-487; *quoting* **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 191; **RL-230**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C v.*

Tribunal's decision must be based on the wording of the TPA, and not on other arbitral decisions involving different treaties.[496] In Respondent's view, the context of the notification requirement in TPA Article 10.16 likewise confirms its jurisdictional character.[497]

461. For Claimants, the notice and wait provisions are procedural in nature and do not affect the Tribunal's jurisdiction.[498] Regarding the consequences of it being considered a procedural requirement, Claimants rely on the decision in *Casinos Austria v. Argentina* that pre-arbitral steps can also be fulfilled subsequent to the initiation of arbitration, until a decision on jurisdiction is taken.[499] According to Claimants' expert Prof. Schreuer, other tribunals have found that notice and wait provisions were hortatory, or there was no need to comply with a waiting period that would have been futile.[500]

462. The Tribunal considers it important to focus on the precise question before it in this case, by reference to the wording of the TPA. To that extent, prior arbitral decisions relied on by the Parties which were based on different procedural circumstances and different treaty wording are of limited assistance.

State of Kuwait, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, ¶ 39; **CL-032**, *Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 390; *also citing* **RL-244**, *Enron Corp. and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 88; **RL-231**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 14.3. *See also* Rejoinder ¶ 482; *quoting* **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 198; *also citing*, *inter alia*, **RL-224**, *B-Mex, LLC, et al v. The United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Dissenting Opinion of Raúl E. Vinuesa, 6 July 2019, ¶¶ 61, 69; **RL-223**, *David R. Aven et al v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶ 346.

496 Rejoinder ¶ 490.

497 Rejoinder ¶ 477.

498 Reply ¶¶ 351-355; *quoting* **RL-130**, *SGS Société Génerale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, ¶ 184; **RL-044**, *Bayindir Inşaat Turizm Tikaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 95, 99, 100; Schreuer Report ¶ 89; *also citing* Schreuer Report ¶¶ 84-86.

499 **CL-120**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶ 280. *See* **CD-01**, Claimants' Opening Presentation, slide 70.

500 Schreuer Report ¶ 88; *see* cases cited in footnotes 111 and 112.

463. To the extent that Claimants' proposed interpretation of the notice requirement would deprive the wording of the TPA of its meaning, the Tribunal does not accept that the notice requirement is a discretionary rule that may be disregarded without consequence. Reading the ordinary meaning of the terms of TPA Article 10.16(2) (see ¶ 265 above), it specifies in mandatory language that a claimant "shall deliver to the respondent" a notice, which "shall specify" a number of enumerated items. Those items include the alleged provision of the TPA breached "for each claim" and the "legal and factual basis for each claim."[501] These words of the TPA must be given effect.

464. As held by the Tribunal in *Kappes v. Guatemala* when interpreting a similar provision under the DR-CAFTA:[502]

> The notice is not characterized as a merely illustrative document, articulating some subset of known claims while omitting others, but rather as a mandatory precondition, requiring advance provision of information regarding all claims the claimant intends to submit to arbitration.

465. The mandatory nature of the notice provision is consistent with its context and with its object and purpose. TPA Article 10.16(2) appears under a set of provisions dealing with "Submission of a Claim to Arbitration." The premise for the submission of a claim to arbitration is that a disputing party "considers that an investment dispute cannot be settled by consultation and negotiation."[503] Before submitting a claim under TPA Article 10.16(1), Articles 10.16(2) and 10.16(3) set out relevant notice ("[a]t least 90 days before submitting any claim to arbitration…") and waiting ("[p]rovided that six months have elapsed since the events giving rise to the claim…") requirements. One key purpose of the notice requirement is therefore to provide an opportunity for potential settlement of a claim by consultation or negotiation.

466. Other purposes include those identified by the *Kappes v. Guatemala* tribunal:[504]

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501 **C-001**/**RL-051**, TPA, Art. 10.16(2)(b) and (c).

502 **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 191.

503 **C-001**/**RL-051**, TPA, Art. 10.16(1).

504 **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 198.

> …there are several purposes of such [notice and waiting] requirements, including to enable the respondent State to investigate the claim, conduct such dispute settlement negotiations as it considers appropriate, and to take initial steps to organize its defense prior to the proceedings getting underway.

467. Whether this mandatory requirement is characterised as a condition of the State's consent, or as a question of admissibility, it must be given effect. The Tribunal rejects the contention that it need not be complied with.

468. Respondent alleges a lack of notice in respect of the Criminal Investigation Claims. This is not, however, a case in which no notice was given to Respondent of the anticipated claims to be submitted in arbitration. As set out in the factual background, three Notices of Intent were issued on: (i) 19 June 2017 (First Notice of Intent, withdrawn on 17 April 2018 see ¶¶ 161 and 181 above);[505] (ii) 8 March 2018 (Second Notice of Intent, see ¶ 195 above);[506] and 28 May 2019 (Third Notice of Intent, see ¶ 219 above).[507] The First Notice of Intent and the Second Notice of Intent were notices to submit a dispute to consultation and negotiation under TPA Article 10.15. The Third Notice of Intent expressed the intent to submit claims to arbitration under TPA Article 10.16. The Third Notice of Intent is the relevant one for the purposes of the present question under TPA Article 10.16.

469. This objection therefore concerns an allegedly defective notice, for failure to include the Criminal Investigation Claims. This is not a situation where no notice under TPA Article 10.16(2) was given.

470. The objection under consideration by the Tribunal therefore concerns the narrow question of whether the Criminal Investigation Claims may be decided upon by the Tribunal, since they were not included in the Third Notice of Intent but were included in the Request for Arbitration.

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505 **C-252**/**MQ-018**, Latam Hydro LLC and CH Mamacocha S.R.L.'s First Notice of Intent, 19 June 2017; **C-267**, Letter from CH Mamacocha S.R.L. to R. Ampuero notifying withdrawal of first Notice of Intent, 17 April 2018.

506 **C-170**, Latam Hydro LLC and CH Mamacocha SRL's Second Notice of Intent, 8 March 2018.

507 **C-023**, Latam Hydro LLC and CH Mamacocha, S.R.L.'s Notice of Intent to Submit a Claim to Arbitration, 28 May 2019.

(ii) Whether the Criminal Investigation Claims May be Decided

471. In order to determine whether the Criminal Investigation Claims may be decided by the Tribunal, consideration must be given to the level of detail that is required to fulfil the notice requirement in TPA Article 10.16(2)(b), and in what circumstances additional facts or claims may be made subsequently.

472. Claimants assert that a notice of intent does not have to be complete or exhaustive.[508] However, the prior arbitral decisions referenced by their expert Prof. Schreuer in support of that assertion almost exclusively concern the level of detail required for a request for amicable settlement or representations made during consultation and negotiation, and not a notice requirement for submission to arbitration analogous to that under TPA Article 10.16.[509]

473. Another case cited by Prof. Schreuer that did deal with notice requirements (a 2003 NAFTA decision in *ADF Group v. United States*) was not deciding on a situation of additional facts or claims, but whether all "relevant provisions" of NAFTA were included in the notice.[510]

474. Of greater relevance, in the NAFTA case of *Mesa Power v. Canada*, the tribunal held that in a notice of intent the investor "must articulate its claims with a reasonable degree of

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508 Reply ¶ 357; *citing* Schreuer Report ¶ 93.

509 *See*, *e.g.*, **RL-068**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 57; **CL-051**, *Salini Construttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 20; **RL-231**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 14.5; **CL-109**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 339; **CL-090**, *Greentech Energy Systems A/S and others v. Italian Republic*, SCC Case No. V (2015/095), Final Award, 23 December 2018, ¶ 213; **CL-114**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, ¶ 338; **CL-173**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶ 223; **CL-134**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶ 318; **RL-112**, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 355; **CL-110**, *Belenergia S.A v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 28 August 2019, ¶ 366.

510 **RL-138**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, ¶ 136.

specificity."[511] That case concerned new facts arising after the notice of intent, which the tribunal held to be within the tribunal's jurisdiction if "sufficient events giving rise to a claim exist six months prior to the submission of the dispute to arbitration."[512]

475. The Tribunal agrees that a reasonable degree of specificity of the "legal and factual basis for each claim" is required when giving notice under TPA Article 10.16(2). The Tribunal further agrees with Respondent that, on the other hand, merely general information about the dispute does not suffice.[513]

476. The Third Notice of Intent alleges that Respondent breached its obligations under the TPA and customary international law, and separately under the RER Contract. With respect to the TPA, Claimants submitted that Respondent had violated: (i) protections accorded to First Claimant's investment under TPA Article 10.5 and customary international law; (ii) TPA Article 10.7 by indirectly expropriating First Claimant's investment; and (iii) TPA Article 10.4 by treating First Claimant less favourably than investors from other countries.[514] Claimants set out a number of different events and circumstances which they considered to constitute interferences with the Mamacocha Project as the basis for the alleged breaches.[515]

477. In the Request for Arbitration, the same alleged breaches of the TPA are put forward by Claimants, i.e., TPA Articles 10.4, 10.5 and 10.7.[516] The factual circumstances described as "interferences with the Mamacocha Project" are also almost identical, with only two types of additions. The first relates to the Criminal Investigation Claims and the denial of the Civil Works Authorization, which are mentioned for the first time in addition to the

511 **RL-136**, *Mesa Power Group v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 297.

512 **RL-136**, *Mesa Power Group v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 301.

513 *See* Rejoinder ¶ 478; *quoting* **RL-051/C-001**, TPA, Art. 10.15.

514 **C-023**, Latam Hydro LLC and CH Mamacocha, S.R.L.'s Notice of Intent to Submit a Claim to Arbitration, 28 May 2019, §§ VII.A, VII.B, VII.C.

515 **C-023**, Latam Hydro LLC and CH Mamacocha, S.R.L.'s Notice of Intent to Submit a Claim to Arbitration, 28 May 2019, §§ VI.A-L.

516 Request for Arbitration, §§ V.A, V.B. V.C.

RGA Lawsuit as part of the RGA bringing the Mamacocha Project to an "abrupt halt."[517] Respondent has not objected to the inclusion of the denial of the Civil Works Authorization in the Request, which is mentioned 19 times in the Request, but does not appear in the Third Notice of Intent. An additional subheading is dedicated entirely to the Criminal Investigation Claims ("The RGA Retaliated by Bringing Unfounded Criminal Charges against CHM's Lead Peruvian Lawyer").[518]

478. The other addition to the Third Notice of Intent which appears in the Request is alleged circumstances that post-date the Third Notice, i.e., (i) "MINEM's December 2018 Measures Ended the Mamacocha Project"; and (ii) "Claimants' Attempts to Resolve this Matter through Consultation."[519] Respondent has not raised an objection to the inclusion of these new matters in the Request.

479. The fact that specific relief has been formulated in relation to the Criminal Investigation Claims in the Request for Arbitration is not determinative, as the specification of relief sought at the time of the notice of intent is indicative only ("relief sought and the approximate amount of damages claimed").[520]

480. It should be noted that at the time of the Third Notice of Intent, alleged facts and circumstances relating to the Criminal Investigation Claims had already arisen. Claimants contend that at the time of their Third Notice of Intent dated 28 May 2019, they were still assessing the nature and impact of the AEP's investigation which closed on 2 May 2019. Formal charges against Second Claimant's External Counsel were not lodged until 18 October 2019, five months after the Third Notice of Intent.[521] In Respondent's view, these later events did not substantially alter the matters that Claimants were already informed of

517 Request for Arbitration, § IV.F.
518 Request for Arbitration, § IV.I.
519 Request for Arbitration, §§ IV.M, N.
520 **C-001/RL-051**, TPA, Art. 10.16(2)(d).
521 Reply ¶ 363.

before the Third Notice of Intent, and Claimants' position is inconsistent with other submissions.[522]

481. While the Criminal Investigation had already commenced at the time of the Third Notice of Intent, the announcement that the investigation was complete was only made on 2 May 2019,[523] a few weeks before the filing of the Third Notice of Intent, with charges brought in October 2019 (see ¶¶ 187-188 above). As such, these factual circumstances were still developing at the time notice was given, and indeed at the time of the Request for Arbitration of 30 August 2019.

482. The Tribunal does not consider that Claimants failed to identify the legal and factual basis for each of their claims, as required by TPA Article 10.16(2)(c). The legal basis for their claim did not change between the Third Notice of Intent and the Request. The inclusion of the additional factual matters relating to the Criminal Investigation Claims are further additional bases for the existing claims, in the same way as the denial of the Civil Works Authorisation which has not been objected to. In this respect, it is not required that the Notice of Intent set out every factual circumstance in minute detail, as long as the factual basis for each claim can be derived with reasonable specificity.

483. Importantly, by the omission of the Criminal Investigation Claims from the Third Notice of Intent, Respondent was not deprived of the opportunity to consult and negotiate with Claimants in relation to the dispute, to investigate the claims that would be made against it in arbitration, or to organise its defence. The Third Notice of Intent sets out in detail the factual basis for the claims.

484. In light of the foregoing, the Tribunal considers that Claimants fulfilled the notice requirement in this case by: (i) setting out each alleged breach of the TPA, including the

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522 Rejoinder ¶ 498; *quoting* Reply ¶ 179; Rejoinder ¶ 499; *quoting* Request for Arbitration ¶¶ 31, 184; *also citing* Second Claimant's External Counsel First Statement ¶¶ 48, 51, 53; Rejoinder ¶ 500; *quoting* Request for Arbitration ¶¶ 184, 191, 229, 231. *See also* Rejoinder ¶ 501; *citing* Memorial ¶¶ 311, 312, 376, 380.

523 **R-113**, *Disposición Fiscal No. 08-2019-FPEMA-MP-AR, Fiscalía Ambiental de Arequipa*, 2 May 2019; Second Claimant's External Counsel First Statement ¶ 58. *See* Memorial ¶ 135; Counter-Memorial ¶ 227.

treaty provisions relevant to each claim; and (ii) describing the factual circumstances alleged to form the basis of each claim with a reasonable degree of specificity.

(iii) Incidental or Additional Claims

485. Even if the Criminal Investigation Claims were characterised as separate legal claims or as a separate factual basis for Claimants' claims (which the Tribunal does not consider to be the case), the Tribunal agrees with Claimants that they are not barred by the TPA or the ICSID Arbitration Rules from raising them in the Request for Arbitration.[524] In this respect, both the TPA and the ICSID Convention and ICSID Arbitration Rules contemplate the admission of potential claims "asserted by the claimant for the first time after such notice of arbitration is submitted."[525]

486. Article 46 of the ICSID Convention and ICSID Arbitration Rule 40 deal with the admission of an "incidental or additional claim … arising directly out of the subject-matter of the dispute."[526] The Tribunal has no question that the Criminal Investigation Claims are incidental to Claimants' claims and arise directly out of the subject-matter of the dispute, being Respondent's alleged interferences in the Mamacocha Project.

487. Respondent objects that incidental claims may only be admitted subject to compliance with the consent requirements of the TPA, including notice.[527] The Tribunal concurs that ICSID Arbitration Rule 40(1) requires that an ancillary claim is "within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre."[528] Article 46 of the ICSID Convention contains almost identical terms. The Tribunal considers, however, that the Criminal Investigation Claims fulfil this requirement. In this respect, the Tribunal agrees with the tribunal in *Kappes v. Guatemala* that the wording of the TPA (which

524 Reply ¶¶ 365-372; *quoting* **C-001/RL-051**, TPA Art. 10.16(4); **RL-092**, ICSID Convention, Art. 46; ICSID Arbitration Rule 40; Schreuer Report ¶ 109; **CL-123**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, ¶¶ 123, 135; *also citing* Schreuer Report ¶¶ 110, 116 119-123.

525 **C-001/RL-051**, TPA, Art. 10.16(4).

526 ICSID Arbitration Rule 40(1).

527 Rejoinder ¶ 516; *quoting* **RL-092**, ICSID Convention, Art. 46; *citing* **RL-223**, *David R. Aven et al v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶ 344. *See also* Rejoinder ¶ 517.

528 ICSID Arbitration Rule 40(1).

mirrors that of the DR-CAFTA in that case) suggests that no additional notice of intent is required for new claims admitted after the notice of arbitration pursuant to the applicable procedural rules (in that case, also the ICSID Arbitration Rules).[529]

488. This is, *inter alia*, clear from: (i) the references to potential amendments to the notice of arbitration in Articles 10.20(4)(a) and 10.20(4)(c), without mentioning recourse to an additional notice period; and (ii) the fact that the TPA cross-references to the ICSID Arbitration Rules and other applicable procedural rules (*see* TPA Articles 10.16(4)(a) and 10.20(4)), which are therefore anticipated to apply to procedural questions addressed by those rules.[530]

489. Respondent argues that TPA Article 10.16(4)(a)[531] only determines the temporal question of when a claim made for the first time after a notice of arbitration is "deemed submitted to arbitration" and does not affect the pre-arbitration notice requirement or the admissibility of the claim.[532] The Tribunal agrees that TPA Article 10.16(4)(a) is not about admissibility of additional claims, which is a matter addressed by the ICSID Arbitration Rules. The point is rather that this provision: (i) presupposes the potential existence of such additional claims, subject to their admissibility under the applicable procedural rules; while (ii) remaining silent as to any additional notice or waiting period that would be required in respect of such claims. The fact that this provision relates to claims submitted to arbitration as opposed to the pre-arbitration notice under TPA Article 10.16(2) does not diminish its relevance, since it would be an illogical result if the admission of additional claims prior to a notice of arbitration is more onerous than additional claims made thereafter.

490. Moreover, any requirement for an additional notice of intent for incidental claims that arise directly out of the subject matter of the dispute would be artificial, contrary to procedural

529 **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶¶ 194-195.

530 *See* **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶¶ 196-197.

531 **C-001/RL-051**, TPA, Art. 10.16(4): "…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."

532 Rejoinder ¶¶ 509, 510, 514.

economy, and inconsistent with the purpose of the dispute settlement provisions of Section B of Chapter 10 of the TPA, which is to provide an effective and efficient mechanism for the resolution of investment disputes. The Tribunal subscribes to the view of the *Kappes v. Guatemala* tribunal that such a requirement would be disruptive and duplicative.[533]

491. The Tribunal does not consider its interpretation to deprive TPA Article 10.16(2) of effect (*effet utile*). That provision is to be given its full effect by requiring a notice to be issued that sets out the matters specified, in order to give the opportunity for the resolution of the dispute, as was done in the present case. The text of this provision (and its context, object and purpose) provides no basis for a requirement of an additional notice for matters which either fall within the already-identified legal and factual basis for each claim, or for claims arising directly out of the subject matter of the dispute which are subsequently admitted by the Tribunal.

(iv) Conclusion on Criminal Investigation Claims and Notice Requirement

492. For the above reasons, the Tribunal determines that the Criminal Investigation Claims are within the jurisdiction of the Tribunal and are admissible, and rejects Respondent's objection to the Tribunal's jurisdiction over those claims.

(4) TPA Jurisdiction *Ratione Materiae*

493. First Claimant makes two types of claims under the TPA: (i) under TPA Article 10.16(1)(a)(i)(A) (see ¶ 264 above), an alleged breach of Respondent's obligation to afford fair and equitable treatment to First Claimant and its investments, to refrain from directly or indirectly expropriating First Claimant's investments, and to treat First Claimant and its investments no less favourably than investors and investments from non-party States;[534] and (ii) under TPA Article 10.16(1)(b)(i)(C) (see ¶ 264 above), an alleged breach of the RER Contract, being an investment agreement between Second Claimant and Respondent.[535]

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533 **CL-126**, *Daniel W Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, 13 March 2020, ¶ 199.

534 Memorial ¶ 208.

535 Memorial ¶ 209; Reply ¶ 379.

494. Respondent makes two objections to the Tribunal's jurisdiction *ratione materiae* over these claims. First, Respondent asserts that the Tribunal has no jurisdiction over First Claimant's claims made on behalf of Second Claimant for alleged breach of the RER Contract, on the basis that the RER Contract is not an investment agreement within the meaning of the TPA.[536] Second, Respondent argues that the Tribunal does not have jurisdiction over First Claimant's claims made with respect to the Upstream Projects, which Respondent argues are not an investment under the ICSID Convention.[537] The Tribunal will address each of these objections in turn below.

495. Subject to its further considerations with respect to its jurisdiction *ratione materiae* below, the Tribunal recalls its findings at ¶¶ 365 and 366 above that: (i) First Claimant made an investment in the territory of Peru, among other things in the form of its 100% direct and indirect ownership of Second Claimant, effected through different corporate structures in the period 2014-2019; and (ii) First Claimant committed cash, expected gain or profit, and assumed risk in relation to the Mamacocha Project on the territory of Peru, and specifically in relation to the performance of the RER Contract.

a. Whether the RER Contract is an "Investment Agreement"

496. For the purposes of First Claimant's TPA claims based on the RER Contract, Respondent disputes the status of the RER Contract as an "investment agreement" under the TPA.[538] An investment agreement is defined in TPA Article 10.28 as follows:[539]

536 Counter-Memorial ¶ 529.

537 Counter-Memorial ¶¶ 555-558; *quoting* **RL-102**, *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, ¶¶ 60-61; **RL-100**, *Raymond Charles Eyre and Montrose Development (Private) Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020, ¶ 302; *also citing* **RL-103,** *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, ¶¶ 416-417; *see* Memorial ¶¶ 56-57, 91. *See also* Rejoinder ¶¶ 577-578.

538 **RD-01**, Respondent's Opening Presentation, slide 15.

539 **C-001/RL-051**, TPA, Art. 10.28.

> …a written agreement[540] between a national authority[541] of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:
>
> (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
>
> (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
>
> (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government[.]

497. Respondent objects that the RER Contract does not grant rights "to supply services to the public on behalf of [Peru], such as power generation or distribution, water treatment or distribution, or telecommunications," since the RER Contract itself does not confer any right to generate energy. Rather, such right would be granted by the separate final concession.[542]

498. Respondent further submits that Claimants have failed to demonstrate that the "subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired…in reliance on the relevant investment agreement."[543] In this

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[540] Appearing as footnote 16 in this provision of the TPA: "'Written agreement' refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement."

[541] Appearing as footnote 17 in this provision of the TPA: "For purposes of this definition, 'national authority' means an authority at the central level of government."

[542] Counter-Memorial ¶¶ 532-533; *citing* Memorial ¶ 209; Mendoza First Statement ¶¶ 10, 13. *See also* Counter-Memorial ¶ 535; *quoting* Mendoza First Statement ¶ 14; Sillen First Statement fn 19; Rejoinder ¶¶ 548, 553, 557-561.

[543] Counter-Memorial ¶ 541; *quoting* **RL-051/C-001**, TPA, Art. 10.16(1)(b)(i)(C).

regard, Respondent submits that a significant portion of Claimants' alleged investments were carried out before the existence of the RER Contract.[544]

(i) Character of the RER Contract

499. For Respondent, the RER Contract is a long-term power purchase and sale contract that guarantees Second Claimant the right to receive the Award Tariff for the contracted energy that Second Claimant agrees to inject in the SEIN. To enjoy the rights associated with an investment agreement set out in TPA Article 10.28, Respondent contends that Second Claimant would have had to obtain a final concession.[545]

500. In support of its view, Respondent relies on: (i) Article 3 of the Electricity Concessions Law, referring to the need for a final concession for the generation, transmission and distribution of electric energy; (ii) Article 24 of the Electricity Concessions Law, providing that the final concession allows the use of public use goods; and (iii) the RER Contract itself, which provides that Second Claimant was required to obtain the final concession.[546]

501. Claimants disagree with Respondent's characterisation of the RER Contract as a long-term power purchase agreement which does not confer any right to generate power.[547] They rely on the language of the title of the RER Contract ("Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System") and the definition of the "Contract" in Clause 1.4.12.[548]

502. In any event, Claimants submit that a long-term power purchase agreement would also meet the definition of an investment agreement under the TPA, being: (i) an agreement to supply services to the public, as per TPA Article 10.28(b);[549] (ii) an agreement "with

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544 Rejoinder ¶ 575.

545 Rejoinder ¶ 554. *See also* Rejoinder ¶¶ 555-557; *quoting* **RL-001**, *Ley de Concesiones Eléctricas*, Arts. 3, 24, 25; **C-002**, RER Contract, Clauses 1.3, 3.2; Rejoinder ¶¶ 558-561.

546 Counter-Memorial ¶ 533-534; Rejoinder ¶ 554-557; *quoting* **RL-001**, *Ley de Concesiones Eléctricas*, Arts. 3, 24, 25; **C-002**, RER Contract, Clauses 1.3, 3.2.

547 Reply ¶ 379; *see* Counter-Memorial ¶ 532.

548 Reply ¶ 380; *quoting* **C-002**, RER Contract, Clause 1.4.12. *See also* **C-002**, RER Contract, Clause 10.2(d).

549 Reply ¶ 382; *quoting* Schreuer Report ¶ 129.

respect to natural resources that a national authority controls" under TPA Article 10.28(a); and (iii) an agreement "to undertake infrastructure projects" under TPA Article 10.28(c).[550]

503. At the outset, the Tribunal recalls with respect to the burden of proof (see ¶¶ 353-355 above) that for matters of law, it is the Tribunal's task to interpret the legal instruments relevant to its jurisdiction, taking into account the submissions made by the Parties. This applies, for example, to the definition of an investment agreement under the terms of the TPA. While the existence of the RER Contract is established as a matter of fact, its legal characterisation is disputed and will be decided by the Tribunal on the basis of the wording of the TPA and the materials presented by the Parties in support of their respective positions.

504. For matters of fact necessary to establish the Tribunal's jurisdiction, Claimants bear the burden of establishing the existence of such facts. For present purposes, this is relevant, for example to establish the fact of Claimants' reliance on an investment agreement under TPA Article 10.28 (see ¶¶ 514 *et seq.* below).

505. The Tribunal also notes that as stated at ¶ 345 above, the jurisdictional requirements of the TPA and the ICSID Convention are cumulative. However, Respondent's objection under consideration in this Section relates to the criteria for jurisdiction under the TPA, and not to whether the RER Contract is a covered investment under the ICSID Convention. The Tribunal therefore focuses on the arguments made under the TPA for present purposes.

506. The Tribunal has little difficulty in deciding that the RER Contract is an investment agreement within the meaning of TPA Article 10.28. The RER Contract is a written agreement between a national authority (i.e, "the Peruvian State, herein represented by the Ministry of Energy and Mines"[551]) and a covered investment (i.e., Second Claimant, see ¶ 377 above).

507. The Tribunal agrees that to be considered an investment agreement, it is not sufficient that the RER Contract relates to the use of national resources, but must "grant[] rights to the

550 Reply ¶ 383; *quoting* Schreuer Report ¶ 130.

551 **C-002**, RER Contract, Preamble.

covered investment or investor" with respect to one of the enumerated areas as stated in the *chapeau* of TPA Article 10.28.[552]

508. The RER Contract grants rights falling under the definition in TPA Article 10.28 in a number of respects, including:

(i) Clause 1.4.45: The "Award Tariff" is "…guaranteed to each Awardee for the Net Energy Injections up to the limit of its Awarded Energy."[553]

(ii) Clause 6.2.1: "The RER generation plant referred to hereunder shall be paid remuneration for Power in accordance with the Applicable Laws."

(iii) Clause 6.2.3: "Net Energy Injections up to the limit of the Awarded Energy shall be remunerated at the Award Tariff."

(iv) Clause 6.3.1: "The Concessionaire Company shall receive, on a monthly basis, payments on account of Guaranteed Revenues for the energy and power injected into the SEIN."

509. These provisions are consistent with Clause 1.4.12, which defines the RER Contract as follows:[554]

> Concession Contract for the Supply of Renewable Energy resulting from the Auction…which contains the commitments and conditions related to the construction, operation, supply of power and tariff regime of the RER power plants…

510. Likewise, the RER Contract contains an option for MINEM to terminate the RER Contract in certain circumstances if Second Claimant "…continues failing to fulfill its obligations

552 Rejoinder ¶ 552; *see* Counter-Memorial ¶¶ 533-536.

553 **C-002**, RER Contract, Clause 1.4.45. Under Clause 1.4.17, the "Awarded Energy" is defined as "the annual amount of active energy…that the Concessionaire Company undertakes to produce with the RER generation plant awarded and to inject into the electric system until the Termination Date of the Contract."

554 **C-002**, RER Contract, Clause 1.4.12.

of supplying the generated power in compliance with the safety and quality standards set forth in the Contract and the relevant technical standards…"[555]

511. By virtue of the above provisions, the RER Contract grants Second Claimant rights to supply power generation services to the public on behalf of Respondent, even if such rights may only be exercised together with a final concession to supply electricity which Second Claimant was required to obtain under the RER Contract and Peruvian law. In Clause 1.4.17 of the RER Contract, Second Claimant "undertakes to produce" energy using the generation plant and "to inject [it] into the electric system." It has the right to receive the "Award Tariff" or guaranteed tariff for that energy, as acknowledged by Respondent.[556] This falls precisely within the scope of TPA Article 10.28(b).

512. While the title of the RER Contract ("Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System") does not determine the legal rights and obligations agreed therein,[557] it is consistent with and confirms the above conclusions.

513. Respondent's argument that the benefits of the RER Contract cannot be obtained without a final concession is beside the point.[558] The RER Contract "grants rights…to supply services to the public."[559] These rights have value, even if permits are required to put them into practice. The Tribunal considers it uncontroversial that the rights granted under an investment agreement will be subject to obtaining other permits, licenses and authorisations from competent authorities, which are not (and cannot) be granted by way of a contract such as an investment agreement.

(ii) Whether Claimants relied on the RER Contract

514. Respondent further submits that the RER Contract is not an agreement "on which the covered investment or the investor relies in establishing or acquiring a covered investment," being another requirement in the *chapeau* of TPA Article 10.28. According

555 **C-002**, RER Contract, Clause 10.2(d).

556 Rejoinder ¶ 553.

557 **C-002**, RER Contract, Clause 1.7. *See* Rejoinder ¶ 563.

558 *See* Rejoinder ¶¶ 560-561, 564-565.

559 **C-001/RL-051**, TPA, Art. 10.28.

to Respondent, Claimants have not established that they relied on the RER Contract to acquire the alleged covered investment, *inter alia* because the RER Contract post-dated the establishment of Second Claimant, and could not legally be the basis for the acquisition of the permits, many of which were obtained prior to the RER Contract.[560]

515. For Respondent, Claimants have asserted but not established that any activities, permits and studies were carried out after the execution of the RER Contract, nor that they constituted covered investments under the TPA themselves.[561] As for the approval of concessions for the hydroelectric generation plant and transmission lines, Respondent submits that these are not investments based on the RER Contract, since it is possible to have a final concession without an RER Contract.[562]

516. Claimants disagree with Respondent's argument that they could not have relied on the RER Contract when making their investment.[563] Claimants argue, in this respect, that: (i) the execution of the RER Contract after Second Claimant's formation was a requirement of Peruvian law and TPA Article 10.28 itself;[564] (ii) the principle of unity of investment views investment activities as an integrated whole;[565] and (iii) numerous activities, permits and studies were carried out after the execution of the RER Contract.[566]

517. To fall within the definition of an investment agreement within TPA Article 10.28, the RER Contract must be an agreement "on which the covered investment or the investor relies in establishing or acquiring a covered investment." Whether Claimants relied on the RER Contract is a question of fact, which Claimants have the burden of proving on the balance of probabilities.

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560 Counter-Memorial ¶ 538; Rejoinder ¶ 568. *See also* Counter-Memorial ¶ 539.

561 Rejoinder ¶ 573; *see* Reply ¶ 389.

562 Rejoinder ¶ 574; *quoting* Mendoza Statement ¶ 14; *see* Reply ¶ 389.

563 Reply ¶ 386; *see* Counter-Memorial ¶ 538.

564 Reply ¶ 387.

565 Reply ¶ 388; *quoting* Schreuer Report, ¶ 139; **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 296.

566 Reply ¶ 389.

518. As pointed out by Claimants,[567] following the signature of the RER Contract on 18 February 2014 (see ¶ 95 above), they relied on it to establish or acquire several covered investments in pursuit of the Mamacocha Project, including investments by First Claimant of millions of dollars in order for Second Claimant to perform the RER Contract,[568] and obtaining the concessions for the hydroelectric generation plant and transmission lines. The covered investments therefore entailed the commitment of capital, the expectation of gain and the assumption of risk in the form of an enterprise (Second Claimant)[569] and authorisations and permits under Peruvian law.[570]

519. To recall, as described at ¶ 109 above, in order to obtain the power-generation and transmission concessions, Second Claimant required a number of permits or certificates including: (i) water use; (ii) environmental certification; (iii) a pre-operational grid impact study; and (iv) an archaeological certificate. The transmission line and the power generation final concessions were issued in March and June 2016, respectively (see ¶ 109(v) above).[571]

520. The fact that certain of Claimants' investment activities were undertaken prior to the execution of the RER Contract does not negate the fact that Claimants also relied on the RER Contract to continue to establish and acquire covered investments after it was entered into. As is well established, "an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project…"[572]

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567 Reply ¶ 389; Schreuer Report ¶¶ 142-143.

568 *See*, *e.g.*, **C-265**, Latam Hydro LLC's invoices, audited and unaudited financial statements and tax returns; **BRG-004**, BRG Investment Value Calculations; BRG First Report ¶¶ 161-162, Table 8; **BRG-081**, BRG Updated Investment Value Calculations, tab "Investment Value Mamacocha"; **BRG-100**, Claimants' Accounting Records of Actual Expenses; BRG Second Report ¶¶ 167-171, Table 8; **CD-06**, Claimants' Closing Presentation, slide 127; Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 2005:15-2006:7.

569 **C-001/RL-051**, TPA, Art. 10.28(a).

570 **C-001/RL-051**, TPA, Art. 10.28(g).

571 **R-128**, *Informe de Gestión No. 9, HLA*, 11 July 2015, p. 4. *See* Memorial ¶ 82; Counter-Memorial ¶ 169; Bartrina First Statement ¶ 59.

572 **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 296.

521. The Tribunal is therefore satisfied that Claimants relied on the RER Contract to establish or acquire a covered investment other than the RER Contract, as required by TPA Article 10.28.

522. For this reason, the Tribunal does not consider it necessary to address the relevance of Claimants' additional argument that it was required to establish Second Claimant prior to execution of the RER Contract by Peruvian law and the TPA.[573] The Tribunal merely notes that this is correct with respect to Peruvian law,[574] but as Respondent points out it is not a requirement of TPA Article 10.28.[575]

(iii) Direct Relationship with Subject Matter and Damages

523. Respondent makes a further assertion that Claimants have not proven that the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, as required by TPA Article 10.16(1)(b)(i)(C).[576] The wording of the provision is as follows:[577]

> …provided that a claimant may submit…a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

524. Claimants do not consider this objection to be related to the definition of an investment agreement, and argue in any event that the requirement is satisfied in the present case.[578]

525. While this text is not part of the definition of an investment agreement in TPA Article 10.28, it may be understood as an aspect of the Tribunal's jurisdiction *ratione materiae* on the basis of the requirement that a claimant may submit a claim to arbitration "only if" this subject matter requirement is fulfilled.

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573 *See* Reply ¶ 387.

574 *See* **C-002**, RER Contract, Clause 1.4.44.

575 *See* Rejoinder ¶¶ 569-572.

576 Counter-Memorial ¶ 541.

577 **C-001/RL-051**, TPA, Art. 10.16(1)(b)(i)(C).

578 Reply ¶¶ 392-393.

526. The Tribunal is satisfied that the subject matter of First Claimant's claim on behalf of Second Claimant under the TPA directly relates to the covered investments that were established or acquired, or sought to be established or acquired in reliance on the RER Contract. In this respect, the language of TPA Article 10.16(1)(b)(i)(C) directly tracks the definition in TPA Article 10.28, by referring to reliance on an investment agreement "in establishing or acquiring a covered investment other than the written agreement itself."[579]

527. Aside from the claims for the Upstream Projects which will be discussed in the next Section, the subject matter of the claims made for breach of the RER Contract all relate to the Mamacocha Project. These alleged breaches by Respondent with respect to the Mamacocha Project directly relate to the covered investments established or acquired in performing the RER Contract for the purposes of the Mamacocha Project (i.e., the commitment of capital, the expectation of gain and the assumption of risk in the form of an enterprise (Second Claimant) and in the form of authorisations and permits under Peruvian law, see ¶ 518 above).

528. Likewise, the damages claimed are based on Claimants' assertion that all or substantially all of the economic value of the Mamacocha Project was destroyed by Respondent's measures.[580] This includes, and is directly related to, the capital contributions made and the concessions needed to carry out the Project.

b. Claims Concerning the Upstream Projects

529. Respondent objects that Claimants' claim for USD 0.142 million in relation to the Upstream Projects is not part of a covered investment under Article 25 of the ICSID Convention or TPA Article 10.28.[581] The Upstream Projects intended to make use of the waterways upstream of the Mamacocha Lagoon to power a number of small hydroelectric plants (see ¶ 87 above).

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579 **C-001/RL-051**, TPA, Art. 10.28.

580 Reply ¶ 941.

581 Counter-Memorial ¶¶ 543, 560; *quoting* **RL-051/C-001**, TPA, Art. 10.28. *See* Memorial ¶¶ 14, 17, 144, 172, 177, 540-543, fn 965.

530. Respondent argues that the Upstream Projects are to be treated as independent of the Mamacocha Project,[582] while Claimants submit that they are all part of one integrated investment.[583]

531. In order to decide whether it has jurisdiction over the Upstream Projects, the Tribunal will consider: (i) the scope of investments covered under the ICSID Convention and the TPA; and (ii) whether the Upstream Projects fall within that scope.

(i) Scope of an Investment and Pre-Investment Activities

532. Article 25 of the ICSID Convention provides that the jurisdiction of the Centre extends to a legal dispute "arising directly out of an investment" (see ¶ 272 above). The ICSID Convention does not define what will be considered an "investment."

533. TPA Article 10.16 sets out that "an investment dispute" may be submitted to arbitration (see ¶ 264 above). TPA Article 10.28 defines an investment as meaning "every asset that an investor owns or controls…that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk," specifying a number of forms that an investment may take (see ¶ 261 above).

534. In the present case, any investments over which the Tribunal has jurisdiction must fulfil the criteria of both the ICSID Convention and the TPA.

535. Respondent argues that pre-investment activities such as those Claimants undertook for the Upstream Projects do not constitute an "investment" for the purposes of the ICSID Convention.[584] In support, Respondent relies on the decisions of: (i) *Mihaly v. Sri Lanka*

582 Counter-Memorial ¶ 545; *see* Memorial ¶¶ 199-203.

583 Reply ¶¶ 435, 437; *quoting* **CL-122**, *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶ 72.

584 Counter-Memorial ¶¶ 555-558; *quoting* **RL-102**, *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, ¶¶ 60-61; **RL-100**, *Raymond Charles Eyre and Montrose Development (Private) Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020, ¶ 302; *also citing* **RL-103,** *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, ¶¶ 416-417; *see* Memorial ¶¶ 56-57, 91. *See also* Rejoinder ¶¶ 577-578.

(lack of jurisdiction over preliminary expenses);[585] (ii) *Zhinvali v. Georgia* (rejection of claims for development costs);[586] (iii) *Eyre v. Sri Lanka* (preliminary efforts and expenditures do not constitute an investment);[587] and (iv) *Nordzucker v. Poland* (decision to invest in a first phase was independent of the outcome of the investor's purchase of the second phase).[588]

536. Claimants, on the other hand, argue that in accordance with the principle of the unity of the investment, their investment including the Upstream Projects must be examined as a whole.[589]

537. Noting that the ICSID Convention does not define an investment, the ordinary meaning of "investment" in Article 25 thereof is to be determined in accordance with Article 31 of the VCLT. The Tribunal has reviewed the decisions of prior arbitral tribunals relied on by the Parties who have been called upon to carry out the same exercise. These decisions confirm that activities constituting the early stage of an integrated investment, being a fundamental part of the overall project, have been considered covered investments.[590] The Tribunal in *CSOB v. Slovak Republic* expressed this as follows:[591]

> …a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that

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585 Counter-Memorial ¶ 555; *quoting* **RL-102**, *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, ¶¶ 60-61.

586 Counter-Memorial ¶ 556; *citing* **RL-103**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, ¶¶ 416-417.

587 Counter-Memorial ¶ 557; *quoting* **RL-100**, *Raymond Charles Eyre and Montrose Development (Private) Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020, ¶¶ 301-302. *See also* Counter-Memorial ¶ 547.

588 Counter-Memorial ¶ 546; *citing* **RL-099**, *Nordzucker AG v. Republic of Poland,* UNCITRAL, Partial Award, 10 December 2008, ¶¶ 146-159.

589 Reply ¶¶ 435, 437; *quoting* **CL-122**, *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶ 72. *See also* Reply ¶ 436; *quoting* **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 296.

590 *See* **CL-174**, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶ 256.

591 **CL-122**, *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶ 72.

> the particular transaction forms an integral part of an overall operation that qualifies as an investment.

538. On the other hand, where the transaction or activities in question do not form an integral part of an overall operation that qualifies as an investment, prior tribunals have held that there is no covered investment. In this regard, the tribunal in *Mihaly v. Sri Lanka* found that:[592]

> The Tribunal is…unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment.

539. The tribunal in *Eyre v. Sri Lanka* further held that the principle of unity of investment did not "elevate" the investor's payments and efforts in relation to a potential hotel development to the contribution and operational risk necessary to prove a qualifying investment.[593] It was determined that:[594]

> There must have been substantive commitments and arrangements entered into, involving specific commitments and financial costs, all of which would entail both certain risks as well as possible benefits.

540. The findings of ICSID tribunals with respect to pre-investment activities that do not qualify as an investment are consistent with the definition of an investment under the TPA, requiring "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." Since the specific criteria of the TPA must be fulfilled in the present case, the Tribunal will use the TPA terminology as the primary reference. The Tribunal does not consider the ICSID Convention definition of an investment to be different to the definition under the TPA for the purposes of the present question before it.

541. The Tribunal subscribes to the principle of the unity of an investment, and has already noted at ¶ 520 above that an investment typically consists of several interrelated economic activities. This does not mean, however, that the scope of an investment is boundless or

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592 **RL-102**, *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, ¶ 61.

593 **RL-100**, *Raymond Charles Eyre and Montrose Development (Private) Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020, ¶ 301.

594 **RL-100**, *Raymond Charles Eyre and Montrose Development (Private) Ltd v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020, ¶ 301.

self-defined by the investor. An investment must satisfy the definition under the TPA and be an investment for the purposes of the ICSID Convention. In order to be considered a single investment, the economic activities in question must constitute a unified whole, which is a question of fact to be determined in the circumstances of a particular case based on the economic, legal, operational and temporal relationships between those economic activities.

(ii) Whether the Upstream Projects are Covered Investments

542. In order to decide whether the Upstream Projects are, or form part of, First Claimant's covered investments, the Tribunal will consider whether the Upstream Projects entailed "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" as required by TPA Article 10.28. To the extent that Claimants' activities with respect to the Upstream Projects do not constitute standalone investments under this definition, the Tribunal will consider whether they constitute an integral part of those operations that do constitute a covered investment.

543. According to Claimants, when they decided to invest in Peru, they commissioned a feasibility study for the Mamacocha Project and a conceptual design for the Upstream Projects.[595] Claimants argue that the Mamacocha and Upstream Projects were presented to prospective investors as a combined product, to be developed in phases starting with the Mamacocha Project first, and once construction was underway Second Claimant would transition from the development of the Mamacocha Project to the development of the Upstream Projects.[596]

544. Respondent submits that Claimants have not shown any concrete steps to develop the Upstream Projects as an integral part of their investment in the Mamacocha Project, since they do not allege that they had applied for any permits or obtained financing, or progressed beyond the conceptual stage. In this regard, Respondent submits that the two feasibility studies and Claimants' subjective expectations cannot make the two Projects into a

595 Reply ¶ 433; *citing* Memorial ¶¶ 50-58; **C-102**, Email from A. Bartrina to S. Sillen attaching Pöyry's Memorandum titled "Upstream Addition Mamacocha II", 3 October 2013.

596 Reply ¶ 434; *citing* Jacobson First Statement, ¶ 15; **C-032**, Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014; Sillen First Statement ¶ 40; Bartrina First Statement ¶ 25.

consolidated investment.[597] Nor is the acquisition and maintenance of an entity to serve as a corporate vehicle for a future project any more than pre-investment activity, in Respondent's view.[598]

545. The Tribunal has reviewed the feasibility study by Pöyry in 2013 with respect to the Upstream Projects,[599] as well as the 2014 presentation to investors of Second Claimant, including the proposed Mamacocha and Upstream Projects.[600]

546. The 2014 investor presentation describes Second Claimant and its projects as follows:[601]

> [Second Claimant] is an ideal platform for investors wanting to partake in development of renewable energy in Peru
>
> [Second Claimant] holds a portfolio including the Mamacocha Hydropower Project (the "Mamacocha Project" or, the "Project"), at an advanced development stage and four other projects (the "Upstream Projects"), in early development stage.

547. It also contains a visual representation of Second Claimant's projects ("LHL" being First Claimant and "HLA" being Second Claimant):

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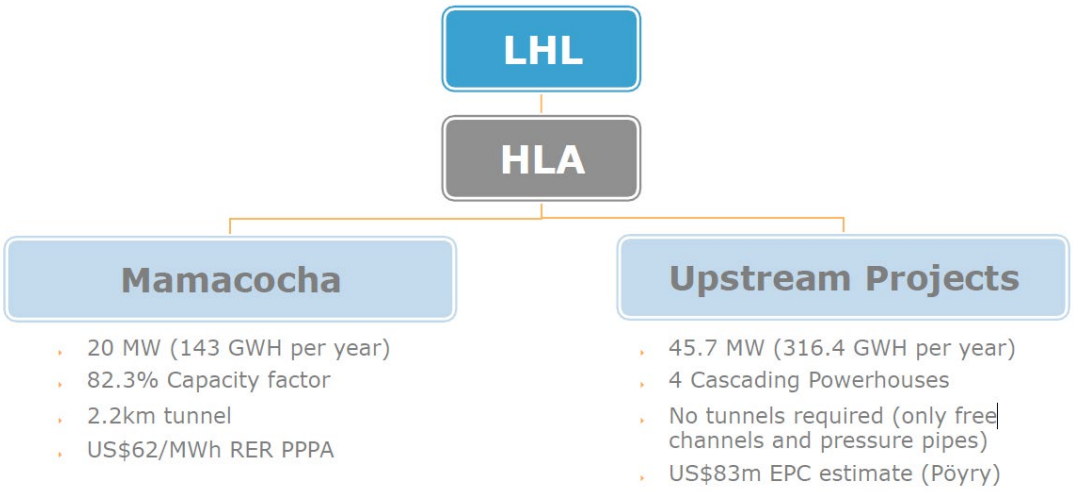
597 Counter-Memorial ¶¶ 549-550, ¶ 544; *quoting* **RL-101**, Christoph H. Schreuer *et al*, The ICSID Convention: A Commentary, 23 July 2009, Art. 25, ¶ 181; Counter-Memorial ¶ 558; *citing* Memorial ¶¶ 56-57, 91. *See also* Rejoinder ¶ 579; *citing* Reply ¶¶ 433, 434.

598 Counter-Memorial ¶ 554; *see* Memorial ¶¶ 56-57, 184, fn 467.

599 **C-102**, Email from A. Bartrina to S. Sillen attaching Pöyry's Memorandum titled "Upstream Addition Mamacocha II", 3 October 2013.

600 **C-032**, Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014.

601 **C-032**, Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014, slide 3.



548. In respect of the Upstream Projects, the presentation states that they are "a natural extension of the Mamacocha project and initial studies suggests that they are technically viable and financially attractive."[602]

549. Mr. Jacobson refers to his intention to have "follow-on projects after the Mamacocha Project," and his desire to offer investors "a portfolio of different projects in Peru to minimize risk and maximize their internal rate of return."[603] He describes the intended sequential development of the Mamacocha and Upstream Projects as follows:[604]

> From the outset, our plan was first to develop the Mamacocha Project and then sell a majority stake to a company that would oversee the Project's construction and operation phases. My team would then pivot to developing the Upstream Projects. The rationale for this sequential approach was three-fold. First, it was too expensive to develop the Upstream Projects at the same time as the Mamacocha Project. Second, successful completion of the first project would enhance the team's credibility and provide both legal rights and critical infrastructure for the upstream projects. Third, a successful initial project would permit us to work with and get to know the local communities that were important to the approval of the Upstream Projects.

602 **C-032**, Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014, slide 30.

603 Jacobson Second Statement ¶ 15.

604 Jacobson First Statement ¶ 15. *See also* Bartina First Statement ¶ 25; Sillen First Statement ¶¶ 38-40.

550. In 2015, Pöyry continued working on the conceptual design of the Upstream Projects,[605] and in 2016 provided its final report on the conceptual design.[606] On Claimants' own evidence, the Upstream Projects did not advance beyond the conceptual design stage.[607]

551. In addition, it has not been asserted that Respondent made any contractual, regulatory or other commitments with respect to the Upstream Projects, whether on a standalone basis or as part of any packaging of the Upstream Projects together with the Mamacocha Project.

552. Based on the evidence before it, the Tribunal finds that the Upstream Projects are not a standalone investment protected under the TPA or the ICSID Convention. In particular, they did not entail the "commitment of capital or other resources" or "the assumption of risk" as required by TPA Article 10.28 to be considered an investment in their own right. The Upstream Projects did not proceed beyond the preliminary stage of conceptual design, prior to the commitment of capital beyond the commissioning of the feasibility study and conceptual design of the projects.[608] The Upstream Projects are typical pre-investment activities as referred to by several other arbitral tribunals (see ¶¶ 538-539 above).

553. Nor does the Tribunal consider the Upstream Projects to be an integral part of First Claimant's other investments. In this respect, the Mamacocha Project and the Upstream Projects were to run on different timelines, based on separate permits, separate contractual relationships, and separate budgets. While it was anticipated that some reporting and work on community relationships carried out for the Mamacocha Project could be applied to the Upstream Projects,[609] and that the Upstream Projects could make use of some of the infrastructure used for the Mamacocha Project,[610] this is not sufficient to make them a part of the same project or investment. To consider the Mamacocha and Upstream Projects as

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605 **HKA-004**, Mamacocha – Upstream Projects: Conceptual Design, Pöyry, 30 September 2015; *see* Sillen First Statement ¶ 38.

606 **BRG-037**, *Proyectos Alto Castilla: Diseño Conceptual y Aplicación para Derechos de Agua – Informe de Diseño Conceptual*, Pöyry, June 2016.

607 Sillen First Statement ¶ 41.

608 *See* **BRG-037**, *Proyectos Alto Castilla: Diseño Conceptual y Aplicación para Derechos de Agua – Informe de Diseño Conceptual, Pöyry*, June 2016, p. 1 for the anticipated stages of the Upstream Projects.

609 **C-032**, Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014, slide 34 (p. 35 of the pdf).

610 Sillen First Statement ¶ 39.

two parts of essentially one unified project would be a distortion of the evidence before the Tribunal. The Mamacocha and Upstream Projects were not legally or economically interdependent, and the Upstream Projects are not a fundamental part of the Mamacocha Project, or vice versa.

554. In this respect, the fact that the two projects were presented to investors together as part of the portfolio of Second Claimant does not assist Claimants, since the Tribunal is required to examine the objective nature of the projects. Moreover, in the investor presentation the two projects are clearly distinguished (see ¶ 547 above). Claimants' subjective intention to proceed with the Upstream Projects is not sufficient. As highlighted by prior tribunals, the scope of an investment is not to be determined by an investor's intended acquisitions or unilateral characterisation of its projects (see ¶ 538 above). Among other things, this would lead to absurd results where an investor could claim protection for all envisaged investments simply by virtue of having made one investment in a country, which would not otherwise be subject to protection. This would discriminate against candidates for future investment who had not yet made such an earlier investment in a country.[611]

555. While Claimants argue that the Upstream Projects never proceeded due to Respondent's measures against the Mamacocha Project,[612] this is inapposite since the Upstream Projects never attained the status of protected investments under the TPA or the ICSID Convention in the first place, whether on their own or as part of the Mamacocha Project.

(iii) Conclusion on Upstream Projects

556. For the above reasons, the Tribunal concludes that it does not have jurisdiction *ratione materiae* over the claims made or relief sought under the TPA in relation to the Upstream Projects. This conclusion is clear from Claimants' own internal contemporaneous documents (see ¶ 547 above), as well as the other evidence on the record.

611 **RL-099**, *Nordzucker AG v. Republic of Poland,* UNCITRAL, Partial Award, 10 December 2008, ¶¶ 151-152.

612 Sillen First Statement ¶ 41.

(5) Jurisdiction *Ratione Temporis*

557. Claimants argue that their investments in Peru are qualifying investments under the TPA and the ICSID Convention.[613] Respondent has not raised an objection with respect to the Tribunal's jurisdiction *ratione temporis*.

558. TPA Article 1.3 defines a "covered investment" as being "in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter."[614] Such "covered investments" fall within the scope of TPA Chapter 10.[615]

559. Since Claimants' investments in Peru were made following the entry into force of the TPA (1 February 2009) and the ICSID Convention (entry into force for Peru on 8 September 1993; entry into force for the United States on 14 October 1966), the Tribunal considers that it has jurisdiction *ratione temporis* over Claimants' claims with respect to those investments.

(6) Jurisdiction under the RER Contract

560. Claimants submit that the Tribunal has jurisdiction under the RER Contract.[616] Respondent's jurisdictional objections are made on the basis of the TPA and the ICSID Convention.[617] While Respondent has not raised an explicit objection to the Tribunal's jurisdiction under the RER Contract on the basis of these matters, the Tribunal understands that certain of those objections may be relevant to the Tribunal's jurisdiction under the RER Contract, in particular in relation to jurisdiction under the ICSID Convention (see ¶¶ 347, 379 and 401 above). The Tribunal will examine these points for the purposes of satisfying itself of its jurisdiction.

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613 Memorial ¶ 220(b). *See also* Memorial ¶ 202.

614 **C-001/RL-051**, TPA, Art. 1.3.

615 **C-001/RL-051**, TPA, Art. 10.1(1)(b).

616 Memorial ¶ 225.

617 *See* **RD-01**, Respondent's Opening Presentation, slide 15.

561. In this respect, the Tribunal confirms its finding that both Claimants fall within the Tribunal's jurisdiction under the ICSID Convention, which conclusion applies also to the Tribunal's jurisdiction under the RER Contract (see ¶¶ 371 and 401 above).

562. The Tribunal further notes that Respondent argues that the RER Contract only binds MINEM and not the Republic of Peru as a State.[618] While this argument does not dispute the Tribunal's jurisdiction over Respondent, the Tribunal merely notes at this stage its conclusion reached below, i.e., that Respondent is the correct counterparty to the RER Contract (see ¶ 651 below).

563. The Tribunal reserves the question of its jurisdiction or the scope of any damages with regard to the Upstream Projects for the purposes of the RER Contract, and will address this issue to the extent required (see ¶ 999 below).

564. The Tribunal considers the other key requirements of Clause 11.3(a) of the RER Contract to be met for the purposes of invoking the arbitration clause. One such requirement is that the dispute does not have a technical nature (a "Non-Technical Dispute") or there is disagreement about whether it has a technical nature (see Clause 11.1 of the RER Contract at ¶ 273 above). Claimants have asserted and the Tribunal agrees that the dispute is a non-technical one. Even if there were disagreement about whether the dispute is technical in nature, Clause 11.1 of the RER Contract specifies that it will be treated as a Non-Technical Dispute for purposes of arbitration under Clause 11.3.

565. An additional requirement for the exercise of Clause 11.3(a), i.e., ICSID arbitration, is that the dispute involves "amounts exceeding Twenty Million Dollars (USD 20,000,000) or its equivalent in national currency." Since Claimants' claims exceed USD 45 million (see ¶ 236 above), this requirement is also satisfied.

566. Clause 11.3(a) of the RER Contract further specifies that the arbitration conducted pursuant to that clause "shall be conducted in Spanish" and the award "shall be rendered within ninety (90) Days following the constitution of the Arbitral Tribunal." It further sets out a specific method for selection of the presiding arbitrator. As already noted at ¶ 435 above,

618 Counter-Memorial ¶¶ 880-892; Rejoinder ¶ 943.

in the course of this arbitration Respondent reached a number of subsequent procedural agreements with Claimants as recorded in agreements concerning the appointment of the presiding arbitrator, as well as its correspondence of 23 April 2020 and Procedural Order No. 2 dated 13 May 2020. These included: (i) English as a procedural language of the arbitration in addition to Spanish; (ii) a procedural timetable exceeding the one provided for under the RER Contract and a provision that the Tribunal will draft the award "within a reasonable time period"; and (iii) confirmation that the Tribunal had been properly constituted. The Parties duly performed these agreements by complying with the language arrangements and filing their written submissions in accordance with the agreed timetable. In any event, the Parties have not objected thereto in the course of the proceedings.

567. The Tribunal confirms its jurisdiction under the RER Contract to decide upon Claimants' claims.

(7) Conclusion on Jurisdiction

568. In light of the foregoing considerations, the Tribunal determines that:

(i) It has jurisdiction over First Claimant's claims under the TPA, with the exception that it has no jurisdiction *ratione materiae* over First Claimant's claims with respect to the Upstream Projects; and

(ii) It has jurisdiction over Second Claimant's claims under the RER Contract.

VIII. ALLEGED BREACHES OF THE RER CONTRACT AND PERUVIAN LAW

569. In this Section, the Tribunal shall decide upon Second Claimant's claims under the RER Contract and Peruvian law.

570. With respect to the structure of its decisions in this Award, Tribunal Question 12 asked the Parties as follows:

> Assuming without admitting the jurisdiction of the Arbitral Tribunal over Claimants' claims under the Treaty and the RER Contract, should the Arbitral Tribunal consider and decide first on the contractual claims of Second Claimant?

(i) If so, what is the relevance, if any, of such considerations and decisions on the BIT claims of Latam Hydro?

(ii) Conversely, if the BIT claims are decided first, what is the relevance, if any, of the decisions on the BIT claims for the contractual claims of Second Claimant?

571. Claimants argue that these two claims are "independent branches or approaches to liability" and their preference is for the Tribunal "to decide both in the interests of justice and a complete resolution of the dispute."[619]

572. Respondent submits that the Tribunal should first consider Second Claimant's claims under the Contract because the success of virtually all Claimants' treaty claims is premised on their interpretation of the Contract.[620]

573. In light of the various overlapping matters between the two claims, the Tribunal finds it appropriate to first decide upon Second Claimant's claims under the RER Contract, before turning to First Claimant's claims under the TPA. The Tribunal will consider any implications of its findings under the RER Contract for First Claimant's claims under the TPA at ¶¶ 1187-1198 below.

574. The Tribunal notes that Claimants have submitted joint pleadings in relation to their claims made under the RER Contract and the TPA. Second Claimant is the sole Claimant for the claims made under the RER Contract. However, First Claimant also makes claims on behalf of Second Claimant under TPA Article 10.16(1)(b)(i)(C) for Peru's alleged breaches of an investment agreement.[621] The Tribunal understands these claims under the TPA to be based upon the same alleged breaches of contract, and will treat them together with Second Claimant's claims under the RER Contract.

575. In deciding on Second Claimant's claims under the RER Contract, in this Section the Tribunal will first consider the law applicable to the RER Contract (Section A), before considering the issue of the parties to the RER Contract (Section B). In Sections C to K the

619 Claimants' response to the President's question, Transcript (Day 9), 18 March 2022, 1970:16-22.

620 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2090:7-20.

621 *See* Memorial ¶ 188; Reply ¶ 314.

Tribunal decides upon a number of alleged breaches of the RER Contract. In Section L the Tribunal analyses an issue related to the termination of the RER Contract and the execution of the Performance Bond. Section M contains the Tribunal's conclusion on liability under the RER Contract.

A. LAW APPLICABLE TO THE RER CONTRACT AND ITS INTERPRETATION

576. Clause 1.2 of the RER Contract provides:[622]

> This Contract has been drafted and signed in accordance with the domestic law of Peru, which shall govern its content, performance and any other consequences arising from this Contract.

577. Clause 1.4.30 of the RER Contract further provides:[623]

> **Applicable Laws** means all binding legal laws and Court precedents that comprise the Internal Laws of Peru, which may be amended or supplemented by Government Authorities from time to time.

578. Based on the foregoing provisions, it is evident that Peruvian law governs the RER Contract, and neither Party has contended otherwise. The Parties' disagreements with respect to the applicable law stem from different views as to which provisions of Peruvian law apply to the RER Contract, and the way in which they are applied. The Tribunal will address those disagreements in the course of its reasoning to the extent necessary to resolve particular issues in dispute. At this stage, the Tribunal finds it helpful to clarify: (i) the application of the Peruvian Civil Code to the Parties' dispute; (ii) the relevant principles of contractual interpretation; and (iii) the character of the RER Contract under Peruvian law.

579. In reaching its conclusions, the Tribunal makes reference to evidence put forward by the Parties in the form of legal opinions from Claimants' experts Dr. Quiñones (Peruvian administrative law) and Dr. Benavides (Peruvian civil law), and Respondent's experts Mr. Lava (Peruvian civil law) and Mr. Monteza (Peruvian administrative law).

622 **C-002**, RER Contract, Clause 1.2.

623 **C-002**, RER Contract, Clause 1.4.30.

(1) Application of the Peruvian Civil Code

580. The question of whether and how the Peruvian Civil Code applies to the Parties' dispute is relevant to specific issues that will be addressed below. At this stage, the Tribunal finds it helpful to address the application of the Peruvian Civil Code in general terms only.

581. Claimants argue that specific provisions of the RER Contract:[624]

> …must be interpreted in a manner that is consistent with the plain-language of the RER Contract *as well as* the legal principles from the Civil Code, which are expressly incorporated under Clauses 1.2 and 1.4.30. (emphasis in original)

582. Respondent disagrees, arguing that all rules in the Peruvian legal system do not apply equally and to the same degree to the RER Contract. In order to know which rules apply to a given situation, Respondent argues that criteria of interpretation must be applied, being the hierarchy of norms, temporality and speciality of the rule.[625] For Respondent, Article IX of the Peruvian Civil Code itself provides the answer as to how it applies.[626]

583. In accordance with Article IX of the *Título Preliminar* of the Peruvian Civil Code, "[l]*as disposiciones del Código Civil se aplican supletoriamente a las relaciones y situaciones jurídicas reguladas por otras leyes, siempre que no sean incompatibles con su naturaleza*."[627]

584. Both Claimants' expert Dr. Benavides and Respondent's expert Mr. Lava confirm that Article IX quoted in ¶ 583 above means that in order to apply the provisions of the Peruvian Civil Code, it is necessary to conduct an analysis on a case by case basis. One must: (i) first, determine whether the legal relationship or situation is regulated by other norms or laws which may provide a solution; and (ii) where the situation is governed by other norms or laws but those norms or laws do not resolve the situation in question, additionally or in

624 Memorial ¶ 424. *See also* Reply ¶ 658.

625 Rejoinder ¶¶ 925-926; *quoting* Lava Second Report ¶ 3.3; *also citing* Lava Second Report ¶ 3.11.

626 Rejoinder ¶ 931; *quoting* Lava Second Report ¶ 3.23.

627 **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Article IX, *Título Preliminar*, p. 63.

a supplementary manner ("*supletoriamente*") apply the Peruvian Civil Code where its provisions are not incompatible with the nature of that other law.[628]

585. The meaning of "*supletoriamente*" is elaborated in commentary cited by Mr. Lava, which states:[629]

> *La aplicación supletoria significa que, en la medida en que aquellas otras leyes no hayan sido consideradas determinadas soluciones necesarias, entonces podrá aplicarse las que contienen las normas civiles.*
>
> …
>
> *De tal manera que no puede establecerse reglas generales y válidas para todos los casos. Simplemente, el criterio metodológico a adoptar será el de analizar, en cada situación, los principios subyacentes al caso materia de estudio, y compararlos con los principios correspondientes a la normatividad civil que sería supletoriamente aplicable*.

586. The Tribunal concurs with this understanding and therefore agrees with Respondent that the Peruvian Civil Code applies under the conditions set out in Article IX of the *Título Preliminar* thereof. The Tribunal does not consider it necessary to enter into further analysis of the hierarchy of norms or otherwise in order to resolve this issue.

587. The Tribunal does not accept that Peruvian law operates in the manner sought to be established by Claimants. Neither the RER Contract nor the Peruvian Civil Code state that the RER Contract will be interpreted to align with every legal principle in the Peruvian Civil Code. Such an approach would ignore the language of the Peruvian Civil Code itself, which specifies the circumstances in which its provisions apply (see ¶ 580 above). Clauses 1.2 and 1.4.30 of the RER Contract do not supplant the rules governing the Peruvian legal order, but rather incorporate them.

588. The question of whether and to what extent a provision of the Peruvian Civil Code applies to a given situation under the RER Contract must therefore be resolved on a case by case basis. As such, the Tribunal agrees with the opinion of Mr. Lava that "*el análisis debe*

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628 Cross-examination of Mr. Benavides, Transcript (Day 4), 10 March 2022,768:8-769:3, 770:14-17; Lava First Report ¶ 2.14. *See also* Lava Second Report ¶ 3.102.

629 **CLC-088**, *Rubio Correa, Marcial. Biblioteca para leer el Código Civil. Volumen III, sexta edición. Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú*, pp. 154-164; *see* Lava First Report ¶ 2.13.

partir necesariamente del propio Contrato y dicho análisis no requiere ser consistente con los principios legales del Código Civil."[630]

589. Regarding Claimants' assertion that the Peruvian Civil Code imposes "independent legal standards" that may result in an "independent breach of the RER Contract,"[631] the Tribunal will examine each specific situation in the course of its analysis in order to determine whether this is the case for the legal standard and alleged breach in question.

590. The Tribunal will likewise consider the applicability of other Peruvian laws on a case-by-case basis as relevant, including the Peruvian General Law of Administrative Procedure ("**GLAP**") and the *Texto Único de Procedimientos Administrativos* ("**TUPA**").

(2) Principles of Contractual Interpretation

591. Chapter IV of the Peruvian Civil Code, including Articles 168 to 170 thereof, set out the principles applicable to the interpretation of legal relations and situations. These principles are referred to by both sides' legal experts in support of their respective opinions on Peruvian law.[632]

592. Pursuant to the analysis under Article IX of the Peruvian Civil Code set out at ¶ 584 above, the Tribunal agrees with Mr. Lava and Dr. Benavides that these provisions of the Peruvian Civil Code apply to the interpretation of the RER Contract. This is on the basis that: (i) the RER Law, the RER Regulations, the Electricity Concessions Law and the Regulations of the Electricity Concessions Law do not contain norms or criteria of contractual interpretation; and (ii) there is no incompatibility between the norms of contractual interpretation in the Peruvian Civil Code and the RER Law, RER Regulations, or other applicable laws.[633]

630 Lava Second Report ¶ 3.102.

631 Reply ¶ 660.

632 Benavides First Report ¶ 134; Quiñones Second Report ¶ 35; Lava First Report ¶¶ 5.2, 5.5, 5.8.

633 *See* Lava Second Report ¶ 3.37; Benavides First Report ¶ 84; Cross-examination of Mr. Benavides, Transcript (Day 4), 10 March 2022, 769:15-770:5.

593. The Tribunal reserves the question of whether other provisions of the Peruvian Civil Code apply to the Parties' relationship, which are to be examined on a case by case basis.

594. Article 168 of the Peruvian Civil Code is entitled "objective interpretation" (*interpretación objetiva*) (also referred to as "literal interpretation") and provides that "[*e*]*l acto jurídico debe ser interpretado de acuerdo con lo que se haya expresado en él y según el principio de la buena fe*."[634]

595. Both Dr. Benavides[635] and Mr. Lava[636] link the reference to good faith in Article 168 with Article 1362 of the Peruvian Civil Code: "[l]*os contratos deben negociarse, celebrarse y ejecutarse según las reglas de la buena fe y común intención de las partes*."[637]

596. Article 169 of the Peruvian Civil Code is entitled "*systematic interpretation*" (interpretación sistemática) and provides that: "[l]*as cláusulas de los actos jurídicos se interpretan las unas por medio de las otras, atribuyéndose a las dudosas el sentido que resulte del conjunto de todas*."[638]

597. Article 170 of the Peruvian Civil Code is entitled "*interpretación integral*" (also referred to as functional interpretation, "*interpretación teleológica*" or "*interpretación funcional*")[639] and states that "[*l*]*as expresiones que tengan varios sentidos deben entenderse en el más adecuado a la naturaleza y al objeto del acto*."[640]

598. The Parties' experts are in agreement that Article 170 of the Peruvian Civil Code is to be applied when a literal interpretation is not sufficient to clearly determine what the parties agreed.[641] For Dr. Benavides, Article 169 of the Peruvian Civil Code is likewise to be

634 **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 168.
635 Benavides First Report ¶ 124; Benavides Second Report ¶ 216.
636 Lava First Report ¶ 5.2.
637 **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 1362.
638 **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 169.
639 Benavides First Report ¶ 136.
640 **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 170.
641 Benavides First Report ¶ 134; Lava Second Expert Report ¶¶ 3.81-3.82.

applied in circumstances where a literal interpretation does not allow a clear determination of the Parties' intentions.[642]

599. In interpreting the RER Contract, the Tribunal will apply Articles 168 to 170 of the Peruvian Civil Code, starting with an objective interpretation under Article 168, and proceeding with Articles 169 and 170 as appropriate.

(3) Character of the RER Contract

600. The Parties and their respective legal experts agree that the RER Contract is an administrative contract under Peruvian law.[643] However, they disagree on what kind of administrative contract, and the implications for interpretation of the RER Contract. Claimants argue that the RER Contract is a "public-private partnership agreement" under Peruvian law, while Respondent submits that it is a "regulated contract" (*contrato normado*).[644]

601. Having reviewed the Parties' respective submissions and the views of their experts, the Tribunal is satisfied that the RER Contract is a *contrato normado* under Peruvian law. As Claimants put it, *contratos normados* are a specific type of contract that allow the State to "impose inflexible conditions that its counterparty cannot ignore or modify."[645] Such contracts are covered by Article 1355 of the Peruvian Civil Code, which is entitled "*Regla y límites de la contratación*" ("Rule and limitations on Contracting") and states:[646]

> The law, for reasons of social, public or ethical interest, can impose rules or set limits to the contents of the contracts.

642 Benavides First Report ¶ 134.

643 Memorial ¶ 407; Rejoinder ¶ 922; **CD-02**, Benavides Presentation, slide 5; **RD-02**, Monteza Presentation, slide 8.

644 Reply ¶¶ 675, 676; Rejoinder ¶ 933.

645 Reply ¶ 677.

646 **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 1355, Translation by Claimants at Reply ¶ 677.

602. Corresponding to this definition, the RER Regulations issued under the RER Law contain clear provisions which have been incorporated into the RER Contract. This includes provisions defining the contract, its termination date, the revenue guaranteed, and others.

603. The provisions corresponding between the RER Regulations and the RER Contract were summarised by Mr. Lava as follows:[647]

Contenido, regla o limitación	Reglamento de la Ley RER	Contrato
Cargo por Prima	1.4.	1.4.8.
Contrato	1.8	1.4.12
Energía Adjudicada	1.10.	1.4.17.
Energía Dejada de Inyectar por Causas Ajenas al Generador RER	1.11.	1.4.18.
Factor de Corrección	1.13	1.4.20
Fecha de Cierre	1.13.A	1.4.21
Fecha de término del Contrato	1.13.B	1.4.22
Fecha Real de Puesta en Operación Comercial	1.13.C	1.4.23
Inamovilidad de la Fecha de la POC	1.13.C	8.4
Fecha Referencial de la Puesta en Operación Comercial	1.13.D	1.4.24
Ingreso Garantizado	1.14	1.4.26
Plazo de vigencia de la Tarifa de Adjudicación	1.22	1.4.37
Garantía de Fiel cumplimiento	10 (g) y 16.3	8.1 y 8.2
Garantía de seriedad de oferta y Garantía de Fiel Cumplimiento	8.3	2.6 y 12 de las Bases

604. Claimants submit that the RER Contract cannot be a *contrato normado* because: (i) only private contracts can be characterised as regulated contracts under Article 1355 of the Peruvian Civil Code;[648] (ii) its contents were not predetermined by legislation;[649] and (iii) it must further an express public interest set forth in the RER Law or its progeny.[650]

605. Claimants' arguments do not withstand scrutiny. As Respondent demonstrates[651] and is clear from its text, Article 1355 of the Peruvian Civil Code (see ¶ 601 above) does not contain a limitation that only contracts between private parties can be *contratos normados*.

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647 Lava Second Report ¶ 4.9.

648 Reply ¶ 679; *quoting* Benavides Second Report ¶¶ 58-59.

649 Reply ¶¶ 681-682.

650 Reply ¶ 683.

651 Rejoinder ¶ 936; *citing* Lava Second Report ¶ 4.2.

606. Regarding the contents of the RER Contract (item (ii) of ¶ 604 above), the Tribunal agrees with Respondent[652] that in order to be characterised as a *contrato normado*, it is not required for the entire content of the agreement to be imposed by law. The regulated aspect may concern specific provisions in the agreement, being those set down in the law.

607. Dr. Benavides' opinion to the contrary is based on his view that the RER Law and RER Regulations do not impose the contents of the RER Contract, and the State (in his view, the counterparty to the RER Contract) has broad leeway in drafting the contractual clauses.[653] According to Dr. Benavides, the references to the RER Contract in the RER Law and RER Regulations are scarce.[654]

608. This view is contradicted by a review of the RER Regulations, which set out key mandatory terms for the RER Contract (see ¶ 603 above). It is further confirmed in the RER Contract itself, which refers to the legal framework in which the agreement was reached in Clause 1.1:[655]

> This Contract is entered into as a result of a Public Tender process conducted by OSINERGMIN under Supreme Decrees No. 012-2011-EM and No. 024-2013-EM [i.e., SD 24], Regulations of Legislative Decree No. 1002 on the Promotion of Investment for the Generation of Electricity from Renewable Energies [i.e., RER Regulations]…

609. While the RER Contract remains a contract, in the sense that it contains an agreement between the parties, certain provisions of that agreement have been set down by law.

610. In respect of the public interest (item (iii) of ¶ 604 above), the Tribunal has little difficulty in finding that the RER Contract furthers the express public interest set out in the Preamble of the RER Law:[656]

> The promotion of renewable energies, eliminating any barrier or obstacle for their development, implies promoting the diversification of the energy matrix, becoming an advance towards an energy security and environmental protection

652 Rejoinder ¶ 937; *citing* Lava Second Report ¶ 4.7.

653 Benavides Second Report ¶ 63.

654 Benavides Second Report ¶ 41.

655 **C-002**, RER Contract, Art. 1.1.

656 **C-007**, Legislative Decree No. 1002, 1 May 2008, Preamble.

> policy, being of public interest to provide a legal framework in which these energies are developed to encourage these investments and amend existing rules and regulations…

611. Dr. Benavides himself also characterises the RER Contract as "an administrative contract with the pursuit of public interest,"[657] even if he sees it as a complex or atypical administrative contract.[658] Claimants do not contradict this, submitting that the public interest in the RER Law and flowing into the RER Contract is "the public's interest in promoting, protecting and incentivizing RER projects."[659] Claimants miss the point by arguing that this interest would be undermined by the "inflexible and rigid restrictions on concessionaires" under Respondent's interpretation.[660] For present purposes, the Tribunal is satisfied that the RER Contract is executed in furtherance of a public interest set forth in the RER Law. The interpretation of the requirements of the RER Contract will be addressed as relevant later in this Award.

612. The Tribunal observes that at least two other arbitral tribunals deciding upon separate disputes under concession contracts pursuant to the RER Law and RER Regulations have reached the same conclusion that contracts like the RER Contract in question are *contratos normados* under Peruvian law.[661]

613. In light of the foregoing, the Tribunal concludes that the RER Contract is a *contrato normado* under Peruvian law. The RER Contract is executed under a binding legal framework which includes the RER Law and the RER Regulations. The Tribunal accepts Respondent's position that the administrative legal framework must be applied pursuant to the hierarchy of legal norms, as well as the speciality of the legal rule in question.[662]

614. The Tribunal therefore cannot accept Claimants' characterisation of the RER Contract as a "partnership" by which the parties were to collaborate to carry out mutual goals under

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657 Presentation of Dr. Benavides, Transcript (Day 4), 10 March 2022, 731:10-13.

658 Presentation of Dr. Benavides, Transcript (Day 4), 10 March 2022, 731:10-18.

659 Reply ¶ 684; *citing* **C-007**, Legislative Decree No. 1002, 1 May 2008, Preamble.

660 Reply ¶ 684.

661 **RL-095**, *Electro Zaña* Award, ¶ 221; **RL-098**, *Santa Lorenza* Award, ¶ 164.

662 *See* Rejoinder ¶¶ 926-927; *quoting* Monteza Second Report ¶ 175.

the RER Law.[663] As for the question of the allocation of risk and other arguments by the Parties in relation to this issue,[664] the Tribunal does not find it helpful to make generalisations at this stage, and will consider the specific terms of the RER Contract and applicable law as relevant in the course of its analysis.

B. PARTIES TO THE RER CONTRACT

615. The Parties disagree as to whether Respondent, i.e., the State of Peru, is Second Claimant's counterparty to the RER Contract.

(1) The Parties' Positions

616. Claimants argue that the State is a party to the RER Contract.[665] Their view is based on the indivisibility of the Peruvian State.[666] For Claimants, where the provisions of the RER Contract refer to the "Ministry", it means MINEM in its capacity as a representative of the Peruvian State. In their view, MINEM signed the contract only in its representative capacity, not in an individual capacity.[667]

617. In Claimants' view, a three-step interpretation of the RER Contract in accordance with Articles 168, 169 and 170 of the Peruvian Civil Code leads to the conclusion that the entire Peruvian State, and not solely MINEM, has assumed the role of Grantor under the RER Contract.[668]

618. Claimants equate the principle of a unitary State with how States are treated under international law. In their view, "the state must be imputed with acts and omissions of all government entities, including national, regional, and local entities."[669]

619. Claimants also argue that it would be unfair and contrary to good faith to adopt an interpretation of the RER Contract which is inconsistent with Peru's contemporaneous

663 Reply ¶ 675.

664 *See, inter alia*, Memorial ¶¶ 402-407; Counter-Memorial ¶¶ 875-879.

665 Reply ¶¶ 685 *et seq*. *See also* C-PHB, Annotated Index, ¶¶ 20-21.

666 Reply ¶ 686; *see* Quiñones Second Report ¶ 55.

667 Reply ¶¶ 695-696; *quoting* Benavides Second Report ¶ 116.

668 Reply ¶¶ 689-690.

669 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1949:21-1950:2.

interpretation of the RER Contract. Claimants rely, in this regard, on a report by MINEM in relation to a different RER project which refers to the indivisibility of the Peruvian State and the attribution of delays to "the Administration, therefore, to the Grantor."[670]

620. For Claimants, an interpretation pursuant to Article 170 of the Peruvian Civil Code confirms that: (i) the purpose of the RER Contract is to ensure that the concessionaire receives the Guaranteed Revenue, which guarantee can only be made by the State;[671] and (ii) the general purpose of the RER Contract is to implement the RER Law, which is enacted by the State to further its goals.[672]

621. Respondent submits that MINEM is the exclusive counterparty to the RER Contract, and did not assume obligations on behalf of all autonomous bodies of the Peruvian State at the national, regional or local level.[673]

622. Respondent contends that: (i) it is legally impossible for MINEM to assume obligations on behalf of other competent authorities under Peruvian law, which provides for decentralized and autonomous competencies;[674] (ii) autonomous levels of government do not affect the principle of the unity of the State; and (iii) Claimants attempt to apply a theory of international law to the contractual sphere.[675]

623. Respondent further argues that the RER Contract differentiates other "*Autoridades Gubernamentales*" from MINEM, and nowhere suggests that such authorities are contracting parties.[676]

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670 Reply ¶¶ 699-700; *quoting* **C-212(2)**, Legal Report No. 026-2014-EM-DGE, 28 October 2014, pp. 6-7.

671 Reply ¶ 710.

672 Reply ¶ 711.

673 Counter-Memorial ¶¶ 882, 885, 892.

674 Counter-Memorial ¶¶ 883-888; *quoting, inter alia*, Monteza Report ¶ 180; **RL-161**, *Ley No. 27783, Ley de Bases de la Descentralización*, 16 July 2002, Art. 10.2; **RL-055**, *Constitución Política del Perú*, 29 December 1993, Art. 188; **CM-039**, *Tribunal Constitucional (2005). Sentencia recaída en el Expediente No. 00020-2005-PI/TC*, 19 September 2005, ¶ 38; *see also* Rejoinder ¶¶ 945-952; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2110:15-2111:3.

675 Counter-Memorial ¶ 883; *quoting* Monteza First Report ¶ 172.

676 Rejoinder ¶ 965; *citing* **C-002**, RER Contract, Clause 1.4.2.

624. For Respondent, the fact that the RER Contract has a public interest as its ultimate objective does not imply that all State entities are contractually obligated to the concessionaire.[677]

(2) The RER Contract

625. Turning to the text of the RER Contract, the *chapeau* to the RER Contract states that it is "made and entered into by and between the Peruvian State, herein represented by the Ministry of Energy and Mines (the "Grantor")."[678]

626. Claimants also rely on the Minutes to the RER Contract which in their view are binding terms under the agreement.[679] These are addressed to the notary and ask for an entry recording the RER Contract:[680]

> *…que celebran, de una parte, el Estado de la República del Perú (en adelante, el Concedente), quien actúa a través del Ministerio de Energía y Minas…debidamente representado por el Director General de Electricidad…*

627. Clause 1.4.2 of the RER Contract defines "Government Authority" for the purposes of the RER Contract as follows:[681]

> …any judicial, legislative, political or administrative authority in Peru authorized by the Applicable Laws to issue or interpret rules or decisions, whether general or special in nature, with binding effects upon any person under their scope. Any reference to a specific Government Authority shall be deemed a reference to such Government Authority or its successor or any other authority appointed by such Government Authority to perform the acts referred to in this Contract or the Applicable Laws.

628. In the definition of "Contract" in Clause 1.4.12 of the RER Contract, it is stated that the RER Contract "is executed by the Concessionaire Company and the Ministry."[682]

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677 Rejoinder ¶ 968; *quoting* Monteza Second Report ¶¶ 93-94.

678 **C-002**, RER Contract, Preamble.

679 Reply ¶ 691; *citing* Benavides Second Report ¶ 104.

680 **C-002**, RER Contract, Minutes.

681 **C-002**, RER Contract, Clause 1.4.2.

682 **C-002**, RER Contract, Clause 1.4.12.

629. In Clause 1.4.19 "Government" is defined as "the Government of the Republic of Peru."[683] Clause 1.4.31 defines "Ministry" as "the Ministry of Energy and Mines, which enters into this Contract on behalf of the Government."[684]

630. In accordance with Clause 1.4.33, OSINERGMIN is "the Supervisory Body for Investment in Energy and Mining, which is competent, in accordance with the Applicable Laws, to oversee compliance with the Contract."[685]

631. "Party" is defined as "the Ministry or the Concessionaire Company" and "Parties" as "[t]ogether, the Ministry and the Concessionaire Company."[686]

632. In Clause 1.4.44, the "Concessionaire Company" is the entity "with which the Grantor enters into the Contract."[687]

633. Clause 2 of the RER Contract contains "Representations of the Parties," and Clause 2.2 contains a number of declarations by the "Ministry."[688] This includes, in Clause 2.2.1, that "[t]he Ministry is duly authorized under the Applicable Laws to act as Grantor of this Contract. The execution, delivery and performance hereof by the Ministry fall within its powers, are consistent with the Applicable Laws and have been duly authorized by the Government Authority."[689] Clause 2.2.2 confirms that the validly signed RER Contract "represents a valid, binding and enforceable obligation for the Ministry."[690]

(3) Tribunal's Analysis

634. Having reviewed the provisions of the RER Contract and the Parties' positions on this issue, the Tribunal finds that Respondent i.e., the State of Peru, is a party to the RER Contract.

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683 **C-002**, RER Contract, Clause 1.4.19.
684 **C-002**, RER Contract, Clause 1.4.31.
685 **C-002**, RER Contract, Clause 1.4.33.
686 **C-002**, RER Contract, Clauses 1.4.34, 1.4.35.
687 **C-002**, RER Contract, Clause 1.4.44.
688 **C-002**, RER Contract, Clause 2.2.
689 **C-002**, RER Contract, Clause 2.2.1.
690 **C-002**, RER Contract, Clause 2.2.2.

635. This is clearly expressed in the terms of the RER Contract, which provide that it is (i) "made and entered into by and between the Peruvian State" (*chapeau*, see ¶ 625 above); and (ii) signed by MINEM "on behalf of the Government" (Clause 1.4.31, see ¶ 629 above).

636. The fact that the State of Peru acts through MINEM in executing the RER Contract does not change the fact that the State of Peru is the counterparty.

637. It does not follow, however, that the Tribunal accepts Claimants' assertion that "[i]f…the State was the Grantor, then ***all*** government measures that adversely affected the Project…must be imputed to the Grantor under the RER Contract."[691]

638. The State of Peru has agreed that MINEM shall "act as Grantor" (see Clause 2.2.1, ¶ 633 above). The State of Peru has not agreed that every government authority of Peru has undertaken obligations under the RER Contract.

639. It is therefore important to refer to the terms of the RER Contract to determine precisely the agreement that has been reached, and the role or responsibility of any specific governmental authority. The Tribunal agrees with Respondent, in this respect, that the RER Contract clearly delineates the role of government authorities in general in Clause 1.4.2 (see ¶ 627 above).

640. Likewise, Clause 4.3 of the RER Contract specifically refers to MINEM's role to "*coadyuvar*" in certain circumstances as distinct from the role of other government authorities, i.e., where permits were "not being timely granted by the relevant Government Authority" (see ¶ 654 below for the full provision).[692]

641. Authorities other than MINEM may have specific obligations or duties under the RER Contract. For example, under Article 6.3.3 of the RER Contract, a settlement shall be prepared at the end of each "Tariff Period" for the total Premium, "calculated according to

691 Reply ¶ 686 (emphasis in original).

692 **C-002**, RER Contract, Clause 4.3.

the relevant Procedure as approved by the OSINERGMIN."[693] The State of Peru has therefore agreed that OSINERGMIN shall undertake this role under the RER Contract.

642. To the extent that any doubt remains from such a literal interpretation, a systematic and functional interpretation confirms the same.

643. Article 1.18 of the RER Regulations confirms that MINEM signs the contract on behalf of the State (MINEM "*en representación del Estado firma el Contrato*").[694] This is consistent with Clause 1.4.31 of the RER Contract (see ¶ 629 above).

644. The Tribunal's conclusion is consistent with Claimants' argument regarding the indivisibility of the Peruvian State (see ¶ 616 above). This is a principle of Peruvian law, separate from the attribution of conduct to a State under international law. Being indivisible, the State of Peru as a whole is the counterparty to the RER Contract.

645. The Tribunal's determination is also consistent with Respondent's argument that the indivisibility of the Peruvian State must be taken into account together with the decentralisation of the Peruvian State. Under the Political Constitution of Peru, the authorities of the Peruvian State are independent and autonomous from one another.[695] This is confirmed by other laws such as the *Ley Orgánica del Poder Ejecutivo (Ley No. 29158)*.[696]

646. As explained by Respondent's experts Mr. Lava and Mr. Monteza, the separation of powers and decentralisation of the State is also confirmed by decisions of the Constitutional Tribunal of Peru, which has explicitly confirmed that "*el Estado unitario es de carácter descentralizado*."[697] As such, a contract by which the State of Peru agrees upon obligations

693 **C-002**, RER Contract, Clause 6.3.3.

694 **MQ-005**, *Reglamento RER*, Art. 1.18

695 Counter-Memorial ¶¶ 885-891; Rejoinder ¶¶ 946-950; R-PHB ¶ 98. *See* **RL-055**, *Constitución Política del Perú*, 29 December 1993, Art. 188.

696 **RL-162**, *Ley No. 29158*, 19 December 2007, Arts. 1, 6.

697 Lava First Report ¶¶ 3.7-3.11; *quoting*, *inter alia*, **CLC-054**, *Tribunal Constitucional del Perú (2018). Sentencia recaída en el expediente 0006- 2018-PI/TC*; **CLC-052**, *Tribunal Constitucional del Perú (2005). Sentencia recaída en los expedientes 0020- 2005-PI/TC y 0021-2005-PI/TC*, ¶¶ 35-38; Monteza First Report ¶ 188; *quoting* **CM-039**, *Tribunal Constitucional (2005). Sentencia recaída en el Expediente No. 00020-2005-PI/TC*, 19 September 2005.

for MINEM or other specific government authorities does not automatically entail the responsibility of every Peruvian government authority under the contract for actions not specified in that contract.

647. The Tribunal accepts the evidence of Dr. Quiñones along these lines, i.e., that those entities bound by the RER Contract would be "all the entities or bodies that are in charge of fulfilling the obligations and charges corresponding to the grantor"[698] or "public bodies linked to the compliance of the contract."[699]

648. The fact that the RER Law in Article 2 refers to the public interest and necessity of the RER projects does not, in the Tribunal's view, add to the present analysis. The Tribunal therefore is not persuaded by Dr. Benavides' arguments in reliance on those aspects of Article 2 of the RER Law.[700]

649. Claimants further argue that it is "neither honest nor fair" for Respondent to adopt an interpretation of the RER Contract that is "completely contrary to how it interpreted the RER Contract during the relevant period."[701] Aside from the fact that the MINEM report relied on by Claimants was issued in relation to a different RER project, such report must be read consistently with the decentralisation of the Peruvian State referred to at ¶¶ 644-646 above.

650. The fact that the Echecopar Reports relied on by Claimants arrived at a different conclusion is also not decisive, since these are legal opinions drafted by outside counsel and are not binding or a reflection of the parties' views.[702]

651. The Tribunal's determination accepts Claimants' submission that the State of Peru is the counterparty to the RER Contract. The Tribunal rejects, however, Claimants' argument that this means that measures taken by every governmental authority implicate

698 Cross-examination of Dr. Quiñones, Transcript (Day 5), 11 March 2022, 1000:21-1001:2.

699 Cross-examination of Dr. Quiñones, Transcript (Day 5), 11 March 2022, 999:4-7. *See also* 998:8-17; 999:14-21, 1026:11-17.

700 *See* Presentation of Dr. Benavides, Transcript (Day 4), 10 March 2022, 731:9-18.

701 Reply ¶ 699; *quoting* **C-212(2)**, Legal Report No. 026-2014-EM-DGE, 28 October 2014, pp. 6-7.

702 *See* Reply ¶ 720; *quoting* **C-235**, First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), 5 April 2018, § 2.2.2.

responsibility under the RER Contract. This view is premised on the public international law notion of attribution of conduct to a State. The obligations agreed by the State of Peru in the RER Contract, including the responsibility of any governmental authority for a specific role or task, are set out in its express terms. The terms of the RER Contract are therefore the reference to determine what has been agreed, and whether a governmental authority is in breach of the RER Contract by its acts or omissions.

652. In the following Sections, the Tribunal will turn to consider the alleged breaches of the RER Contract.

C. ALLEGED FAILURE TO PROVIDE ASSISTANCE REGARDING PERMITS

653. Claimants argue that Respondent breached its obligation under Clause 4.3 of the RER Contract to assist Second Claimant in obtaining all necessary permits from the relevant government authorities in a timely manner. In Claimants' view, the State of Peru remains ultimately responsible for this obligation, but it is delegated under the RER Contract to MINEM.[703] Respondent denies that MINEM breached the RER Contract on this ground.[704]

654. Clause 4 of the RER Contract is entitled "Construction of the Generation Plant" and Clause 4.3 provides:[705]

> The Ministry [i.e., MINEM] shall create any such easements as may be required in accordance with the Applicable Laws but shall not bear any costs incurred in obtaining them.
>
> Furthermore, the Ministry shall, upon request of the Concessionaire Company, use its best endeavors in order to allow the latter to access third-party facilities, and shall assist it ["*coadyuvará*"] in obtaining permits, licenses, authorizations, concessions, easements, rights of use, and any other similar right, in the event of these not being timely granted by the relevant Government Authority despite all requirements and procedures required under the Applicable Laws having been met.

703 Memorial ¶ 441.

704 Counter-Memorial ¶ 913.

705 **C-002**, RER Contract, Clause 4.3.

655. There being no precise English term corresponding to the Spanish "*coadyuvará*", the Tribunal will generally refer to the Spanish term in its reasoning.

656. In relation to Clause 4.3 of the RER Contract, Tribunal Question 3 asked:

> Assuming without deciding that the meaning of "*coadyuvará*" is to assist or provide support:
>
> (i) Did Second Claimant make a request(s) for assistance under this provision;
>
> (ii) Is it Claimants' position that Respondent is in breach of this provision; and
>
> (iii) What is the support for that allegation, if made?

657. The Tribunal takes into account the Parties' respective answers to this question in reaching its conclusions below.[706]

(1) Meaning of *Coadyuvar*

658. The Parties disagree on the meaning of "*coadyuvar*" and what is required to fulfil the obligation in Clause 4.3, in particular with respect to "obtaining permits, licenses, authorizations…and any other similar right."

659. For Claimants, "*coadyuvar*" means "to contribute and help to obtain."[707] They submit that it is a results-driven obligation.[708] In the context of a property right issued by a government authority, Claimants contend that the obligation must be interpreted to mean that MINEM must help Second Claimant to successfully obtain those rights, rather than just offer assistance.[709]

660. For Respondent, "*coayudvar*" is an obligation of means and not result.[710] In Respondent's view, the clause provides no guarantee that Second Claimant's permits will be granted.[711]

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706 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1948:18-1949:13; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2110:1-9, 2112:8-2114:11.

707 Memorial ¶¶ 443-444; *quoting* Benavides First Report ¶¶ 131-132; Reply ¶ 831; *citing* Lava First Report ¶ 1.12.

708 Reply ¶ 831.

709 Memorial ¶ 445; *quoting* Benavides First Report ¶ 13. *See also* C-PHB, Annotated Index, ¶ 29.

710 Counter-Memorial ¶¶ 913, 917; Rejoinder ¶ 1036.

711 Counter-Memorial ¶ 917; *citing* Lava First Report ¶ 3.57.

Respondent argues that the clause requires MINEM to contribute and collaborate in obtaining the permits, limited to actions within its sphere of control within the legal framework, i.e., exhaustion of best efforts.[712]

661. To interpret Clause 4.3 of the RER Contract, the Tribunal will apply Articles 168-170 of the Peruvian Civil Code, as relevant (see ¶¶ 591-599 above).

662. Under Article 168 of the Peruvian Civil Code, the Tribunal first carries out a literal reading of Clause 4.3 of RER Contract.

663. Both Dr. Benavides and Mr. Lava rely on the definition of "*coadyuvar*" in the Diccionario de la Real Academia Española de la Lengua, which provides that "*coadyuvar*" is to "*contribuir o ayudar a que algo se realice o tenga lugar*."[713] The ordinary meaning of the Spanish term is therefore to contribute or help to make something happen or take place.

664. While they refer to the same definition, the Parties' experts draw opposing conclusions: for Dr. Benavides, the term "*coadyuvar*" means that the permit must be granted to fulfil the obligation.[714] For Mr. Lava, on the other hand, "*coadyuvar*" requires MINEM to contribute and collaborate in obtaining the permits, but limited to actions within its sphere of control within the legal framework.[715]

665. The Tribunal observes that the ordinary meaning of the term "*coadyuvar*" is not merely assistance, but assistance that is linked to an objective, in this case being to obtain the permit, license or similar. However, the Tribunal does not find support in this language for a conclusion that MINEM promised to ensure or guarantee that a permit, license or similar is granted by the competent authority in question.

666. Further, the obligation to "*coadyuvar*" can be distinguished from the language of the best efforts obligation ("*mejores esfuerzos*") in Clause 4.3 of the RER Contract in relation to

712 Counter-Memorial ¶ 917; *quoting* Lava First Report ¶ 3.68.

713 **CLC-055**, *Real Academia Española*, "*Diccionario de la Lengua Española*", 23 Ed. 2014; *see* Benavides First Report ¶ 131; Lava First Report ¶ 3.61.

714 Benavides First Report ¶ 13.

715 Lava First Report ¶ 3.68.

access to third party facilities (see ¶ 654 above). In the Tribunal's view, this does not necessarily reflect different degrees of assistance, but rather different types of assistance due to the nature of the processes in question. Unlike access to third party facilities ("*instalaciones de terceros*"), the process of obtaining permits, licenses, authorisations and similar necessarily requires the input of the applicant, i.e., Second Claimant. The term "*coadyuvará*" implies joint efforts, i.e., a collaboration towards the goal in question between two parties, in this case Second Claimant and MINEM. Clause 4.3 confirms this by referring to "all requirements and procedures required under the Applicable Laws having been met" ("*de haberse cumplido los requisitos y trámites exigidos por las Leyes Aplicables*").[716] Best efforts, on the other hand, refers to the conduct of one party ("*el Ministerio hará sus mejores esfuerzos*").

667. Further clarity is drawn from systematic and functional interpretations under Articles 169 and 170 of the Peruvian Civil Code, which read Clause 4.3 in the context of the RER Contract as a whole and in light of its nature and object (see ¶¶ 596-597 above).

668. First, as the Tribunal has already determined at ¶ 651 above, while the Peruvian State is the counterparty to the RER Contract, this does not mean that measures taken by every governmental authority implicate responsibility under the RER Contract. For the actions of any particular governmental authority, it will be necessary to verify whether such action constitutes a breach of the RER Contract by reference to the terms of the RER Contract.

669. While Claimants submit that the unitarian rather than federal nature of the Peruvian State means that the State must be imputed with the acts and omissions of all government entities,[717] the Tribunal does not agree. As the Tribunal has found above and as Respondent argues, the Peruvian State is also decentralised, with autonomy for regional and local governments which grant permits.[718]

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716 **C-002**, RER Contract, Clause 4.3.

717 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1949:19-1950:9. *See* Tribunal Question 16: "Does the fact that Respondent is a unitarian State (Article 43 of the Peruvian Constitution) and not a federation (or Federal State) have any impact on how the Tribunal should examine the matter of permitting?"

718 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2110:10-2112:7.

670. In this regard, Clause 4.3 of the RER Contract does not contain an obligation on MINEM to ensure that permits are successfully obtained. Consistent with the decentralised nature of the Peruvian State (see ¶¶ 645-646 above), the wording of Clause 4.3 itself refers to "the relevant Government Authority" from which a permit or authorisation is sought, confirming the separate role and competencies of MINEM and other agencies or authorities in the Peruvian State.[719]

671. Claimants' interpretation that the "*coadyuvará*" obligation "takes on a new meaning" when the subject matter "concerns a property right issued by a government authority" is without merit.[720] Likewise, it is not correct to speak of MINEM as relying on its "own breaches"[721] when referring to actions undertaken by separate and independent parts of the Peruvian government.

672. In addition, Respondent correctly argues that it would be inconsistent with fundamental principles of Peruvian law for one government ministry to be obliged to intervene in, and guarantee the outcome of, a permitting process undertaken by another authority.[722] Article 63.1 of the GLAP confirms the independence and autonomy of Peru's administrative authorities:[723]

> *Es nulo todo acto administrativo o contrato que contemple la renuncia a la titularidad, o la abstención del ejercicio de las atribuciones conferidas a algún órgano administrativo.*

673. This principle of independence is also protected by way of sanctions under criminal law. Likewise, the Peruvian *Tribunal Constitucional* has confirmed the independence of the judiciary vis-à-vis other public authorities including the executive and legislative branches

719 **C-002**, RER Contract, Clause 4.3.

720 Memorial ¶ 445.

721 *See* Reply ¶ 836.

722 *See* Rejoinder ¶¶ 1050-1052.

723 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. 63.1.

of government.[724] Article 139 of the Political Constitution of Peru provides, in this respect:[725]

> *...La independencia en el ejercicio de la función jurisdiccional. Ninguna autoridad puede avocarse a causas pendientes ante el órgano jurisdiccional ni interferir en el ejercicio de sus funciones.*

674. Claimants' response to this point is that MINEM did not have to force other government authorities to do anything, but rather to "work with [Second Claimant] to help secure the permits that were unduly delayed or subject to challenge."[726] This aligns precisely with the Tribunal's interpretation of Clause 4.3 of the RER Contract, in the sense that the clause obliges MINEM to work with Second Claimant to help it to secure relevant permits. However, the obligation necessarily falls short of ensuring an outcome, based on the wording of the clause.

675. In further confirmation of the above interpretation, the express wording of several other provisions of the RER Contract explicitly assign the responsibility for obtaining permits to the concessionaire. Read together with these clauses, the obligation on MINEM to "*coadyuvar*" can only be to provide assistance in pursuit of those permits, without guaranteeing that the joint efforts will be successful. In this regard, Clause 1.3 of the RER Contract refers to: [727]

> the Concessionaire Company's obligation to request, sign and comply with the requirements for the Final Concession of the Power Plant to be obtained by the Concessionaire Company from the Ministry.

676. Clause 3.2 of the RER Contract further states that "[t]he Concessionaire Company shall manage and comply with all the requirements in furtherance of obtaining the Final

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724 **RL-039**, *Decreto Legislativo No. 635, Código Penal*, 3 April 1991, ("*Código Penal*"), Art. 410; **R-165**, *Sentencia del Tribunal Constitucional, Exp. No. 0023-2003-AI/TC*, 9 June 2004, ¶ 29; **R-166**, *Sentencia del Pleno Jurisdiccional del Tribunal Constitucional, Exp. 0004-2006-PI/TC*, 29 March 2006, ¶ 18.

725 **RL-055**, *Constitución Política del Perú*, 29 December 1993, Art. 139.

726 Reply ¶ 839.

727 **C-002**, RER Contract, Clause 1.3.

Concession…"[728] The *Bases Consolidadas* (which form a part of the agreement) further confirm this.[729]

677. Based on the foregoing, the Tribunal rejects Claimants' argument that the purpose of Clause 4.3 of the RER Contract was to ensure that the Project had all its permits so that the Project could advance to completion.[730] While Clause 4.3 provides a mechanism for the Parties to collaborate in specific circumstances to support the permitting process, it was by no means a guarantee that such permits would be granted, or that they would be insulated from requirements or proceedings under applicable law.

678. For good order, the Tribunal notes that it is not assisted by the example cited by Claimants of MINEM's coordination role which led to a positive result for an issue that arose with OSINERGMIN in relation to the Performance Bond.[731] Claimants did not assert that this request was made pursuant to Clause 4.3 of the RER Contract, and did not submit the content of this request to the record. Naturally, none of the Tribunal's findings prevent MINEM from providing assistance to Second Claimant when it makes a request to MINEM that is consistent with Peruvian law but falls outside Clause 4.3 of the RER Contract.

679. The Tribunal therefore finds Mr. Lava's interpretation of "*coadyuvar*" to be more accurate, requiring MINEM to contribute and collaborate in obtaining the permits, limited to actions within its sphere of control within the legal framework.[732]

(2) Requirements to Activate Clause 4.3

680. The language of Clause 4.3 of the RER Contract refers to three elements necessary to activate the "*coadyuvar*" obligation upon MINEM, or circumstances in which that

728 **C-002**, RER Contract, Clause 3.2.

729 **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Clause 1.4.1: "…*Cada Adjudicatario debe obtener la Concesión Definitiva cumpliendo las disposiciones establecidas en la LCE* [Ley de Concesiones Eléctricas] *y el RLCE* [Reglamento de la Ley de Concesiones Eléctricas], *en caso que no tuviera dicha Concesión Definitiva…En ese sentido, es de su exclusiva responsabilidad el contar con los títulos que los habiliten legalmente para la instalación de la central de generación RER en el área de terreno que señalen para tal fin*…"

730 Reply ¶ 835.

731 Reply ¶ 841.

732 Lava First Report ¶ 3.68.

obligation applies. These are: (i) upon request of the Concessionaire Company ("*de ser requerido por la Sociedad Concesionaria*"); (ii) in case the permit, license, authorisation or similar was "not being timely granted by the relevant Government Authority" ("*en caso éstos no fueran otorgados por la Autoridad Gubernamental competente en el tiempo debido*"); and (iii) the delay in granting it is "despite all requirements and procedures required under the Applicable Laws having been met" ("*a pesar de haberse cumplido los requisitos y trámites exigidos por las Leyes Aplicables*").[733] These requirements are cumulative, in that all three must be satisfied for the obligation to "*coadyuvar*" to be activated.

681. The Parties agree on criteria (ii) and (iii) in ¶ 680 above[734] but disagree on the meaning of the first criterion (i), i.e., whether Clause 4.3 of the RER Contract requires an explicit request by the Concessionaire Company invoking the "*coadyuvar*" obligation.[735]

682. According to Claimants, "there is no formal notice requirement under Clause 4.3." As a result of MINEM's role as representative of Peru, Claimants contend that MINEM was in charge of supervising the RER Contract and ensuring the timely progress of the Project. Claimants argue, on this basis, that MINEM had a *sua sponte* obligation under Clause 4.3 to work with Second Claimant in securing the Project's permits.[736]

683. The Tribunal finds no support for Claimants' view in the wording of Clause 4.3, nor in a systematic or functional interpretation of that clause. The wording "upon request of the Concessionaire Company" ("*de ser requerido por la Sociedad Concesionaria*") necessarily involves an action by the Concessionaire Company to request or require the assistance of MINEM. Claimants' interpretation does not take account of this language and leaves it without meaning.

684. The Tribunal further is not persuaded by Claimants' argument based on the punctuation of the clause, i.e., that the wording "upon request of the Concessionaire Company" only

733 **C-002**, RER Contract, Clause 4.3.

734 Reply ¶ 831; Counter-Memorial ¶ 916.

735 Counter-Memorial ¶ 916; Reply ¶ 837; Rejoinder ¶ 1036; R-PHB ¶ 89.

736 Reply ¶ 837.

relates to MINEM's obligation to "use its best endeavors in order to allow the latter to access third-party facilities," due to the comma in that sentence separating the two obligations (see ¶ 654 above).[737] On the Tribunal's reading, the requirement to make a request applies to both obligations in that clause.

685. Claimants' view further appears based on the premise, already rejected by the Tribunal (see ¶ 651 above), that authorities and instrumentalities of the Peruvian State generally have direct obligations under the RER Contract.[738] Any such obligations must have a basis in the terms of the RER Contract.

686. Claimants rely on the opinion of Dr. Quiñones that government authorities have the legal duty to initiate procedures under their responsibility, without waiting for a delay to be brought to their attention.[739] As Respondent argues, this is essentially an argument based on administrative law rather than the RER Contract.[740] It mixes matters between: (i) the obligation to "*coadyuvar*" triggered by a permit or similar which is delayed in being issued; and (ii) Peruvian administrative law obligations regarding the timely issuance of permits and other authorisations.[741] In addition, the opinion of Dr. Quiñones cited by Claimants is expressly stated to be independent of the "*coadyuvar*" obligation ("*[i]ndependientemente del deber de coadyuvar*") and it is therefore unclear what guidance it offers on the interpretation of Clause 4.3 of the RER Contract.

687. The Tribunal notes that Clause 4.3 does not set any specific requirements with respect to the format or means by which the Concessionaire Company should bring a matter requiring assistance to MINEM's attention. The Tribunal considers it sufficient that the obligation to "*coadyuvar*" is invoked by explicit reference to Clause 4.3 of the RER Contract.

688. Therefore, while MINEM was required to collaborate with Second Claimant for the purpose of supporting it to obtain necessary permits, this obligation did not arise "*sua*

737 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1948:18-1949:5.

738 Reply ¶ 837; *quoting* Quiñones Second Report ¶ 169.

739 Quiñones Second Report ¶ 169.

740 Rejoinder ¶ 1045.

741 Rejoinder ¶ 1047.

sponte" in the absence of a request by Second Claimant. Contrary to Claimants' understanding, and as set out above (see ¶¶ 675-676 above), several provisions of the RER Contract make clear that Second Claimant was responsible for securing the permits, and the "*coadyuvar*" obligation is to be understood in this context.

(3) Alleged Breaches of Clause 4.3

689. Claimants submit that Respondent failed to fulfil its obligation to "*coadyuvar*" in the following ways:[742]

(i) By the RGA's commencement of the RGA Lawsuit, which had the purpose of obstructing, not aiding development of, the Project.[743]

(ii) When MINEM failed to immediately provide assistance to Second Claimant to dismiss the RGA Lawsuit, in spite of Second Claimant's correspondences to MINEM invoking Clause 4.3 of the RER Contract dated 28 March 2017, 21 April 2017, 26 April 2017, 17 July 2017.[744]

(iii) When MINEM failed to provide assistance to Second Claimant after the AEP commenced a criminal investigation into how Second Claimant obtained the Project's environmental permits ("**Criminal Investigation**"), as a result of which Second Claimant's legal counsel is facing criminal charges and a potential three-year prison term for signing a permit-related application for reconsideration on behalf of Second Claimant (the "**Criminal Proceedings**").[745]

(iv) When MINEM failed to provide assistance to Second Claimant's efforts to obtain the Project's CWA. According to Claimants, Second Claimant applied to the AAA for this permit in November 2016, and a determination should have been issued by January 2017. However, the AAA did not issue a valid permit until January 2018. Claimants submit that this caused an unjustified year of delay to the Project, caused

742 *See* Reply ¶ 832.
743 Memorial ¶ 451.
744 Memorial ¶ 452.
745 Memorial ¶ 453.

by the AAA's arbitrary and unlawful rejection of the permit application in May 2017. This was followed, Claimants argue, by a materially defective permit in July 2017, which the AAA refused to fix until an ANA administrative court ordered it to be reissued in December 2017. While Second Claimant had complied with applicable laws, Claimants argue that the AAA failed in its administrative duty to issue the CWA in a timely manner, and MINEM gave no assistance to Second Claimant.[746]

690. Respondent opposes each of these claims on the basis, *inter alia*, that they do not fulfil the requirements or fall under the scope of Clause 4.3 of the RER Contract.[747]

691. The Tribunal will consider the first two alleged breaches together, followed by the third and fourth breaches separately.

a. The RGA Lawsuit

692. Claimants requested MINEM's assistance in respect of the RGA Lawsuit and invoked Clause 4.3 of the RER Contract in their letters of 28 March 2017, 26 April 2017 and 17 July 2017.[748] While Claimants also refer to a letter of 21 April 2017,[749] no mention of Clause 4.3 is found in the text of that letter.[750] In addition, it appears that the invocation of Clause 4.3 in the letter of 28 March 2017 was primarily made in relation to a separate issue that is not the subject of Claimants' present allegation.[751] On the other hand, and contrary to Respondent's assertion,[752] the letter of 17 July 2017 does make reference to Clause 4.3 of the RER Contract, even if it does so among other requests and in addition to invoking other legal provisions. Based on the letters of 26 April and 17 July 2017, the Tribunal finds

746 Memorial ¶ 454.

747 Counter-Memorial ¶¶ 938-954; Rejoinder ¶¶ 1048-1062.

748 **C-091**, Letter from C.H. Mamacocha to Ministry of Energy and Mines, 28 March 2017, p. 1; **C-139,** *Carta de CH Mamacocha (C. Diez) al MINEM (G. Tamayo)*, 26 April 2017, pp. 1, 15, 17; **C-142**/**MQ-020**, *Carta de CH Mamacocha al MINEM (A. Vásquez)*, 17 July 2017, p. 7.

749 Memorial ¶ 452; Reply ¶ 835.

750 **C-215**, CH Mamacocha S.R.L. Request for Suspension, 21 April 2017.

751 **C-091**, Letter from C.H. Mamacocha to Ministry of Energy and Mines, 28 March 2017, p. 2.

752 Rejoinder ¶ 1044.

that a request for MINEM to "*coadyuvar*" under Clause 4.3 of the RER Contract was made in relation to the RGA Lawsuit.

693. The Tribunal observes that Second Claimant requested assistance not in relation to a delayed permit, but rather asked for MINEM to use its good offices before the Governor of Arequipa and the RGA Council to "*obtener la revocatoria inmediata de la Resolución N° 033-2016-GRA/ ARMA*" issued by ARMA dated 12 December 2016, which had declared that Claimants' environmental permits suffered from nullity and had referred the matter to the RGA Prosecutor (see ¶ 128 above).[753] The Tribunal agrees with Respondent that this does not fall within the scope of the "*coadyuvar*" obligation.[754] Among other things, it does not satisfy the second criterion to activate Clause 4.3 of the RER Contract as set out at ¶ 680 above.

694. In this regard, Clause 4.3 does not and cannot prevent or preclude competent authorities from commencing administrative or judicial legal proceedings provided for under Peruvian law. Nor does it require MINEM to ensure the revocation of a resolution or dismissal of such a lawsuit, which would be contrary to the separation of powers (see ¶ 646 above). Claimants see MINEM as the protector of the permits, which must rebuff any challenges and ensure that their validity is maintained. Claimants allege, in this respect, that MINEM "failed to…*coadyuvar* [Second Claimant] in defending these permits from unreasonable government interferences."[755] However, this does not accord with the meaning of "*coadyuvar*" in the RER Contract determined above (see ¶¶ 665 to 677 above).

695. The Tribunal therefore rejects this basis for a claim that MINEM breached Clause 4.3 of the RER Contract.

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753 *See* **C-139**, *Carta de CH Mamacocha (C. Diez) al MINEM (G. Tamayo)*, 26 April 2017, p. 1; **C-142**/**MQ-020**, *Carta de CH Mamacocha al MINEM (A. Vásquez)*, 17 July 2017.

754 Counter-Memorial ¶¶ 940-941.

755 Reply ¶ 832.

696. This determination is consistent with what MINEM advised to Second Claimant at the time. On 13 July 2017, MINEM indicated to Second Claimant:[756]

> *…la responsabilidad del Estado a través del [MINEM], se limita a coadyuvar; no existiendo renuncia u obligación de no ejercer el derecho de acción en el marco de un proceso contencioso administrativo, que tenga por objeto solicitar al Poder Judicial la nulidad de una actuación administrativa (agotado el plazo para poder declarar la nulidad en sede administrativa, a través de la autotutela declarativa).*
>
> …
>
> *[MINEM] carece de competencias para evaluar la legalidad y oportunidad (en los términos de la solicitud) de la actuación del Gobierno Regional de Arequipa (autónomo respecto al Gobierno Nacional, según la legislación vigente), ni del Poder Judicial (constitucionalmente autónomo).*

697. In light of this conclusion, the Tribunal need not address Respondent's additional argument that no obligation arose in respect of the RGA Lawsuit because the Amparo Judgment had annulled the permits in question *ab initio*.[757]

b. Criminal Investigation

698. Second Claimant's allegation under this head relates to the Criminal Investigation initiated by the AEP in March 2017 into ARMA officials who were involved in the reclassification and approval of Second Claimant's environmental permits, to investigate whether the officials committed the crime of "illegal granting of rights" under Article 314 of the Penal Code, to the detriment of the environment and the State and the benefit of Second Claimant (see ¶ 149 above).[758]

699. Unlike the RGA Lawsuit, Second Claimant cites no specific request to MINEM under Clause 4.3 of the RER Contract in respect of the Criminal Investigation. To the extent that Claimants submit that the requests made in relation to the RGA Lawsuit also cover what

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[756] **MQ-019**, *Oficio No. 121-2017-MEM/VME del MINEM a HLA*, 13 July 2017, attaching *Informe No. 122-2017-MEM/DGE*, 28 July 2017, pp. 6, 7.

[757] Rejoinder ¶ 1053.

[758] **C-188**, *Disposición Fiscal No. 01-2017-0-FPEMA-MP, Fiscalía Ambiental de Arequipa*, 24 March 2017. *See* Memorial ¶ 105; Counter-Memorial ¶ 219.

they refer to as "the related criminal proceeding,"[759] the Tribunal finds no reference to the Criminal Proceedings in the letters of 26 April and 17 July 2017 and is not persuaded that those requests related to this matter of the Criminal Investigation.[760]

700. In fact, it is unclear precisely what "assistance" Claimants argue that MINEM should have provided in relation to the Criminal Investigation. Claimants merely submit that "MINEM has never provided any assistance with this matter."[761] What kind of assistance would have been open to MINEM, while respecting Peruvian law and the separation of powers, has not been established by Claimants.

701. As the Tribunal found in relation to the RGA Lawsuit, this alleged breach of Clause 4.3 of the RER Contract also does not concern the delayed issuance of a permit or authorisation. It rather relates to separate legal proceedings brought in relation to the circumstances in which Second Claimant's environmental permit was granted. It therefore does not fulfil the criteria needed to activate Clause 4.3 mentioned at ¶ 680 above. Claimants' assertion that the Criminal Investigation "unfairly and baselessly questioned the legality of the Project's environmental permits"[762] is inapposite in light of the Tribunal's findings at ¶¶ 662-679 above on the meaning and scope of the "*coadyuvar*" obligation.

c. Civil Works Authorisation

702. This item concerns an alleged failure by MINEM to "*coadyuvar*" in relation to the issuance of the CWA. Second Claimant's application for a CWA was subject to delays, including an initial denial by the AAA, and a subsequently defective issuance that required correction as set out at ¶¶ 151 to 158 above.

703. In respect of the delay in obtaining the CWA, Claimants have not asserted that they made a request to MINEM to "*coadyuvar*" under Clause 4.3 of the RER Contract. The notice requirement to activate Clause 4.3 is therefore not satisfied. As found above, the obligation

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759 Reply ¶ 835.

760 **C-139,** *Carta de CH Mamacocha (C. Diez) al MINEM (G. Tamayo)*, 26 April 2017, pp. 1, 15, 17; **C-142 /MQ-020**, *Carta de CH Mamacocha al MINEM (A. Vásquez)*, 17 July 2017, p. 7.

761 Memorial ¶ 453.

762 Reply ¶ 832.

to "*coadyuvar*" is not a *sua sponte* one upon MINEM, but is activated only upon request by Second Claimant.

704. There being no request, MINEM cannot have failed in its duty to "*coadyuvar*." It is important to note, in this respect, that a delay in issuing the CWA by the AAA is not a breach of Clause 4.3 of the RER Contract. The alleged breach must relate to MINEM's failure to act to assist Second Claimant when requested. The Tribunal therefore rejects Second Claimant's argument under this item.

(4) Conclusion

705. Based on the Tribunal's determinations in relation to each of the arguments made under Clause 4.3 of the RER Contract, the Tribunal rejects Second Claimant's claim for a breach of this clause. As noted above, several of its arguments under this claim are based on an incorrect understanding of the scope of the obligation to "*coadyuvar*" or the role of MINEM as counterparty to the RER Contract.

D. ALLEGED BREACHES REGARDING THE REJECTION OF THE THIRD EXTENSION REQUEST

706. By letter dated 1 February 2018, Second Claimant requested an extension under the RER Contract of the Actual COS date (to 28 February 2021) and the termination date (to 31 December 2041) ("**Third Extension Request**").[763] The Third Extension Request referred to delays in granting permits and delays resulting from Addenda 1 to 4, which in its view caused reduction of the term of validity of the Award Tariff. Second Claimant requested a modification of the Works Execution Schedule and the date of termination of the contract in recognition of the 1480 calendar days of delay, which it argued were not caused by Second Claimant.[764]

763 **C-127**, Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, 1 February 2018. *See* Memorial ¶ 142; Counter-Memorial ¶ 268.

764 **C-127**, Letter from CH Mamacocha to A. Grossheim, Minister of Energy and Mines regarding third extension request, 1 February 2018, pp. 4-5. *See* Counter-Memorial ¶¶ 269-270.

707. The Third Extension Request was formally rejected by MINEM on 31 December 2018 (see ¶ 217 above).[765] Tribunal Question 7 asked:

> Was the rejection of the Third Extension Request adopted by MINEM acting in its capacity as contracting party to the RER Contract, If so, what is the relevance, if any, for Claimants' claims?

708. The Tribunal takes into account the Parties' respective answers to this question in reaching its conclusions.[766]

709. Second Claimant argues that by rejecting its Third Extension Request (see ¶ 217 above), Respondent has breached the RER Contract. According to Claimants, this denial "effectively ended the Mamacocha Project."[767] It is therefore a key issue to be decided by the Tribunal in the Parties' dispute.

710. In order to focus on the matters necessary to reach its decision on this issue, the Tribunal will address the following: (i) whether the RER Contract contains a duty to confer on Second Claimant the economic benefits of a 20-year Guaranteed Revenue Concession; (ii) whether Second Claimant was entitled to an extension under the RER Contract; and (iii) the alleged breach of Addenda 3 to 6.

(1) Guaranteed Revenue under the RER Contract

711. Claimants argue that "the chief incentive in the RER Contract" is its guarantee of "a fixed price per megawatt hour, for a fixed amount of megawatt hours per year, over a 20-year period" ("**Guaranteed Revenue**").[768] Claimants cite, as the source of this obligation, Clauses 1.4.26, 1.4.37, and 6.3 of the RER Contract.[769] In their requests for relief, Clauses 1.4.26, 1.4.37 and 6.3 are among those for which Claimants seek a declaration that Peru "has breached its obligations under the RER Contract" (see ¶ 236 above).

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765 **MQ-026/CLC-038**, *Oficio No. 2312-2018-MEM/DGE del MINEM (V. Carlos) a Mamacocha (C. Diez)*, 31 December 2018, attaching *Informe No. 511-2018-MEM/DGE*, 31 December 2018.

766 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1947:14-1948:10; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2117:11-19.

767 Memorial ¶ 440.

768 Memorial ¶ 31.

769 *See* Memorial ¶ 31, fn 30.

712. As a first step, the Tribunal will examine Clauses 1.4.26, 1.4.37 and 6.3 of the RER Contract to determine the existence and scope of the alleged obligation to provide Guaranteed Revenue.

713. Clause 1.4.26 of the RER Contract defines Guaranteed Revenue as follows:[770]

> **Guaranteed Revenue** means the annual revenue that the Concessionaire Company shall receive for the net injections of energy up to the limit of the Awarded Energy paid at the Award Tariff. It will only apply during the Term of Validity. (emphasis in original)

714. Clause 1.4.37 defines the "Term of Validity of the Award Tariff" as follows:[771]

> **Term of Validity of the Award Tariff (Term of Validity)** means the period between the Actual Date of Commercial Operation Start-up and the Termination Date of the Contract (December 31, 2036). During the Term of Validity, the Concessionaire Company undertakes to supply electricity to the system using RER technology, and is guaranteed the payment of the Award Tariff for the Net Energy Injections produced by its RER generation plant, up to the limit of the corresponding Awarded Energy.

715. Clause 6.3 of the RER Contract is entitled "Billing Procedure and Payment for Supply":[772]

> 6.3.1 The Concessionaire Company shall receive, on a monthly basis, payments on account of Guaranteed Revenues for the energy and power injected into the SEIN.
>
> 6.3.2 Injected energy shall be appraised at the Short-Term Marginal Cost, following the same procedures applicable to any other generator in the SEIN. Capacity payments shall be made according to the Firm Capacity, determined pursuant to the COES Procedures.
>
> 6.3.3 At the end of each Tariff Period, a settlement shall be prepared for the total amount of the Premium, calculated according to the relevant Procedure as approved by the OSINERGMIN.
>
> 6.3.4 The Premium so calculated at the end of the Tariff Period shall result in a debit or credit charge for the Concessionaire Company, as appropriate, which shall be cancelled in monthly installments over the twelve (12) months

770 Memorial ¶ 412; *quoting* **C-002**, RER Contract, Clause 1.4.26.

771 **C-002**, RER Contract, Clause 1.4.37.

772 **C-002**, RER Contract, Clause 6.3.

> immediately following the annual settlement period, at the applicable monthly interest rate equal to the annual update rate set forth in Article 79 of the LCE.

716. The Actual Date of Commercial Operation Start-up ("**Actual COS**") is defined in Clause 1.4.23:[773]

> "**Actual Date of Commercial Operation Start-up**" means the actual date of Operation Start-up of each power plant, certified by the COES according to its Procedures, which may not be more than two (02) years after the Reference Date of Commercial Operation Start-up; otherwise, the Contract shall be automatically terminated and the Performance Bond shall be executed.

717. The Reference Date of Commercial Operation Start-up ("**Reference COS**") is indicated in Clause 1.4.24 as:[774]

> …December 31, 2016, that is, the date established in Section 1(1), paragraph 3, of the Tender Requirements. The Termination Date of the Contract shall be twenty (20) years after this date.

718. Clause 1.4.22 defines the "Termination Date of the Contract" ("**Termination Date**") as follows:

> "**Termination Date of the Contract**" means December 31, 2036, a date that cannot be modified for any reason whatsoever and until which the Concessionaire is guaranteed the Award Tariff.

719. Based on a literal interpretation of the above contractual provisions, the Tribunal finds that Second Claimant was entitled to the Guaranteed Revenue as calculated in accordance with Clause 6.3 of the RER Contract for the period between the Actual COS and the Termination Date of 31 December 2036. Evidently, and as stated by Claimants themselves, the Guaranteed Revenue is contingent on Second Claimant supplying electricity to the grid.[775]

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773 **C-002**, RER Contract, Clause 1.4.23. *See also* Clause 1.4.40: "**Commercial Operation Start-up**" means the Actual Date of Commercial Operation Start-up of each plant, certified by the COES according to its procedures." (emphasis in original).

774 **C-002**, RER Contract, Clause 1.4.24.

775 Memorial ¶ 31. *See also* Memorial ¶ 413.

720. It follows from the above provisions that if the Actual COS (date of certified entry into commercial operation) is the same as the Reference COS (31 December 2016), the period during which Second Claimant will receive the Guaranteed Revenue is 20 years.

721. As Claimants acknowledge, this 20-year period would not apply in the event that the Actual COS fell later than the Reference COS.[776] In this regard, there was a two year "cushion" period between the Reference COS and the Actual COS, in which the Actual COS could validly take place under Clause 1.4.23 (see ¶ 716 above). In that scenario, Second Claimant would receive the Guaranteed Revenue from the date of the Actual COS until 31 December 2036, the end of the Term of Validity of the Award Tariff.

722. Two years after the Reference COS, the cushion period expires and Clause 1.4.23 states that the RER Contract "shall be automatically terminated." The Tribunal will give further consideration to this at ¶ 741 and in its further reasoning below.

723. The Tribunal considers the wording of the RER Contract to provide a clear basis for its literal interpretation of the above clauses, and does not find it necessary to carry out a further systematic or functional interpretation of the above terms for present purposes.

724. In light of the foregoing, any "duty" to confer on Second Claimant the economic benefits of 20 years of Guaranteed Revenue would be conditioned on: (i) Second Claimant supplying the requisite electricity to the grid; and (ii) the Actual COS taking place on 31 December 2016. The RER Contract did not guarantee that the Award Tariff would be received for a 20 year period, and explicitly contemplated an 18 year period in the event that Actual COS took place two years after Reference COS. The Tribunal therefore agrees with Respondent that the right to earn the Guaranteed Revenue for 20 years was not an absolute one.[777]

725. The Tribunal therefore rejects the premise of Claimants' argument that the Third Extension Request asked MINEM "to extend the COS deadline and Termination Date in a manner

776 Memorial ¶ 416.

777 Rejoinder ¶¶ 993, 995.

that restored the 20-year term of validity that Peru had guaranteed."[778] The RER Contract contained no guaranteed 20-year term of validity in respect of the Guaranteed Revenue.

726. In this regard, and leaving aside the question of whether they would apply to the interpretation of the RER Contract at all after taking into account Article IX of the Civil Code (see ¶ 583 above), the Tribunal rejects Second Claimant's arguments that a number of provisions of the Peruvian Civil Code imply that it "cannot be deprived of its contractual benefits" and that Peru cannot be "relieved of its obligation to pay Guaranteed Revenue."[779] The Tribunal rejects these arguments on the basis of its finding that there is no right to receive Guaranteed Income for a 20-year period.

(2) Whether Second Claimant Was Entitled to an Extension

727. In this Section, the Tribunal will consider whether Second Claimant was entitled to an extension pursuant to the Third Extension Request under the RER Contract.

728. Second Claimant's argument that the obligation to provide the Guaranteed Revenue does arise in this case is premised on its view that: (i) the Actual COS and the Termination Date of the Contract could be moved, and that (ii) Respondent was obliged to move them by granting the Third Extension Request, because it was responsible for the delays to the Project.[780]

729. In order to decide upon these arguments, the Tribunal will first consider whether the RER Contract permitted or required an extension for delays caused by MINEM or other Peruvian government authorities (Section (a) below). It will then consider the findings of other arbitral tribunals on this issue (Section (b) below), before concluding (Section (c) below).

778 Reply ¶ 775.

779 Reply ¶ 776.

780 Memorial ¶¶ 421, 433, 438; Reply ¶ 780.

a. Whether the RER Contract Permitted or Required an Extension for Delays Caused by Respondent

730. Second Claimant does not argue that it had an express entitlement to an extension of the Actual COS and the Termination Date in the RER Contract. Its argument is rather that:[781]

> Peru had an obligation to grant these extension requests under the RER Contract because, by Peru's own public admissions, each of the delays to the Mamacocha Project was solely attributable to Peru, and [Second Claimant] at all times acted diligently.

731. With respect to the Termination Date, Second Claimant further argues that:[782]

> …Peru had an obligation under the RER Contract to grant corresponding extensions to the Termination Date in order to preserve the 20-year Term of Validity of the Guaranteed Revenue Concession. Or, alternatively, Peru had an obligation to compensate [Second Claimant] for the time that Peru unjustifiably took away from the Guaranteed Revenue Concession…

732. In effect, Second Claimant argues that MINEM was obliged to amend the RER Contract so as to accommodate its Third Extension Request.

733. In addition to Clauses 1.4.22, 1.4.23 and 1.4.24 which are relevant to this point (see ¶¶ 716-718 above), Clause 8.4 of the RER Contract is entitled "Commercial Operation Start-up after December 31, 2018" and provides:[783]

> If, for any reason, Commercial Operation Start-up of the RER Generation Project provided for hereunder has not taken place by December 31, 2018, this Contract shall be automatically terminated, and the Performance Bond shall be enforced.

734. A particular disagreement between the Parties stems from whether "for any reason" ("*por cualquier motivo*") in Clause 8.4 of the RER Contract includes an acceptance by Second Claimant of its responsibility for potential delays to the Actual COS, even if the delays are not attributable to it and are attributable to the Peruvian government administration.[784] This

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781 Memorial ¶ 433.

782 Memorial ¶ 438.

783 **C-002**, RER Contract, Clause 8.4.

784 Memorial ¶ 421; *citing* **C-009**, Addendum 2 to the RER Contract, 3 January 2017; Counter-Memorial ¶ 893.

was the subject of Tribunal Question 2 to the Parties.[785] A related dispute is whether Clause 8.4 operates as a *condición resolutoria*, which would terminate the contract automatically upon fulfilment of the condition therein.[786]

735. Second Claimant submits that it did not accept responsibility for delays not attributable to it, on the basis that: (i) the contractual dates are not inviolable and Addendum 2 already extended the Actual COS date beyond the limit in Clause 8.4; (ii) the clause does not explicitly state that Second Claimant accepts such responsibility, which would be required for it to have such effect; (iii) other arbitral awards agree with Claimants' position; (iv) Clause 7.1 of the RER Contract on responsibility reflects the principle that a party cannot be held responsible where its failure to perform was caused by another party; (v) any provision where one party tries to punish another for its own breaches is contrary to the Peruvian Constitution and other applicable laws such as Article 1328 of the Civil Code; and (vi) such a reading would violate the RER's express mandate to create a legal framework that promoted and encouraged investments, as advised in the Echecopar Report.[787]

736. Respondent submits that pursuant to the RER Regulations, the *Bases Consolidadas* and the RER Contract, the Termination Date, the Reference COS and the Actual COS are interconnected and immovable, so it was proscribed from granting the Third Extension Request.[788] Respondent further contends that the RER Regulations set out the direct and automatic consequence of not meeting the Actual COS, being automatic termination of the RER Contract and execution of the Performance Bond.[789] By agreeing to Clause 8.4 of the RER Contract (see ¶ 733 above), Respondent argues that Second Claimant had already accepted that the agreement would be terminated if the Actual COS did not take place by

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785 Tribunal Question 2: "In agreeing to Clause 8.4 of the RER Contract (termination as of right in the event that 'Commercial Operation Start-up…has not been completed for any reason whatsoever…'), did Second Claimant assume responsibility for potential delays to Commercial Operation Start-up for which Second Claimant is not responsible?" *See* Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1939:3-1940:6; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2101:15-2104:18.

786 Reply ¶ 782; Rejoinder ¶ 986.

787 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1939:9-1942:7; Memorial ¶ 421; Reply ¶ 780.

788 Counter-Memorial ¶¶ 424, 428; R-PHB ¶¶ 22-23, 73-74.

789 Counter-Memorial ¶ 430; *quoting* **MQ-005**, *Reglamento RER*, Art. 1.13C.

31 December 2018, regardless of whether the reason for a delay was attributable to Second Claimant, or to Peruvian State agencies.[790]

737. Respondent further submits that: (i) the extension of the Actual COS in Addendum 2 was invalid and should not have been granted;[791] (ii) any tension between Clauses 8.4 and Clause 10.2 is resolved in favour of Clause 8.4 by the legally binding provisions in Articles 1.13B to 1.13D of the RER Regulations and Articles 1.2.31 and 10 of the *Bases Consolidadas*; and (iii) all four Lima arbitration tribunals have confirmed the terms of Clause 8.4, including automatic termination in the event of non-completion by 31 December 2018.[792]

738. To resolve this disputed issue, in the following Sections the Tribunal will: (i) carry out a literal interpretation of the contractual clauses; (ii) refer to a systematic and functional interpretation; (iii) address a good faith interpretation; (iv) consider amendment of the RER Contract or RER Regulations; (v) comment upon the Echecopar Reports; and (vi) consider Addenda 1 and 2.

(i) Literal Interpretation

739. The Tribunal makes its literal reading of the plain language of Clauses 1.4.22, 1.4.23, 1.4.24 and 8.4 in the following paragraphs, in accordance with Article 168 of the Peruvian Civil Code. In light of the Parties' strongly diverging interpretations, the Tribunal considers it appropriate to also carry out a systematic and functional interpretation of these provisions under Articles 169 and 170 of the Peruvian Civil Code in addition to a literal one (see ¶¶ 596-598 above).

740. *Clause 1.4.22* (see ¶ 718 above). A literal reading of this Clause is that the Termination Date of 31 December 2036 cannot be modified "for any reason whatsoever." The ordinary meaning of "any reason whatsoever" is absolute, expansive and without exclusion.

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790 Respondent's Closing Statement (Response to Tribunal Questions 1 and 2), Transcript (Day 9), 18 March 2022, 2102:9-17; Counter-Memorial ¶ 898.

791 Counter-Memorial ¶ 424.

792 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2101:15-2104:11.

741. *Clause 1.4.23* (see ¶ 716 above). The plain wording of this Clause refers to the Contract being "automatically terminated" ("*automáticamente resuelto*") in the event that the Actual COS exceeds the Reference COS by more than two years. The ordinary meaning of automatic termination is that it will happen upon occurrence of the event specified in the clause, without further action or exercise of discretion by a contractual party.

742. *Clause 1.4.24* (see ¶ 717 above). This clause defines the Reference COS as 31 December 2016, which is set based on a 20-year period until the Termination Date.

743. *Clause 8.4* (see ¶ 733 above). This clause provides that if the Actual COS is not reached by 31 December 2018 "for any reason", the RER Contract will be "automatically terminated." The words "for any reason" are all-encompassing and do not refer to any exception. The words "shall be automatically terminated" ("*quedará resuelto de pleno derecho*") indicate an automatic termination of the RER Contract in the circumstance that the Actual COS is not achieved by 31 December 2018. Based on the clear wording of this clause, the Tribunal determines it to be a condition subsequent ("*condición resolutoria*"), i.e., an automatic termination that operates without discretion, independently of the diligence or lack of fault of Second Claimant. While Claimants argue that there is no explicit statement that Second Claimant accepts responsibility for delays which are not attributable to it, the Tribunal draws that understanding from the words already included in the clause.

744. Having reviewed the language of Clauses 1.4.22, 1.4.23, 1.4.24 and 8.4 both separately and in combination (i.e., systematically pursuant to Article 169 of the Peruvian Civil Code), the Tribunal finds that the framework of the RER Contract agreed between Second Claimant and MINEM provides for an interdependence between the Reference COS, the Actual COS and the Termination Date of the Contract, as Respondent argues.[793]

745. This framework foresees some level of flexibility for the Actual COS, which may take place up to two years from the Reference COS. Tied to that, on the other hand, are "hard stops" for: (i) the Actual COS at 31 December 2018; and (ii) the Termination Date of the

[793] Counter-Memorial ¶ 428.

Contract at 31 December 2036. Clauses 1.4.23 and 8.4 of the RER Contract consistently refer to the hard stop for the Actual COS in strong and broad language. This strong language is matched in Clause 1.4.22, which forestalls any modification of the Termination Date of the Contract.

746. In addition, the *Bases Consolidadas* form part of the RER Contract.[794] Clause 1.1 of the *Bases Consolidadas* sets out that:[795]

> *Las Bases, y las Leyes Aplicables tal como éstas son definidas más adelante, regirán la Subasta y el Contrato. Se presumirá, sin admitirse prueba en contrario, que toda Persona que, de manera directa o indirecta participe en la Subasta, conoce las Leyes Aplicables y los usos y costumbres del mercado peruano. No son de aplicación a la Subasta ni al Contrato, las normas de la Ley de Adquisiciones del Estado ni su reglamento*.

747. Clause 1.4.4 of the *Bases Consolidadas* further provides that the submission of a bid in the Third Auction would imply full knowledge and acceptance of the terms set out therein:[796]

> *…el pleno conocimiento, aceptación y sometimiento incondicional del Participante, de todo lo dispuesto en las Bases, así como su renuncia irrevocable e incondicional, de la manera más amplia que permitan las Leyes Aplicables, a plantear cualquier acción, reconvención, excepción, reclamo, demanda o solicitud de indemnización contra el Estado Peruano o cualquier dependencia, organismo o funcionario de éste, el Ministerio, OSINERGMIN, el Comité y sus Asesores.*

748. Article 1.2.31 of the *Bases Consolidadas* defines the Actual COS as follows:[797]

> ***Fecha Real de Puesta en Operación Comercial****: Es la fecha real de entrada en operación comercial de cada central, certificada por el COES de acuerdo a sus Procedimientos, la cual no podrá exceder en dos (02) años la Fecha Referencial de Puesta en Operación Comercial, caso contrario el Contrato quedará automáticamente resuelto y se ejecutará la Garantía de Fiel Cumplimiento.*

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794 **C-002**, RER Contract, Clause 1.1.

795 **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Clause. 1.1.

796 **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Clause 1.4.4.

797 **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Art. 1.2.31.

749. As such, it specifies that the Actual COS may not exceed the Reference COS by more than two years, failing which the contract will be automatically terminated.

750. Article 7.1 of the *Bases Consolidadas* further states that the *Fecha de Término del Contrato* is not modifiable for any reason, even for force majeure ("*no será modificable por ninguna causa, ni aún por Fuerza Mayor*.")[798]

751. The *Bases Consolidadas* also refer to the termination date ("*Fecha de Término del Contrato*") as "*el 31 de diciembre de 2036, fecha no modificable por ninguna causa, hasta la cual se le garantiza al Concesionario la Tarifa de Adjudicación*."[799] This mirrors Clause 1.4.22 of the RER Contract.

752. At face value, the wording of the RER Contract, including the *Bases Consolidadas* does not provide a basis for extending the Actual COS or the Termination Date of the Contract. To the contrary, it appears to preclude such an extension in clear terms by: (i) setting a deadline for the Actual COS, failing which the RER Contract is automatically terminated; and (ii) specifying that the Termination Date of the RER Contract is non-modifiable. There is no exception provided in the text of these provisions for actions attributable to third parties, even if those third parties are governmental authorities, or other causes outside Second Claimant's sphere of responsibility.

753. In the same context, Tribunal Question 6 asked:

> Was the period of two years (the "cushion") between the Reference COS and the Actual COS intended to accommodate delays attributable to Second Claimant only or also delays attributable to third parties, MINEM, Respondent or its Government Authorities?

754. Claimants argue that the cushion was meant to accommodate delays by Second Claimant and not Respondent,[800] while Respondent submits that it was to accommodate all delays.[801]

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798 **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Art. 7.1.

799 **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Art. 1.2.30.

800 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1942:17-1944:12.

801 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2108:18-2109:19; R-PHB ¶ 25.

In line with its conclusions above, the Tribunal finds that the cushion period between the Reference COS and the Actual COS was intended to accommodate all kinds of delays, whether attributable to Second Claimant or not.

(ii) Systematic and Functional Interpretation

755. In the context of a systematic interpretation, Claimants rely on Clause 7.1 of the RER Contract, which states:[802]

> Neither party shall be liable for the non-performance of an obligation or for the partial, belated or defective performance thereof for as long as the Party bound is affected by an event of Force Majeure, provided that it can prove that such event prevented adequate performance.

756. The Tribunal does not understand Clause 7.1 of the RER Contract to assist Claimants. The fact that the clauses setting the Actual COS and Termination Date have liability implications but are not placed in Clause 7 on "Contract Liability" is not a reason to deprive them of their meaning as drafted. In addition, as Claimants have emphasised,[803] this is not a case of force majeure. The Tribunal does not consider Clause 7.1 to contain a principle that should be applied to other scenarios beyond force majeure, to the effect that a party will not be responsible for late or defective performance which is caused by governmental authorities. Moreover, the *Bases Consolidadas* explicitly exclude modification of the Termination Date of the Contract for force majeure reasons (see ¶ 750 above).

757. The Parties have also raised Clause 10.2(b) of the RER Contract, which provides:[804]

> The Ministry may terminate the Contract if the Concessionaire Company:
>
> …
>
> b) Fails to fulfill any of its obligations under paragraphs 8.2, 8.3, and 8.4.

802 **C-002**, RER Contract, Clause 7.1.

803 Reply ¶ 49: "…it is undisputed that this case does not involve delays caused by *force majeure* events." *See also* Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1940:19-22.

804 Reply ¶ 782; Rejoinder ¶ 987.

758. In relation to this provision, Tribunal Question 1 asked "What is the relationship between Clauses 8.4 and 10.2(b) of the RER Contract (C-002)?" The Parties provided their answers in their respective Closing Statements at the Hearing.[805]

759. As Claimants point out,[806] the option for MINEM to terminate the RER Contract in Clause 10.2(b) of the RER Contract is difficult to read systematically with Clause 8.4 of the RER Contract which refers to termination "*de pleno derecho*", i.e., a termination that would occur as of right and without any exercise of discretion by MINEM. This difficulty was acknowledged by Respondent's expert Mr. Lava, who considered Clause 10.2 to be incongruous with Clause 8.4.[807] However, some light is shed by Clause 10.4 of the RER Contract, which contains a procedure for notice and termination of the RER Contract: "[i]n the absence of any grounds for termination of this contract by operation of law, in which case the contract shall be terminated on the sole basis of the breach…" ("*[s]i no mediara una causal de resolución de pleno derecho de este contrato, en cuyo caso el contrato concluirá por el solo hecho del incumplimiento*…").[808] This reference to a termination "*de pleno derecho*" precisely mirrors the language of Clause 8.4 of the RER Contract, confirming that where the parties to the RER Contract have specifically provided for automatic termination, the RER Contract will conclude "on the sole basis of the breach" and not by the procedure outlined in Clause 10.4 which applies to other circumstances. The fact that Clause 10.2(b) refers to an optional termination under Clause 8.4 therefore cannot deprive Clause 8.4 of its meaning and effect, which is to provide for automatic termination in the event that the Actual COS is not met within two years. The Tribunal considers this reading to give greatest effect to the provisions of the RER Contract as drafted.

805 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1945:6-22; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2101:15-2104:18.

806 Reply ¶¶ 783-784. *See also* C-PHB, Annotated Index, ¶ 27.

807 Cross-examination of Mr. Lava, Transcript (Day 4), 14 March 2022, 1403:22-1404:1, 1404:13-14.

808 **C-002**, RER Contract, Clause 10.4.

760. The non-movability of the Termination Date of the Contract was also the subject of a declaration made by Second Claimant on 30 October 2013, prior to signature of the RER Contract:[809]

> *DECLARAMOS BAJO JURAMENTO que reconocemos el carácter no modificable de la Fecha de Término del Contrato, aun cuando se presenten eventos de Fuerza Mayor*.

761. In response to Tribunal Question 4 on the legal significance of this declaration,[810] Second Claimant argues that while it indicates that it assumed the risk that force majeure events would reduce the term of validity of the RER Contract, it contains no statement that Second Claimant assumed the risk of "government interference", which would have been required for Second Claimant to assume such risk.[811] Respondent submits, on the other hand, that Second Claimant understood and accepted the immutability of the Termination Date, and that its wording ("*aún cuando*") is not exhaustive.[812]

762. The Tribunal considers that Second Claimant's reading of the declaration does not give due acknowledgement to the statement that Second Claimant "*reconoce[] el carácter no modificable de la Fecha de Término del Contrato*." This non-modifiable character is "even if" it is presented with force majeure events, as defined in the RER Contract. It does not suggest that the Termination Date may be moved for other events that are outside Second Claimant's sphere of control but are not necessarily force majeure.

763. The non-modifiable character of the Termination Date of the Contract was also clear to participants at the stage of the consultation phase in the Third Auction from a number of queries submitted by participants in the auction. These queries were compiled in circulars

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809 **R-138**, *Declaración Jurada sobre reconocimiento de carácter no modificable de la fecha de término del contrato, aun cuando se presenten eventos de fuerza mayor*, CH Mamacocha, 30 October 2013.

810 Tribunal Question 4: "What is the legal significance, if any, of the declaration signed by Second Claimant dated 30 October 2013 (R-138), as follows: [see text of declaration]."

811 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1944:17-1945:5. *See also* C-PHB, Annotated Index, ¶¶ 22-25.

812 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2105:2-18.

which pursuant to Clause 1.4.12 of the RER Contract became part of the RER Contract together with the *Bases Consolidadas*.[813]

764. For example, a request was made to alter the agreement with respect to the Termination Date, such that it would be non-modifiable "*por ninguna causa salvo por Fuerza Mayor*…" This suggestion was not accepted.[814] Likewise, a request was made that Clause 8.4 of the agreement exclude situations of force majeure ("*por cualquier motivo salvo Fuerza Mayor*"). This request was also rejected.[815]

765. In Second Claimant's view, the above interpretation would allow Respondent to:

> …act with impunity and any and all benefits that [Second Claimant] and its investors hoped to achieve in executing the RER Contract and making substantial investments in reliance on Peru's commitments would be illusory.[816]

766. Respondent disagrees, submitting that Claimants had a contractual right to seek damages for any action taken by MINEM in bad faith, and could have sought extra-contractual remedies under general administrative law for unjustifiable delays by other State entities.[817]

767. Claimants further rely on other provisions and principles of Peruvian law, such as Article 1.8 of the GLAP, which in their view requires the parties to implement the RER Contract in good faith, and Article 103 of the Peruvian Political Constitution, which provides that the State has an obligation to protect others from any abuse of rights.[818]

768. This argument is based on Claimants' submission, which has been rejected by the Tribunal, that every authority of the Peruvian State is responsible under the RER Contract. As the Tribunal held at ¶ 651 above, the fact that the Peruvian State is the counterparty of Second

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813 **R-101**, *Circular No. 1, Comité para la Tercera Subasta*, 10 September 2013; **C-002**, RER Contract, Clause 1.4.12, which defines the Contract, and provides, in part, that it: "includ[es] the Tender Requirements and the circulars."

814 **R-101**, *Circular No. 1, Comité para la Tercera Subasta*, 10 September 2013, p. 15.

815 **R-101**, *Circular No. 1, Comité para la Tercera Subasta*, 10 September 2013, p. 10.

816 Memorial ¶ 421. *See also* Memorial ¶ 422; *quoting* Quiñones First Report ¶ 81; Reply ¶¶ 730, 732.

817 R-PHB ¶ 84.

818 Reply ¶ 740.

Claimant does not make every authority of the Peruvian State responsible for the progress of the Project under the RER Contract. Nor does the Tribunal consider a situation of abuse of rights to arise.

769. Notably, Respondent does not argue that concessionaire companies accepted the risk that MINEM itself would not fulfil its own obligations under the RER Contract.[819]

770. In Tribunal Question 15, the Tribunal also asked the Parties about Claimants' risk assessment in light of the terms of the RER Contract:

> Does a risk assessment for a project, which will require environmental permits to proceed, take account of the risk that such permits are (i) delayed, (ii) not granted, or (iii) subsequently annulled by competent authorities, due to objections to the environmental impact of the project? If so, did Claimants take account of such risk in their assessment of the proposed contract terms and planning for the Mamacocha Project, and how?

771. In Claimants' view: (i) they never assumed the risk of "government interference", so they argue that arbitrary conduct by the government would never count against Second Claimant; (ii) the granting and subsequent annulment of a permit should not count against Second Claimant because Peruvian administrative law includes a presumption of validity of the administrative act; and (iii) Claimants mitigated the risk of permitting delays by, starting in 2012, hiring a top Peruvian law firm, and dozens of employees and consultants to liaise with permitting authorities.[820]

772. For Respondent, the risk of permitting delays was identified by the Mamacocha Project's feasibility study in July 2013 and Claimants already experienced such delays prior to signing the RER Contract. Moreover, Clause 4.3 of the RER Contract refers to permitting delays. In its view, the purpose of the two-year cushion period to achieve the Actual COS was to allow for such delays, with the investor bearing the risk.[821] Respondent further

819 Rejoinder ¶ 100.

820 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1954:16-1956:6.

821 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2055:18-2057:20. *See* **RD-06**, Respondent's Closing Presentation, slides 36-37; **C-101**, Mamacocha Hydroelectric Project, Peru: Feasibility Study—Phase I—Final Report, Pöyry, July 2013, p. 158; **C-149**, *Carta de HLA (C. Diez) al MINEM (L. Nicho)*, 24 November 2014. *See also* R-PHB ¶ 27.

submits that given that the Mamacocha lagoon is the world's largest natural lagoon, it was foreseeable that there would be community challenges to the Project, as well as engineering challenges affecting the timing of construction.[822]

773. In light of the terms of the RER Contract, the Tribunal agrees with Respondent that the purpose of the cushion period between the Reference COS and the Actual COS was to account for potential delays such as those related to permitting. The Tribunal does not consider permitting delays, in principle, to amount to "government interference", noting the conclusions reached above regarding responsibilities under the RER Contract, and that Clause 4.3 of the RER Contract expressly contemplates such delays. Whether any arbitrary conduct took place that would change this analysis will be examined by the Tribunal in the course of this Award.

774. Claimants further rely on the purpose of the RER Law to eliminate barriers to investment in RER projects, incentivize investors to make investments in RER projects, and provide a stable and consistent legal framework to protect these investments.[823] In addition, for Second Claimant, an interpretation in line with the RER Contract's purpose under Article 170 of the Peruvian Civil Code confirms that the deadlines introduced into the RER Contract were in response to substantial delays caused by concessionaires in the first two public auctions, including abuses of force majeure-related extensions.[824]

775. The Tribunal accepts that these are among the purposes of the RER Law, which states that the development of electricity generation by means of RER projects is "of national interest and public necessity."[825] However, it was for the Peruvian State (in the RER Regulations), and the State together with Second Claimant (as parties to the RER Contract) to detail how those objectives will be achieved, and how delays will be addressed. The Tribunal finds no conflict between these broadly-stated purposes and the specifics of the immovability of the Termination Date of the Contract and the consequences of failing to meet the Actual COS,

822 R-PHB ¶¶ 9-10.

823 Reply ¶ 743; *citing* **C-007**, Legislative Decree No. 1002, 1 May 2008, Preamble and Art. 2. *See also* C-PHB, Annotated Index, ¶ 3.

824 Memorial ¶¶ 429-430; **CD-01**, Claimants' Opening Presentation, slide 131.

825 **C-007**, Legislative Decree No. 1002, 1 May 2008, Art. 2.

as determined in the RER Regulations and reflected in the RER Contract. In particular, the Tribunal does not consider such a reading to breach or distort the RER Law contrary to Section 118(8) of the Political Constitution of Peru, or to be inconsistent with Article 51 of the Political Constitution which provides for the hierarchy that laws prevail over legal norms of a lower hierarchy such as regulations.[826]

776. In Claimants' view, a systematic interpretation of the RER Contract also requires consistency with the legal principles of the Peruvian Civil Code, including: (i) Article 1328, which provides that a contract cannot be interpreted in a manner that would immunise a party of its own breaches, as such interpretation would be unconscionable and deemed null and void;[827] (ii) Article 1314, which provides that a party which acts with required ordinary diligence is not imputable for the non-performance of the obligation or for its partial, late or defective fulfilment; and (iii) Article 1317, providing that a party is not liable for damages resulting from the non-performance of an obligation for non-attributable causes, unless otherwise expressly provided by law or by the title of the obligation.[828] According to Claimants, the Peruvian Civil Code "delegates the risk of government interference to Peru."[829]

777. Claimants' arguments are without merit. The Actual COS and the Termination Date are regulated by law and are not open to reinterpretation by way of the Peruvian Civil Code, which applies only in a supplementary fashion (see ¶ 586 above). Article 1317 of the Peruvian Civil Code itself expressly contemplates the present scenario, providing that an obligor will not be liable for damages resulting from causes not attributable to it "…unless otherwise expressly provided by law or the title of the obligation…" ("*salvo que lo*

826 Reply ¶¶ 40-41; *citing* **C-007**, Legislative Decree No. 1002, 1 May 2008; **C-235**, First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), 5 April 2018; Quiñones Second Report ¶¶ 207, 211.

827 Memorial ¶ 425; *quoting* Art. 138 of the Civil Code; *citing* Benavides Report I, ¶¶ 194-196.

828 Memorial ¶ 427; *citing* Benavides Report ¶¶ 182-183, 194. *See also* **CD-01**, Claimants' Opening Presentation, slide 127.

829 **CD-01**, Claimants' Opening Presentation, slide 127.

contrario esté previsto expresamente por la ley o por el título de la obligación").[830] As noted here, the RER Regulations expressly provide otherwise.

778. Article 1314 of the Peruvian Civil Code likewise cannot rewrite the specific agreement reached in the RER Contract, or interfere with the binding provisions of the RER Law or RER Regulations. Pursuant to Article IX of the *Título Preliminar* of the Civil Code, the Tribunal finds that Article 1314 is not applicable for present purposes.

779. The Tribunal further rejects Second Claimant's argument that the RER Law requires that the RER Promotion must be executed in accordance with the protections set out under the TPA, meaning that the RER Contract cannot be interpreted in a manner that would render these protections meaningless.[831] The Tribunal finds no such obligation in the text of the RER Law, and no basis for the interpretation sought by Second Claimant.

(iii) Good Faith Interpretation

780. In relation to Claimants' argument that the above interpretation would be inconsistent with a good faith reading, the Tribunal observes that as Claimants contend,[832] the purpose of a good faith reading is to interpret the contract: (i) in the sense it would have been reasonably understood by loyal economic agents; (ii) preserving the effects of the agreement and discarding readings that lead to ineffectiveness or illegality; and (iii) avoiding absurd, illogical and inconsistent interpretations.[833]

781. It should be noted that the good faith reading is part of the literal interpretation exercise under Article 168 of the Peruvian Civil Code (see ¶ 594 above) and is not designed to rewrite the agreement reached. This is consistent with Article 1361 of the Peruvian Civil Code, which provides:[834]

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830 **RL-048/CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 1317. Translation by Claimants at Memorial ¶ 427.

831 Memorial ¶ 428; *citing* **C-007**, Legislative Decree No. 1002, 1 May 2008.

832 Reply ¶ 733.

833 Quiñones Second Report ¶ 77; *quoting* **MQ-091**, *Bullard, Alfredo, De Acuerdo en que no estamos de Acuerdo: Análisis Económico de la Interpretación Contractual, Revista De Instituciones, Ideas y Mercados*, October 2007.

834 **RL-048/CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 1361.

> *Los contratos son obligatorios en cuanto se haya expresado en ellos. Se presume que la declaración expresada en el contrato responde a la voluntad común de las partes y quien niegue esa coincidencia debe probarla*.

782. While a good faith interpretation may include interpreting the RER Contract "in accordance with the investor-friendly objectives of eliminating barriers, [and] creating a consistent legal framework," Claimants go too far when they assert that a good faith interpretation requires "protecting the RER projects, and ensuring their advancement."[835]

783. In this sense, the Tribunal considers that a good faith interpretation does not justify reading into the provisions of the RER Contract an exception that would allow the Actual COS and the Termination Date to be extended for "government-caused delays." This does not square with the wording of the agreement and would leave Clauses 1.4.22, 1.4.23 and 8.4 ineffective.

784. In terms of potential illegality in an interpretation of the RER Contract (being another aspect of a good faith reading), the Tribunal has reviewed the RER Law and the RER Regulations, which are specifically defined in the RER Contract, form part of the "Applicable Laws" and are relied on by both Parties in support of their respective interpretations.[836] As noted at ¶ 613 above, the RER Law and the RER Regulations are a binding legal framework within which the RER Contract has been concluded.

785. Article 1.13C of the RER Regulations provides:[837]

> *Fecha Real de Puesta en Operación Comercial: Fecha real de entrada en operación comercial de cada central, certificada por el COES de acuerdo a sus Procedimientos, la cual no podrá exceder en dos (02) años la Fecha Referencial de Puesta en Operación Comercial, caso contrario el Contrato quedará automáticamente resuelto y se ejecutará la Garantía de Fiel Cumplimiento*.

786. Article 1.13B of the RER Regulations provides:[838]

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835 Reply ¶ 734.

836 Memorial ¶ 428; Counter-Memorial ¶ 427.

837 **MQ-005**, *Reglamento RER*, Art. 1.13C.

838 **MQ-005**, *Reglamento RER*, Art. 1.13B.

> *Fecha de Término del Contrato: Es la fecha máxima establecida en las Bases, no modificable por ninguna causa, hasta la cual se le pagará al Concesionario la Tarifa de Adjudicación*.

787. Article 1.13D of the RER Regulations further provides:[839]

> *Fecha Referencial de Puesta en Operación Comercial: Es la fecha establecida en las Bases, considerando veinte (20) años hasta la Fecha de Término del Contrato.*

788. It is evident from the above provisions that the "hard stop" in relation to the Actual COS two years after the Reference COS, and the non-modifiable nature of the Termination Date of the Contract ("*por ninguna causa*") are a matter of binding law under the RER Regulations in addition to being aspects of the agreement between the parties to the RER Contract.

(iv) Amendment of the RER Contract or RER Regulations

789. While considering the RER Regulations, the Tribunal notes that Claimants do not allege for the purpose of the contractual claim that Respondent was obliged to amend the RER Regulations in order to grant the Third Extension Request. This was the subject of Tribunal Question 5 to the Parties.[840]

790. In Claimants' view, the Actual COS, Reference COS and Termination Date of the RER Contract can be effectively amended by contract, as long as they stay within certain "parameters" of the regulation, i.e., that the Actual COS cannot exceed the Reference COS by two years, and the Reference COS must be 20 years from the Termination Date.[841] Respondent disagrees, arguing that the critical dates could not be contractually amended because they were set forth in Articles 1.13B, C and D of the RER Regulations.[842]

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839 **MQ-005**, *Reglamento RER*, Art. 1.13D.

840 Tribunal Question 5: "Can the following dates be amended by contract or only by regulatory action: (i) Actual Date of Commercial Operation Start-up [Actual COS]; (ii) Reference Date of Commercial Operation Start-up [Reference COS]; (iii) Termination Date of the RER Contract [Termination Date]?"

841 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1946:5-18.

842 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2106:4-11.

791. The Tribunal agrees with Respondent that the Actual COS, Reference COS and Termination Date could only be amended by regulatory action and not by contract, taking into account the binding provisions of the RER Regulations.

792. Even if a potential contractual amendment of the RER Contract that complied with the RER Regulations could be devised, Claimants have not established that the Third Extension Request proposed such an amendment that would have fallen within the parameters of the legal framework they have identified.

793. Claimants further allege that Respondent succumbed to "regulatory opportunism" by abandoning a draft Supreme Decree which would have amended the RER Regulations to allow for extensions to the Termination Date and Actual COS ("**Draft Supreme Decree**", see ¶¶ 208-212 above).[843] The Tribunal will give further consideration to this argument at ¶¶ 1225-1227 below in the context of Claimants' claim under the TPA.

(v) Echecopar Reports

794. Claimants rely on the Echecopar Reports as evidence that the Third Extension Request could be granted, and that it was "illegal" not to grant it.[844] Respondent submits, *inter alia*, that: (i) MINEM officials did not share the views in the Echecopar Reports;[845] (ii) Echecopar were hired for consultation purposes, not representation purposes, and it was never contemplated that the recommendations of the Echecopar Reports would be binding on MINEM;[846] and (iii) the Echecopar Reports had serious conflicts of interest arising from parallel representation of companies seeking to change the regulatory framework governing the RER contracts.[847]

795. The Echecopar Reports are legal advice from external counsel to MINEM and do not reflect a binding decision on the issues in dispute or conduct or representations of the Peruvian

843 Reply ¶ 234.
844 Reply ¶ 84. *See also* **CD-01**, Claimants' Opening Presentation, slide 132.
845 Rejoinder ¶ 150.
846 Rejoinder ¶ 151.
847 Rejoinder ¶ 153.

State.[848] The Tribunal does not share the views expressed in the Echecopar Reports, as per the Tribunal's reasoning above.

(vi) Addenda 1 and 2

796. Second Claimant further argues that an interpretation which is inconsistent with the Parties' prior course of dealing is contrary to good faith. In particular, Second Claimant relies on the extensions to the COS deadline granted under Addenda 1 and 2, which in its view recognised that Clause 8.4 of the RER Contract did not allocate to Second Claimant the risk that the government could delay Second Claimant's execution of the Works Schedule.[849] For Claimants, these Addenda are dispositive of the contractual claims.[850] According to Respondent, on the other hand, Addendum 2 should not have been granted.[851] Since Addenda 1 and 2 were stated to amend the RER Contract, the Tribunal considers it appropriate to recount their background and effect.

797. Before doing so, the Tribunal notes that Second Claimant commenced the permitting process prior to the date of the RER Contract, i.e., 18 February 2014 (see ¶ 109 above). In response to Tribunal Question 13 on the relevance, if any, of delays in permitting prior to the date of the RER Contract, Claimants submit that Respondent was obliged to compensate Second Claimant for those delays, and did partially cure them in Addendum 1 (see ¶¶ 112 *et seq.* above).[852] Respondent argues, on the other hand, that such delays confirm that: (i) Second Claimant was aware that permitting may be delayed; (ii) Second Claimant could not meet the Reference COS, and would not be entitled to the 20 years of Guaranteed Revenue (see ¶ 97 above); and (iii) Second Claimant was at greater risk of not meeting the Actual COS deadline.[853]

798. In Tribunal Question 7A, the Tribunal asked:

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848 *See*, in this regard, Rejoinder ¶ 151. Respondent further alleges that the Echecopar Reports are undermined by conflicts of interest on the part of the law firm. *See* Rejoinder ¶¶ 152-156.

849 Reply ¶ 738. *See also* C-PHB ¶ 11.

850 C-PHB ¶ 29.

851 Counter-Memorial ¶ 450.

852 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1950:10-1951:10.

853 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2069:4-20.

> Please advise what changes to the RER Contract were made in Addenda 1 and 2, and how those changes correspond to Clauses 1.4.23, 1.4.24 and 1.4.40 of the RER Contract.

799. The Parties provided their views in their respective Closing Statements at the Hearing.[854]

800. Addendum 1 granted an extension to the Works Execution Schedule and set a new Actual COS of 8 December 2018.[855] It mentions that "delays in the administrative procedures made it impossible to achieve Financial Closing for the project…" and that "said events of non-compliance do not fall within the scope of the Concessionaire's liability, applying article 1314 of the Civil Code."[856] The delays were was stated to be:[857]

> …caused by the Regional Environmental Authority of the Regional Government of Arequipa, in the evaluation of the requests for classification of the preliminary environmental study and the subsequent approval of the Declaration of Environmental Impact (DEI), both for the Laguna Azul Hydroelectric Plant as well as the Transmission Line; by the Ministry of Culture with the approval of the execution of the archaeological evaluation project with excavation, as well as the approval of the Final Report; by the Local Water Authority of Camaná – Majes, with the approval of the water use studies; and by the COES with the approval of the Preoperational Study of the project[.]

801. Addendum 1 further states that:[858]

> All of the other stipulations of the Concession Agreement not specifically mentioned in this Minute shall remain fully in effect, inasmuch as they do not oppose the provisions contained herein.

802. MINEM Ministerial Resolution No. 320-2015-MEM/DM of 3 July 2015 approved the extension under Addendum 1, providing:[859]

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854 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1932:6-1933:12; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2117:4-10.

855 **C-008**, Addendum 1 to the RER Contract, 22 July 2015, Recital 8.

856 **C-008**, Addendum 1 to the RER Contract, 22 July 2015, Recital 6. Article 1314 of the Peruvian Civil Code provides: "*Quien actúa con la diligencia ordinaria requerida, no es imputable por la inejecución o por su cumplimiento parcial, tardío o defectuoso*." *See* **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984.

857 **C-008**, Addendum 1 to the RER Contract, 22 July 2015, Recital 4.

858 **C-008**, Addendum 1 to the RER Contract, 22 July 2015, Recital 10.

859 Ministerial Resolution No. 320-2015-MEM/DM in **C-008**, Addendum 1 to the RER Contract, 22 July 2015, p. 5 (p. 6 of the pdf).

> Inasmuch as the aforementioned delays in the administrative procedures made it impossible to achieve Financial Closing for the project, entailing the failure to comply with the terms of the Milestones of the Works Execution Schedule of the Concession Agreement—having failed to conclude with the process of financing the project—the conclusion must be reached that said events of non-compliance do not fall within the scope of the Concessionaire's liability, applying article 1314 of the Civil Code which establishes that a party acting with the ordinary due diligence cannot be held responsible for failure to execute obligations or for the partial, late, or defective compliance with said obligations[.]

803. Respondent argues that Addendum 1 should never have been granted, submitting that it is based on the false affirmation that Claimants were not responsible for delays, and that Claimants' request for extension omitted information crucial to its evaluation.[860] Claimants deny these allegations.[861]

804. Addendum 2 arose from an additional request for an extension by Second Claimant on the basis of delays which it stated were "*un incumplimiento del Estado Peruano de las obligaciones asumidas en el Contrato de Concesión*."[862] In its letter requesting the extension, Second Claimant made a number of requests:[863]

(i) An extension of 393 calendar days plus a term equivalent to the days counted from 24 June 2016 to the date on which MINEM makes available to Second Claimant the documents necessary to contractually formalise the amendment to the RER Contract Works Execution Schedule.

(ii) Modify Clause 1.4.22 of the RER Contract concerning the Termination Date, i.e., 31 December 2036, taking into account the new proposed Works Execution Schedule, and that the time between the COS date and the Termination Date should be at least 20 years.

860 Counter-Memorial ¶¶ 181-182.

861 Reply ¶¶ 61-64.

862 **C-157**, *Carta de Hidroeléctrica Laguna Azul (C. Diez) al MINEM (R. María)*, 1 July 2016, p. 1. *See* Counter-Memorial ¶ 187.

863 **C-157**, *Carta de Hidroeléctrica Laguna Azul (C. Diez) al MINEM (R. María)*, 1 July 2016, p. 29.

(iii) Modify Clause 8.4 of the RER Contract, to specify that the State of Peru cannot terminate the RER Contract in the event that the COS date falls after 31 December 2018 for causes attributable to it.

(iv) Add a clause stating that in case of inconsistency between the RER Contract and the consolidated terms and conditions of the third international tender for the supply of electric power to the SEIN using renewable energy resources, the provisions of the RER Contract shall prevail.

805. On 6 October 2016, MINEM issued a report on the extension request to Ms. Carla Paola Sosa Vela, the Director General of Electricity, which was subsequently endorsed by her on 22 November 2016 ("**Sosa Report**").[864]

806. The Sosa Report concluded that the delay attributable to MINEM (excluding delays from other entities) in respect of the Works Execution Schedule was 449 calendar days.[865] Accordingly, the requested extensions of 393 calendar days for financial closing and 449 calendar days for the remaining items of the Works Execution Schedule (out of 860 days requested) were partially granted.[866] The other three requests set out at (ii), (iii) and (iv) of ¶ 137 above were not granted because (ii) was considered inadmissible in light of Section 1.13B of the RER Regulations (Termination Date may not be amended for any reason); while (iii) and (iv) were considered unnecessary.[867]

807. The Sosa Report provided an interpretation of Clause 8.4 of the RER Contract that "the expression 'for any reason' must be interpreted as excluding the delay attributable to

[864] **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, p. 15.

[865] **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.1.

[866] **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.6.

[867] **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.6.

MINEM (contracting Public Administration), as the issuer of the operating permits necessary for the provision of economic activity."[868]

808. The Sosa Report's conclusion was reached having provided analysis that: (i) Second Claimant's obligation does not include the assumption of risk resulting from an act of God or event of force majeure, including the so-called *factum principis*; (ii) under the principle of good faith, it is not appropriate to obtain advantages arising from the own actions of the administration; and (iii) delay in obtaining the operating permit can be understood as unreasonable treatment afforded to the investor, making reference to the ICSID Award in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*.[869]

809. On 3 January 2017, Addendum 2 was registered, extending the Works Execution Schedule by 393 days for the financial closing milestone, and 462 days for the other milestones (some 13 days more than the Sosa Report had concluded), resulting in a new Actual COS of 14 March 2020.[870]

810. Clause 2.3 of Addendum 2 provides: "The Parties declare that the remaining provisions in the [RER Contract] not specifically considered in this Minute remain fully valid as long as they do not contradict what is stated herein."[871]

811. According to Respondent, Addendum 2 was contrary to the RER Regulations and the *Bases Consolidadas*.[872]

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868 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 3.1. *See* Memorial ¶ 85.

869 **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016, ¶ 2.2.5. *See* Memorial ¶¶ 86-88.

870 **C-009**, Addendum 2 to the RER Contract, 3 January 2017, Clause 2.1. *See* Memorial ¶ 88; Counter-Memorial ¶ 193.

871 **C-009**, Addendum 2 to the RER Contract, 3 January 2017, Clause 2.3.

872 Counter-Memorial ¶ 195; R-PHB ¶ 32.

812. MINEM's Ministerial Resolution No. 559-2016-MEM/DM approved the text of Addendum 2 and was inserted into the document following Annex No. 1 (containing the new Works Execution Schedule).[873] The Resolution stated:[874]

> That, by extending the CCO term four hundred and sixty-two (462) calendar days, the new date for this milestone would be March 14, 2020, exceeding the deadline of December 31, 2018 contained in number 8.4 of Clause Eight of the RER Agreement, the same which stipulates that said date cannot be exceeded "*for any reason*", which must be understood, excluding the scope of responsibility of the Concessionaire, non-performance or late or defective performance, directly caused by acts of the contracting Public Administration (Ministry of Energy and Mines) in its role as grantor of qualifying licenses (definitive generation and transmission concessions); therefore, effectually including an interpretation oriented in the criteria of reasonableness, good faith and fairness, in accordance with the provisions of Article 1362 of the Civil Code, because there are delays in the processing of the definitive generation and transmission concessions originated by the Administration itself[.]

813. In the Resolution of 29 December 2016 MINEM further stated:[875]

> …the deadline for the Project CCO, December 31, 2018, does not constitute an essential term, because if the Project is not delivered on the scheduled date for the CCO milestone, the impact caused to the SEIN would not be relevant because currently the system reserve is around 54%… Therefore, if the Project CCO does not occur on December 31, 2018, the SEIN will not be affected nor will the local system where the Project is being developed, since at that time, the relevant area has access to electricity supply through three (3) different projects. The delay not attributable to the Concessionaire creates a delay in the temporary obligation, which afterwards, allows (at a material level) the performance of the obligation[.]

814. The Tribunal notes that contrary to Claimants' interpretation, the Tribunal finds no language in Addenda 1 and 2 that modified Clause 1.4.24 of the RER Contract regarding the Reference COS. It does not follow that because the Actual COS and Reference COS are "linked together" in the original text of RER Contract, the Addenda automatically

873 MINEM Ministerial Resolution No. 559-2016-MEM/DM, in **C-009**, Addendum 2 to the RER Contract, 3 January 2017, p. 9.

874 MINEM Ministerial Resolution No. 559-2016-MEM/DM, in **C-009**, Addendum 2 to the RER Contract, 3 January 2017, pp. 9-10.

875 MINEM Ministerial Resolution No. 559-2016-MEM/DM, in **C-009**, Addendum 2 to the RER Contract, 3 January 2017, p. 10.

modified those dates as Claimants assert.[876] This is precluded by the language of both Addenda, which specifies that provisions of the RER Contract not specifically mentioned in the respective Addenda remain in effect.[877]

815. From the above details about the Sosa Report, Addenda 1 and 2 and the Ministerial Resolutions accompanying them, it is clear that not all of the views expressed by MINEM in the Sosa Report and the Ministerial Resolutions are consistent with the Tribunal's interpretation of the RER Contract. In this respect, the Tribunal refers, *inter alia*, to: (i) the extension by Addendum 2 of the Actual COS to a date falling more than two years beyond the Reference COS; (ii) the meaning of "for any reason" in Clause 8.4 of the RER Contract; and (iii) the indication in the Ministerial Resolution No. 559-2016-MEM/DM that the Actual COS "does not constitute an essential term."

816. In reading Addenda 1 and 2 harmoniously together with the RER Contract and the binding RER Regulations to the extent possible, the Tribunal first notes that Addendum 1 did not extend the Actual COS to a date beyond the two-year contractual limitation, nor extend the Termination Date of the Contract. The Actual COS was originally 2 January 2017, extended to 8 December 2018 under Addendum 1.[878] This was still within two years of the Reference COS of 31 December 2016. As such, it does not have specific contractual implications for the present question before the Tribunal.

817. In respect of Addendum 2, the Tribunal notes that MINEM's focus, as stated in Resolution No. 559-2016-MEM/DM, was "non-performance or late or defective performance, directly caused by acts of the contracting Public Administration (Ministry of Energy and Mines) in its role as grantor of qualifying licenses (definitive generation and transmission concessions)."[879] The premise for the extension granted in Addendum 2, which went beyond the two year period for the Actual COS, was that MINEM had directly caused the

876 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1933:1-7.

877 **C-008**, Addendum 1 to the RER Contract, 22 July 2015, Recital 10; **C-009**, Addendum 2 to the RER Contract, 3 January 2017, Clause 2.3.

878 **C-008**, Addendum 1 to the RER Contract, 22 July 2015, Recital 3, 8.

879 MINEM Ministerial Resolution No. 559-2016-MEM/DM, in **C-009**, Addendum 2 to the RER Contract, 3 January 2017, p. 10.

delay in question. This is to be distinguished from Second Claimant's proposed interpretation, which would be to require an extension to be granted for delay caused by any government authority, and not just MINEM.

818. The Tribunal further notes that while an extension was granted to the Actual COS in Addendum 2, MINEM explicitly did not accept the movability of the Termination Date of the Contract, which was cited to be inappropriate in light of Article 1.13B of the RER Regulations (see ¶ 786 above).[880] Addendum 2 therefore does not support a view that the Termination Date was movable, or that the Parties had agreed on a guaranteed 20 years of validity for the Award Tariff.

819. In addition, the Tribunal observes that pursuant to Clause 12.3 of the RER Contract, and as repeated in Addendum 1,[881] "[a]mendments or clarifications to the Contract shall only be valid when they… comply with the relevant requirements under the Applicable Laws."[882] To the extent that Addenda 1 and 2 are not compliant with Applicable Laws, they are therefore not valid and should not have been granted. Even without this clear language, as a matter of Peruvian law, the binding administrative legal framework within which the RER Contract operates must prevail (see ¶ 613 above).

820. In December 2017, according to Claimants, they held discussions with MINEM regarding the basis for a potential extension to the Termination Date of the RER Contract.[883] Following those discussions, an email from First Claimant's President at the time Mr. Goran Stefan Sillen, to Mr. Ampuero Llerena, the President of the Special Commission, records as follows:[884]

> I would like to have a private conversation with you with respect to moving the term of the PPA. We are making some progress with MINEM and we are seemingly in agreement that a) our request to move the end date of the contract is legally justified and b) that there is a legal mechanism to do so.

880 **C-009**, Addendum 2 to the RER Contract, 3 January 2017, pp. 9-10.

881 **C-008**, Addendum 1 to the RER Contract, 22 July 2015, Recital 7.

882 **C-002**, RER Contract, Clause 12.3.

883 **C-233**, Memorandum to the Special Commission regarding the extension of the RER Contract Term Date, 20 December 2017; Sillen Second Statement ¶ 54; Reply ¶¶ 73-74.

884 **C-234**, Email from S. Sillen to R. Ampuero, 23 January 2018.

> However, MINEM wants to make sure that it doesn't create a precedent for other projects and I respect that so we are willing to find ways to achieve that. That said, our case is unique in that the delays are caused by authorities and, hence, the state of Peru whereas other projects may be delayed for reasons which are under the control of the developer or not caused by the state.

821. Respondent submits, on the other hand, that MINEM's exploration of possible alternative solutions in good faith never resulted in any offer to Second Claimant, and Claimants have not produced any document issued by Peru mentioning such an offer.[885]

822. The Tribunal does not find that the discussions between MINEM and Claimants regarding a hypothetical extension of the end date of the RER Contract to alter any of its conclusions. Whatever the contents of those discussions, they did not result in the implementation of any legal mechanism, contractual or otherwise.

823. Taking the legal situation as a whole, the Tribunal acknowledges the difficulty posed by MINEM's conduct in entering into Addenda 1 and especially Addenda 2, and subsequently disavowing those Addenda, as a matter of good faith and consistency in the interpretation of the RER Contract. Under different circumstances, the Tribunal would agree with Claimants regarding the agreements reached in Addenda 1 and 2, in particular in light of the matters mentioned at ¶ 815 above. However, in the present case, the Tribunal is not at liberty to disregard the binding provisions of the RER Regulations, which included a "hard stop" for the Actual COS, which Second Claimant was well aware of. Without an amendment of those binding legal provisions, deviation from the mandatory requirements of the RER Regulations was not possible. As such, the Tribunal confirms its literal, systematic and functional interpretation of the RER Contract to the effect that the Actual COS was required to take place by a date two years beyond the Reference COS, and that the Termination Date could not be moved beyond 31 December 2036. The Tribunal finds that Article 1 of Addendum 2 has no effect insofar as it set the Actual COS at 14 March 2020, being a date beyond that prescribed in Article 1.13C of the RER Regulations. The Tribunal will give further consideration to issues of good faith under Peruvian law and the TPA at ¶¶ 901-906 and 1204 below.

885 Rejoinder ¶ 141.

824. Additionally, the fact that the Parties engaged in contemporaneous discussions which potentially included an offer of an extension to the Termination Date (that was not accepted by Claimants) is of no assistance to Claimants, leaving aside the issue that no agreement was entered into in that respect.[886]

825. The Tribunal further notes that in the context of their argument regarding the principle of estoppel under customary international law, Claimants make passing reference to "the contractual and Peruvian law principle of waiver," which allegedly precludes Respondent's "various arguments in this arbitration concerning the alleged invalidity of Addenda 1 and 2."[887] The Tribunal does not consider any claim of waiver with respect to Addenda 1 and 2 to be made out.

826. While Respondent has disavowed the validity of Addenda 1 and 2, it has not made any formal request for relief in the form of a request for a declaration of nullity before this Tribunal, and the Tribunal therefore does not have to consider whether such a declaration should be made.[888] As confirmed by the Parties in response to Tribunal Question 9,[889] the Lima Arbitration was the only forum in which Respondent sought such a declaration, but that arbitral tribunal declined jurisdiction without granting Respondent's request.[890]

827. The Tribunal's reasoning likewise entails the rejection of Claimants' argument that its interpretation of Clause 8.4 of the RER Contract would violate Article 70 of Peru's Political Constitution on the inviolability of property rights.[891] Article 70 of the Political Constitution provides that the right to property is exercised "*dentro de los límites de ley*."[892]

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886 *See* Reply ¶¶ 73-75, 87.

887 Reply ¶ 651.

888 *See* Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1931:5-16; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2118:6-14.

889 Tribunal Question 9: "Have Addenda 1 and 2 to the RER Contract been declared null and void? If so, please identify when such a declaration was made, and by whom, with reference to the corresponding evidence on the record."

890 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1930:4-1932:5; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2118:6-14.

891 Reply ¶¶ 786-787.

892 **RL-055**, *Constitución Política del Perú*, 29 December 1993**,** Art. 70:

The Tribunal does not consider the operation of Clause 8.4 of the RER Contract in accordance with its terms and the terms of the RER Regulations to be inconsistent with the inviolability of property rights. The question of whether an expropriation has taken place at all will be addressed in the context of Claimants' claims under the TPA (see Section IX.C below).

b. Findings of Other Arbitral Tribunals

828. In support of their respective arguments on the interpretation of the RER Contract, both Parties have raised the findings of other arbitral tribunals seated in Lima, Peru that have made determinations with respect to other hydropower projects in the Third Auction and Fourth Auction (see ¶¶ 224-233 above) .[893]

829. The Tribunal recognises that each of these arbitrations has its own factual matrix, and each tribunal made its decisions based on the arguments made and evidence put before it. This Tribunal is not bound by the findings of other arbitral tribunals, and makes its decision based on the record presented by the Parties. The findings of these tribunals are still of relevance insofar as they interpret identical or analogous provisions of the RER Contract and applicable Peruvian law. The Tribunal therefore notes some of the relevant circumstances and conclusions reached by those tribunals below, many of which correspond with findings made by the Tribunal in this Award.

(i) Electro Zaña

830. The Electro Zaña arbitration was brought by a RER concessionaire in the Third Auction. The concessionaire achieved the Actual COS on 15 February 2019, i.e., after 31 December 2018. It suffered delays in obtaining easements necessary for construction, and while its generation units were installed by the time of a test for COS on 28 December 2018, one of

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"*El derecho de propiedad es inviolable. El Estado lo garantiza. Se ejerce en armonía con el bien común y dentro de los límites de ley. A nadie puede privarse de su propiedad sino, exclusivamente, por causa de seguridad nacional o necesidad pública, declarada por ley, y previo pago en efectivo de indemnización justipreciada que incluya compensación por el eventual perjuicio. Hay acción ante el Poder Judicial para contestar el valor de la propiedad que el Estado haya señalado en el procedimiento expropiatorio*."

893 Counter-Memorial ¶¶ 452-457; Reply ¶¶ 763-773; Rejoinder ¶¶ 131-132, 255-260.

the generation units encountered a technical issue and its certification did not become valid until 15 February 2019.[894]

831. The tribunal held that the Reference COS and the Actual COS were considered as fundamental milestones to determine the period of validity of the Award Tariff and the RER contract itself.[895] The tribunal further characterised Clause 8.4 of the RER contract as a *condición resolutoria*. Taking into account this clause and Clause 10.2(b) of the RER contract, the tribunal held that the State was not entitled to extend the validity of the RER contract or to maintain it if the Actual COS was not achieved in the required period.[896]

832. The tribunal held that the time periods set by the RER regime are non modifiable, while the concessionaire company can freely use the two year cushion period between the Reference COS and the Actual COS to account for delays in execution of the works, without having to justify the reasons for such delays and regardless of whether it, the State, or third parties were responsible for them.[897] The tribunal saw this two year period as a damage mitigation tool for the concessionaire, which had assumed the risk of any circumstance that could impact on the timing of the execution of the works.[898] By using the cushion period, the tribunal noted that the concessionaire would reduce the period that

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894 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 45.

895 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 211:

"*En consecuencia, queda claro que las fechas, tanto referencial como real, de la POC han sido consideradas por la legislación como hitos fundamentales para determinar no sólo la vigencia de la tarifa de adjudicación sino también del contrato mismo, tal como se verá a continuación*."

896 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 241 (*see also* ¶ 264):

"*Puesto que la resolución del Contrato se produce en forma automática por el solo hecho de que la POC real no sea alcanzada por el Concesionario en el plazo máximo establecido, es claro que nos encontramos ante una condición resolutoria y no ante una causal de resolución del Contrato por incumplimiento, que habilite al Estado a resolver, o no, el Contrato. Y es así como deben ser interpretadas las cláusulas 8.4 y 10.2.B del Contrato, toda vez que el Estado no tiene la atribución legal de prorrogar los plazos del Contrato RER ni tiene la atribución de mantenerlo vigente a pesar de que la POC real no se haya alcanzado dentro del plazo*."

897 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶¶ 286, 291, 292.

898 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 289.

it would receive the Award Tariff, since the Termination Date of the Contract is not modifiable.[899]

833. Regarding the operation of the termination in Clause 8.4 "for any reason", the Tribunal held that this included causes attributable to the concessionaire, and causes outside its control. Such causes outside its control include facts of nature, acts of government (*fait du prince* or *hecho del príncipe*), acts of third parties, and acts attributable to the State.[900]

834. The Tribunal held that the works execution schedule is unilaterally elaborated by the concessionaire, and is not a contractual document placing obligations on the State. Moreover, the tribunal found that the schedule is only presented to OSINERGMIN and not MINEM, the counterparty to the RER contract. OSINERGMIN does not approve or consent to the works execution schedule, but verifies that its form and contents comply with the contract.[901] While Claimants argue that the tribunal found that the State, and not MINEM, is the Grantor under the RER Contract,[902] Claimants' citation for that argument is ¶¶ 1-3 of the award, in which the tribunal sets out the names of the parties and indicates that "*[l]a parte demandada es el Estado Peruano...representado por* [MINEM]..."[903] It is not clear that the tribunal made the finding that Claimants seek to establish, however, since elsewhere in the award the tribunal refers to MINEM as "*contraparte en el Contrato celebrado*."[904]

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899 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 288.

900 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 263 (*see also* ¶¶ 250-255):

"*Igualmente, el Tribunal ha establecido que la condición resolutoria producirá sus efectos si el hecho negativo del cual depende, no llega a producirse "por cualquier motivo", supuesto que incluye causas atribuibles al concesionario, y causas ajenas a su control. Dentro de estas últimas puede haber causas atribuibles a hechos de la naturaleza, hechos de príncipe, hechos determinantes de terceros e inclusive, hechos atribuibles al propio ESTADO. Si algún remedio cabe ante esta situación, éste no es el de modificar la fecha de la POC real para salvar el Contrato, pues esa fecha es inmodificable*."

901 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 300.

902 Reply ¶ 771.

903 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 2.

904 **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 300.

(ii) Santa Lorenza

835. The Santa Lorenza arbitration was brought by an RER concessionaire awarded an RER contract in the Third Auction. The tribunal was called upon to decide whether MINEM should have extended the Actual COS due to the existence of force majeure events. It found that the RER contract in that case had terminated automatically when the Actual COS was not achieved by 31 December 2018 due to reasons of force majeure. In doing so, the tribunal distinguished the case before it from causes attributable to the Peruvian State as "*acreedor*."[905]

836. With respect to Clauses 1.4.23 and 8.4 of the RER contract, the tribunal found that the parties had clearly and specifically declared their intention that the RER contract would terminate in the event that the Actual COS was not reached by 31 December 2018.[906] It further held that with the expression of its intentions in the language of Clauses 1.4.23 and 8.4, the concessionaire had consciously assumed the risk of termination of the RER contract as a consequence of the impossibility of meeting the 31 December 2018 Actual COS for any reason, whether force majeure or otherwise.[907]

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905 **CLC-101**, *Empresa de Generación Eléctrica Santa Lorenza S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0672-2018-CCL, Laudo, 28 October 2019, ¶ 174.

906 **CLC-101**, *Empresa de Generación Eléctrica Santa Lorenza S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0672-2018-CCL, Laudo, 28 October 2019, ¶ 128:

"*Es evidente que en virtud a los términos contenidos en las cláusulas bajo análisis, se evidencia la voluntad declarada de las partes de delimitar clara y específicamente como momento de resolución y cese de los efectos del Contrato de Concesión RER, el hecho que no se haya alcanzado el resultado de la prestación, consistente en la Puesta en Operación Comercial de la Central RER certificada por el COES al 31 de diciembre de 2018*."

907 **CLC-101**, *Empresa de Generación Eléctrica Santa Lorenza S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0672-2018-CCL, Laudo, 28 October 2019, ¶ 138:

"*De la declaración de voluntad contenida en el texto de las Cláusulas 1.4.23 y 8.4 del Contrato de Concesión RER se constata que la asignación del riesgo de terminación del contrato como consecuencia de incumplimiento por imposibilidad de concretar al 31 de diciembre de 2018 con una Central RER con su Puesta en Operación Comercial certificada por el COES, por cualquier causa, sea esta una fuera mayor,fue conscientemente asumido por el Concesionario*."

(iii) Egecolca

837. This arbitration was brought against MINEM as the respondent.[908] While the contractual relationship with MINEM was understood to be one with the Peruvian State,[909] the tribunal drew a distinction between delays attributable to MINEM and administrative delays originating in other institutions, which cannot be attributed to MINEM.[910]

838. The tribunal found that pursuant to the *condición resolutoria* in Clause 8.4 of the RER contract, if the Actual COS is not met for any reason, this results in the immediate and automatic termination of the RER contract.[911]

(iv) Sur Medio

839. This case concerned an arbitration brought by a concessionaire in the Fourth Auction. The tribunal held that while OSINERGMIN was to approve the works execution schedule, it did not have the nature of a contractual document, and the periods foreseen therein were not enforceable against the State.[912] As such, the tribunal held that the State was not obliged to adapt its administrative activities to the periods specified in that document.[913]

840. The tribunal held that as a result of Clause 8.4 of the RER contract, the agreement would have no effect if the Actual COS was not met, regardless of whether the reason was attributable to the concessionaire or the State, or whether the State had communicated an

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908 **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, p. 1.

909 **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, ¶¶ 42-44.

910 **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, ¶ 18:

"*Que, la responsabilidad administrativa de las Entidades del Estado que justificaron el retraso, no pueden ser atribuibles a la Entidad puesto que las mismas se encuentran originadas por otras instituciones; por lo que no se puede observar del estudio de los medios probatorios que justifican la Adenda N° 01, no se puede observar que se le haya atribuido responsabilidades el Ministerio de Energía y Minas, puesto que los retrasos no se derivaron de este*."

911 **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, ¶¶ 15, 19-22.

912 **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, ¶ 329.

913 **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, ¶ 331.

intention to terminate the contract.[914] As such, termination under Clause 8.4 happens automatically.[915]

(v) Conclusion on the Findings of Other Arbitral Tribunals

841. As set out above, all four of the arbitral tribunals referred to found that Clause 8.4 operates to terminate the respective RER contract automatically when the Actual COS is not achieved by the relevant deadline "for any reason", albeit each of them was deciding on the basis of different circumstances. This is consistent with the Tribunal's finding in the present case.

842. Claimants argue that, to the contrary, these tribunals did not consider Clause 8.4 of the RER Contract to be a liability clause.[916] However, the references cited either do not support Claimants' contention, or go to a different question of the consequences of automatic termination, in particular in respect of the Performance Bond. The findings of the arbitral tribunals on this point will be considered at ¶ 992 below.

c. Conclusion on the Third Extension Request

843. For the above reasons, the Tribunal finds that Respondent did not breach the RER Contract by rejecting Second Claimant's Third Extension Request. Neither the RER Contract nor Peruvian law provide an entitlement to an extension of the Actual COS or the Termination Date of the Contract or an obligation on Respondent to grant one. To the contrary, such an

914 **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, ¶ 371:

"*A la vista de lo anterior, el Tribunal no puede sino concluir que, de conformidad con las cláusulas 1.5.25 y 8.4 de los Contratos RER, los contratos quedarían sin efecto si la Demandante no alcanzaba la Puesta en Operación Comercial de sus proyectos antes del 31 de diciembre de 2020, sin que fuese preciso que dicho incumplimiento fuese imputable a la sociedad concesionaria, que el Estado hubiese constituido en mora a su contraparte, ni que el Estado hubiese comunicado a aquella su intención de resolver los contratos*."

915 **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, ¶ 386.

916 **CD-06**, Claimants' Closing Presentation, slide 37; *citing* **CLC-101**, *Empresa de Generación Eléctrica Santa Lorenza S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0672-2018-CCL, Laudo, 28 October 2019, ¶ 240; **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶ 333; **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, ¶ 389; **CM-086**, *Empresa de Generación Eléctrica Colca S.A.C. c. Ministerio de Energía y Minas*, Caso Arbitral No. 0651-2018-CCL, Laudo arbitral de derecho, 10 March 2021, p. 70.

extension would have been inconsistent with the terms of the RER Contract and binding provisions of the RER Regulations. Moreover, insofar as the premise of this claim by Second Claimant's is an alleged entitlement to 20 years of Guaranteed Revenue under Clauses 1.4.26, 1.4.37 and 6.3 of the RER Contract, this claim is without merit.

844. The Tribunal will further discuss the implications of its findings with respect to the termination of the RER Contract at ¶¶ 977 *et seq.* below.

(3) Alleged Breach of Addenda 3 to 6

845. Second Claimant argues that by rejecting the Third Extension Request, Respondent also separately breached obligations under Addenda 3 to 6 and Peruvian law to suspend the Works Execution Schedule and to compensate Second Claimant for the 17-month period that the RER Contract was under suspension.[917]

846. Respondent argues that Addenda 3 to 6 did not release Second Claimant from the requirement to achieve the Actual COS in order to receive the Award Tariff. In its view: (i) neither the RER Contract nor the applicable legal framework permitted an extension of the Actual COS or the Termination Date; and (ii) nowhere in Addenda 3 to 6 did MINEM agree to extend the Actual COS or the Contract Termination Date.[918]

847. In order to determine the merits of Second Claimant's claim, the Tribunal will examine Addenda 3 to 6. Addenda 3 to 6 put in place a series of suspensions related to the RER Contract while the Parties were carrying out negotiations with respect to the dispute (see ¶¶ 164-166, 191-196, 203 above). Tribunal Question 10 asked the Parties to advise to which rights and obligations the suspension referred to in Addenda 3 to 6 applies,[919] which was addressed by the Parties in their respective Closing Statements at the Hearing.[920]

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917 Reply ¶ 790.

918 Rejoinder ¶ 1003. *See also* Rejoinder ¶¶ 277-295; R-PHB ¶ 33.

919 Tribunal Question 10: [quoting Clause 2.1 of Addendum 3]: "(i) To which rights and obligations under the RER Contract does the suspension referred to in Addendum 3 apply? (ii) Please advise also with respect to the suspensions referred to in Addenda 4 to 6…."

920 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1933:13-1936:17; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2072:5-2074:2.

848. Addendum 3 dated 8 September 2017 ratified the agreement reached by Second Claimant and MINEM as recorded in Paragraph 2.1 of the Direct Negotiation Minute dated 21 July 2017:[921]

> To provide, in the framework of the RER Concession Agreement, and having previously informed the main representative of the Ministry of Economy and Finances of the Special Committee created through Law No. 28933 for the information centralization and coordination purposes established in that regulation, the suspension of the Concession Agreement for the Supply of Renewable Power to the National Interconnected Electrical Grid for the project CH Mamacocha S.R.L., including the obligations, rights and the Works Execution Schedule contained in Annex II of the RER Concession Agreement previously modified by Addendum No. 1 and Addendum No. 2[.] (emphasis added)

849. The suspension referred to in Addendum 3 was extended as follows: (i) Article 2.1 of Addendum 4 orders "the extension of the final suspension date" from 21 April 2017 to 28 February 2018;[922] (ii) in Article 2.1 of Addendum 5, the parties to the RER Contract agreed "within the framework of the RER Concession Contract, the extension of the suspension end date" until 30 June 2018, or until the completion of the negotiations under the responsibility of the Special Commission;[923] (iii) Article 2.1 of Addendum 6 extended the suspension of the RER Contract until 30 September 2018, or until completion of the negotiations with the Special Commission.[924]

850. According to Claimants, Addenda 3 to 6 "stopped the clock" on all of Second Claimant's obligations under the RER Contract, including the Actual COS.[925] The effect of the suspension, Claimants argue, was to modify the Actual COS.[926] In support of this view, Claimants rely on: (i) an internal email to Mr. Jacobson in April 2017, which mentions that "...[w]e also have confirmed that MINEM has the power to 'suspend the calendar' on our

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921 **C-014**, Addendum 3 to the RER Contract, 8 September 2017, Art. 2; referring to Annex 1 of Addendum 3, ¶ 2.1. *See also* **C-094**, Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Víctor Carlos Estrella (MINEM), 21 July 2017.

922 **C-015**, Addendum 4 to the RER Contract, 17 January 2018, Art. 2.1.

923 **C-016**, Addendum 5 to the RER Contract, 26 March 2018, Art. 2.1.

924 **C-017**, Addendum 6 to the RER Contract, 23 July 2018, Art. 2.1.

925 Reply ¶ 146. *See also* C-PHB, Annotated Index, ¶ 13.

926 Reply ¶ 157.

COD and all intermediate deadlines..."[927]; (ii) Second Claimant's formal request to suspend the Works Execution Schedule, which requested the suspension of "the execution of the Contract and of all the rights and obligations that derive from the same";[928] (iii) the Direct Negotiation Minute of 21 July 2017, which refers to the suspension as "including the obligations, rights, and the Works Execution Schedule," which Schedule includes the Actual COS deadline;[929] and (iv) the text of MINEM's resolution confirming the Direct Negotiation Minute, which mentions that the suspension was to:[930]

> ...prevent the negative consequences against assets of [Second Claimant] becoming worse, taking into consideration the future achievement of the milestones "Financial Closing" on August 29, 2017 and "Commencement of Civil Works" on November 10, 2017, contained in the RER Concession Agreement.

851. Respondent disagrees, asserting that neither Addenda 3 to 6, nor the Direct Negotiation Minute, refer to the modification or extension of the Actual COS or the Termination Date.[931] For Respondent, the effect of Addenda 3 to 6 was to suspend enforcement of the Parties' performance during the suspension period.[932] In its view, the wording of Articles 3.2 and 3.3 of Addenda 4 to 6 expressly refute Claimants' argument.[933]

852. Article 3.2 of Addendum 4 states:[934]

> The clauses and points of the RER Concession Agreement, which have not been modified or invalidated through this Addendum, remain unchanged, and are effective and enforceable in accordance with the terms of the Agreement. Nothing indicated or contained in this Addendum may be interpreted or considered as a waiver, discontinuance, consent or modification of any position or statement by the Parties with respect to any subject or matter of the Agreement, unless expressly stated in this Modification. (emphasis added)

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927 Reply ¶ 149; *quoting* **C-259**, Email from J. Lepon to M. Jacobson, et al., 4 April 2017, p. 1.

928 Reply ¶ 150; *quoting* **C-092/MQ-016**, Letter from C.H. Mamacocha to Ministry of Energy and Mines, 21 April 2017.

929 Reply ¶ 152; *quoting* **C-094**, Direct Negotiation Minute signed by C. Diez Canseco (C.H. Mamacocha) and Víctor Carlos Estrella (MINEM), 21 July 2017.

930 Reply ¶ 153; *quoting* **C-014**, Addendum 3 to the RER Contract, 8 September 2017, p. 8.

931 Rejoinder ¶¶ 281-282.

932 Rejoinder ¶ 280; *quoting* Lava Second Report ¶ 3.54.

933 Rejoinder ¶ 285.

934 **C-015**, Addendum 4 to the RER Contract, 17 January 2018, Art. 2.1.

853. Articles 3.2 of Addendum 5 and Addendum 6 contain a similar provision.[935]

854. Addenda 4, 5 and 6 further provide in their respective Articles 3.3: [936]

> This Addendum enters into force on the calendar day following its execution. Specifically, and without limitation, everything provided for in the Eighth Clause of the RER Concession Contract maintains its full force and effect. (emphasis added)

855. To recall, Clause 8.4 of the RER Contract provides, in part:[937]

> If, for any reason, Commercial Operation Start-up of the RER Generation Project provided for hereunder has not taken place by December 31, 2018, this Contract shall be automatically terminated, and the Performance Bond shall be enforced.

856. The Tribunal finds that the ordinary meaning of the suspension agreed in Addendum 3 and extended in Addenda 4 to 6 was to pause performance of the RER Contract, and in particular the upcoming deadlines in the Works Execution Schedule. The Tribunal agrees with Respondent that suspension is not synonymous with modification.[938] None of the Addenda refers to a modification of the Actual COS or an entitlement to be granted a subsequent extension of time in relation to the Actual COS. A suspension operates to suspend, i.e., to freeze or pause the obligations in question. While this may be understood to "stop the clock" in some sense, it cannot automatically amend the RER Contract or oblige Respondent to do so. This is all the more so when the Actual COS and the Termination Date are regulated by binding law and, as the Tribunal determined at ¶ 791 above, could not be extended by contract alone.

857. The Tribunal further has difficulty with Claimants' argument, on the one hand, that Addendum 3 had already modified the Actual COS deadline, while the Third Extension Request also sought Respondent's agreement to such an extension.

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935 **C-015**, Addendum 4 to the RER Contract, 17 January 2018, Art. 3.3; **C-016**, Addendum 5 to the RER Contract, 26 March 2018, Art. 3.2; **C-017**, Addendum 6 to the RER Contract, 23 July 2018, Art. 3.2.

936 **C-017**, Addendum 6 to the RER Contract, 23 July 2018, Art. 3.3.

937 **C-002**, RER Contract, Clause 8.4.

938 Rejoinder ¶ 286.

858. The fact that the Works Execution Schedule included an entry for the Actual COS does not imply that Addenda 3 to 6 modified the other provisions of the RER Contract referring to that date. Specifically, Clause 1.4.23 provides that the Actual COS "may not be more than two (02) years after the" Reference COS (see ¶ 716 above), and Clause 8.4 set out the automatic termination of the RER Contract if the Actual COS had not been completed by 31 December 2018 (see ¶ 855 above).

859. Any doubt about this interpretation is eliminated by the express wording in Addenda 4 to 6 to the effect that clauses which have not been modified or invalidated remain unchanged, and that Clause 8 of the RER Contract "maintains its full force and effect" (see ¶¶ 852, 854 above).

860. Claimants submit that Clause 8.4 of the RER Contract does not require Second Claimant to achieve the Actual COS by 14 March 2020, as the obligation to achieve the Actual COS arises from the Works Execution Schedule. In their view, a postponement of the Actual COS would "similarly postpone" the deadline in Clause 8.4.[939] However, Claimants' proposed interpretation does not withstand scrutiny, because Clause 8.4 does not merely contain a referential deadline but a specific hard stop at 31 December 2018. It also fails to address the requirement in Clause 1.4.23 of the RER Contract that the Actual COS may not exceed the Reference COS by more than two years.

861. The Tribunal's understanding is also consistent with the purposes of Addenda 3 to 6, which as both Parties acknowledge was to provide room for negotiations with a view to potential amicable resolution of the dispute.[940] The immediate concern was, as Claimants point out (see ¶ 848 above), the impending deadlines in the Works Execution Schedule for financial closing and commencement of civil works, which are expressly referred to in MINEM's resolution confirming the Direct Negotiation Minute.[941]

939 Reply ¶ 158.

940 Reply ¶ 148; Rejoinder ¶ 294.

941 MINEM Resolution No. 356-2014-NEN/DM, in **C-014**, Addendum 3 to the RER Contract, 8 September 2017, p. 16.

862. Consistent with the fact that the Addenda were for the purpose of allowing negotiations to progress, and only suspended performance of the RER Contract for a specified period, Article 2.2 of Addendum 3 provides that MINEM does not recognise contractual or non-contractual liability of MINEM or the State of Peru, and both parties reserve their rights.[942] Addenda 4 to 6 contain the same declaration.[943]

863. In light of the foregoing, the Tribunal finds no support in the language of Addenda 3 to 6 for an alleged obligation to grant the Third Extension Request. Addenda 3 to 6 do not themselves modify the Actual COS, nor do they contain any explicit right to the extension of time sought. Addenda 3 to 6 further do not refer to a right to compensation for the 17-month period of suspension. The Tribunal confirms its findings above that the interdependence between the Actual COS and the Reference COS, as well as the deadline for achieving the Actual COS by 31 December 2018, are binding law.

864. The Tribunal is also unpersuaded by Claimants' reliance on MINEM's internal legal memorandum dated 28 June 2017.[944] The contents of the document do not refer to the legal effect of the Addenda at all, which had not yet been entered into. The document provides advice on a hypothetical situation of what "should be" done in relation to a request for suspension and scheduling of a new COS date if it were granted, specifically flags that consideration should be given to Clause 8.4 of the RER Contract, and ultimately recommends not to grant the suspension.[945] Likewise, Claimants' reliance on submissions made by MINEM in the Lima Arbitration do not alter the Tribunal's conclusions reached above.[946] The Tribunal agrees with Respondent[947] that these submissions are not contemporaneous to the signature of the RER Contract and therefore do not establish the Parties' intentions when entering into it.

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942 **C-014**, Addendum 3 to the RER Contract, 8 September 2017, Art. 2.2.

943 **C-015**, Addendum 4 to the RER Contract, 17 January 2018, Art. 2.2; **C-016**, Addendum 5 to the RER Contract, 26 March 2018, Art. 2.2; **C-017**, Addendum 6 to the RER Contract, 23 July 2018**,** Art. 2.2.

944 Reply ¶ 163.

945 **C-216**, Official Letter No. 121-2017-MEM/VME, 13 July 2017, ¶ 2.3, § III.

946 *See* Reply ¶ 167.

947 Rejoinder ¶ 1014.

865. Claimants make a further submission in relation to Addenda 3 to 6 that by waiting 10 months to respond to the Third Extension Request and denying it, Respondent repudiated its commitments to good faith negotiation under those Addenda 3 to 6.[948] The Tribunal finds this assertion to be unfounded. Whether or not Addenda 3 to 6 contained any binding commitment to negotiate, such negotiations did in fact proceed (see ¶¶ 191-196, 200-203 above). The fact that such negotiations were unsuccessful and that the Third Extension Request was denied does not constitute a breach of the RER Contract or its Addenda.

866. For the above reasons, the Tribunal rejects Second Claimant's claim for alleged breach of Addenda 3 to 6 of the RER Contract as being without merit.

E. ALLEGED BREACH OF CLAUSE 2.2.1 FOR DISAVOWAL OF ADDENDA 1-2

867. Clause 2.2.1 of the RER Contract provides:[949]

> The Ministry is duly authorized under the Applicable Laws to act as Grantor of this Contract. The execution, delivery and performance hereof by the Ministry fall within its powers, are consistent with the Applicable Laws and have been duly authorized by the Government Authority.

868. Tribunal Question 8 asked the Parties: "On which occasion(s), and in what context, did Respondent take the position that Addenda 1 and 2 to the RER Contract are null and void?" The Parties provided their respective answers in their Closing Statements at the Hearing.[950]

869. Claimants submit that Respondent has breached a guarantee under Clause 2.2.1 of the RER Contract that its execution of Addenda 1 and 2 and other actions taken in "fulfilment" of the RER Contract were in accordance with law and "duly authorized" by it.[951] When Respondent commenced the Lima Arbitration challenging the validity of Addenda 1 and 2, Claimants contend that it breached its sovereign guarantee that the MINEM officials

948 Reply ¶ 790.

949 **C-002**, RER Contract, Clause 2.2.1.

950 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1928:6-1930:3; Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2118:6-14.

951 Memorial § V.B.4.

who executed the two contractual modifications were duly authorized and acted in accordance with the applicable laws.[952]

870. For Claimants, Clause 2.2.1 refers to the "fulfillment" of the RER Contract and therefore includes not just its execution but its future performance.[953] A contrary interpretation which limits this obligation to the RER Contract without its amendments would, in their view: (i) be contrary to good faith;[954] (ii) be inconsistent with the "time is of the essence" nature of the RER Contract;[955] and (iii) be irreconcilable with the RER Law's objective of transparency, consistency and a predictable legal framework.[956]

871. Respondent submits that Clause 2.2.1 refers to the execution of the RER Contract only and not its Addenda.[957] In Respondent's view, Claimants seek to restrict Respondent's right to submit disputes to arbitration under the RER Contract. By initiating the Lima Arbitration, Respondent argues that it reasonably sought to rectify its actions on the grounds that Addenda 1 and 2 were contrary to applicable law.[958]

872. In Respondent's view, Claimants' argument is an example of procedural bad faith and abuse of process.[959] Respondent contends that when submitting their bid in the Third Auction, Claimants declared their knowledge of the laws applicable to the RER Contract including the inability to extend the Actual COS and Termination Date and cannot now claim ignorance of them.[960] In accordance with the principle of legality, Respondent argues that the public administration must depart from ("*apartarse de*") an act issued in

952 Memorial ¶ 469; Reply ¶ 823.

953 Reply ¶ 825.

954 Reply ¶ 826.

955 Reply ¶ 827.

956 Reply ¶ 828.

957 Counter-Memorial ¶ 959; *quoting* Lava First Report ¶ 6.101.

958 Counter-Memorial ¶¶ 960-961; *quoting* Lava First Report ¶¶ 6.66, 6.103.

959 Rejoinder ¶ 1027.

960 Rejoinder ¶ 1030; *citing* **R-001,** *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013; **R-139,** *Declaración Jurada del Participante*, CH Mamacocha, 22 October 2013.

contravention of applicable norms. The administration's error does not, it its view, give rise to rights for Claimants.[961]

873. The Tribunal is not persuaded by Respondent's argument that Clause 2.2.1 of the RER Contract is limited to the moment of execution of the RER Contract, to the exclusion of subsequent amendments thereto. The language of Clause 2.2.1 refers to the "execution, delivery and performance" of the RER Contract (emphasis added). To the extent that the parties to the RER Contract agree to amendments forming part of the agreement, such actions fall within the scope of this Clause.

874. The Tribunal notes that Claimants do not argue that Respondent breached the RER Contract by entering into Addenda 1 and 2, which the language of Clause 2.2.1 may call into question. They rather contend that Respondent's disavowal of Addenda 1 and 2 in the Lima Arbitration is a violation of this provision. The Tribunal agrees with Respondent that the act of resorting to arbitration to challenge Addenda 1 and 2 is not a breach of Clause 2.2.1 of the RER Contract. Clause 2.2.1 of the RER Contract does not insulate MINEM's acts from subsequent question.

875. For these reasons, the Tribunal rejects Second Claimant's allegation of breach of Clause 2.2.1 of the RER Contract. In doing so, the Tribunal does not consider that Claimants' claim on this ground is brought in procedural bad faith or an abuse of rights, and dismisses Respondent's assertion to that effect.

F. ALLEGED BREACH FOR COMMENCING THE LIMA ARBITRATION

876. Claimants argue that by commencing the Lima Arbitration, Respondent breached its obligation under Clause 11.3 of the RER Contract to submit to ICSID non-technical disputes valued at over USD 20 million.[962] They rely on the findings of the tribunal in the Lima Arbitration which dismissed Respondent's claims in their entirety, and held that

961 Rejoinder ¶ 1032; *citing* Monteza Second Report ¶¶ 64, 99-111.

962 Memorial ¶ 455; Reply ¶ 812.

Respondent's interpretation was: (i) not a good-faith interpretation; (ii) allowed for forum-shopping; and (iii) was nonsensical from an efficiency perspective.[963]

877. Claimants further submit that filing a lawsuit in an improper forum can amount to a breach of Clause 11.3 of the RER Contract on the basis of the language of Clause 11.3 which demonstrates the Parties' intention to strictly adhere to the monetary thresholds therein.[964]

878. In addition, Claimants argue that such an interpretation is inconsistent with the purpose of Clause 11.3(a) of the RER Contract to protect and incentivise foreign investment in the renewable energy sector.[965] In their view, the filing of the Lima Arbitration significantly injured Second Claimant, among other things because it made it impossible for Second Claimant to obtain project financing and signalled that Respondent would no longer honour previous extensions and would seek an award that allowed it to terminate the RER Contract and call the Performance Bond.[966]

879. Respondent denies that it violated Clause 11.3(a) of the RER Contract by initiating the Lima Arbitration.[967] Respondent contends that the claims brought by MINEM in the Lima Arbitration are fundamentally distinct and based on different facts, and were not intended to evade the jurisdiction of ICSID.[968] In its view, MINEM reasonably considered that the request to annul Addenda 1 and 2 did not have a value over USD 20 million, on the basis of a decision of the Supreme Court of Justice of Peru which held that the annulment of legal acts cannot be numerically valued.[969]

880. According to Respondent, the fact that the Lima Arbitration was dismissed by the tribunal renders Claimants' claims about that proceeding abstract, since it ultimately never took off, and had no impact on Claimants, the Mamacocha Project, Addenda 1 and 2, the RER

963 Reply ¶ 815; *citing* **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶¶ 117-119, 120-124, 125.

964 Reply ¶ 818.

965 Reply ¶ 819.

966 Reply ¶ 820.

967 Counter-Memorial ¶¶ 957 *et seq*.; Rejoinder ¶ 1021; R-PHB ¶ 92.

968 Counter-Memorial ¶ 962. *See also* Rejoinder ¶¶ 327, 331-335; R-PHB ¶ 93.

969 Rejoinder ¶ 1021; *citing* **RL-225**, *Sentencia de Corte Suprema de Justicia*, Exp. No. 003145-2000, 7 September 2001, pp. 4-5.

Contract, or this ICSID Arbitration.[970] Respondent denies that it initiated the Lima Arbitration to terminate the RER Contract and execute the Performance Bond.[971] Respondent further submits that the financial risk of the Project was on Claimants, and that they would not have achieved the Actual COS even without the Lima Arbitration.[972]

881. Clause 11.3 of the RER Contract is extracted at ¶ 273 above. It provides for two different types of arbitration of non-technical disputes, depending on the amount in dispute. ICSID arbitration is available for "[d]isputes involving amounts exceeding Twenty Million Dollars (USD 20,000,000)." For those "[d]isputes involving amounts equivalent to or lower than Twenty Million Dollars (USD 20,000,000)…or which cannot be quantified or assessed in money," Clause 11.3(b) provides for arbitration in Peru in accordance with the Arbitral Rules of the National and International Arbitration Centre of the Chamber of Commerce of Lima.[973]

882. The Tribunal has difficulty with Claimants' assertion that by filing its claims in the Lima Arbitration MINEM breached Clause 11.3 of the RER Contract. As set out at ¶ 881 above, the plain language of Clause 11.3 of the RER Contract foresees two different possible forums for potential arbitration proceedings under the RER Contract, depending on the amount in dispute. To hold a party liable for seeking recourse in a contractually-provided dispute resolution forum, even if that claim is subsequently found to be without merit, would be exceptional and a significant restriction of a party's contractual rights. Accordingly, the Tribunal agrees with Respondent that the filing of the Lima Arbitration was a legitimate exercise of the possibility for domestic arbitration foreseen in the RER Contract, and an option which Claimants were aware of.[974]

883. Claimants have not established that Respondent's interpretation of Clause 11.3 was merely an abusive forum shopping exercise as a means of avoiding having this dispute heard

970 Rejoinder ¶¶ 326, 1024.
971 Rejoinder ¶ 1025.
972 Rejoinder ¶ 1026.
973 **C-002**, RER Contract, Clause 11.3.
974 Counter-Memorial ¶ 963; Rejoinder ¶ 1022.

before an ICSID tribunal.[975] Claimants argue that it was always clear that the dispute brought in the Lima Arbitration was not one "which cannot be quantified or assessed in money," but rather had a quantifiable and immediate impact of more than USD 20 million.[976] This was a matter which the tribunal in the Lima Arbitration was properly competent to determine, and did so when it rejected jurisdiction over Respondent's claims.

884. For these reasons, the Tribunal rejects Second Claimant's claim that Respondent is in breach of Clause 11.3 of the RER Contract for bringing the Lima Arbitration. There being no breach of Clause 11.3 of the RER Contract, the question of harm caused does not arise.

G. ALLEGED BREACH OF GOOD FAITH OBLIGATION

(1) Applicability

885. Article 1362 of the Peruvian Civil Code provides that "*los contratos deben negociarse, celebrarse y ejecutarse según las reglas de la buena fe y común intención de las partes*."[977] It is common ground that Article 1362 applies to the parties' dealings under the RER Contract in some form, although the Parties disagree on the scope of the obligation.[978] In this regard, consistent with the analysis outlined at ¶¶ 584-586 above, the Tribunal agrees with the opinion of Mr. Lava that the principle of good faith applies because it is not already regulated by the legal regime applicable to the RER Contract, and is not inconsistent with the legal nature of the RER Contract.[979] Dr. Benavides takes a broader view on the application of the Peruvian Civil Code but for the purposes of the present issue, no disagreement arises on the application of Article 1362 of the Peruvian Civil Code.[980]

975 Memorial ¶ 462.

976 Memorial ¶¶ 457-462; Reply ¶¶ 813-814.

977 **RL-048**/**CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, p. 481.

978 Memorial ¶ 409; Counter-Memorial ¶¶ 73, 966-968; Reply ¶ 660.

979 Lava Second Report ¶ 3.115.

980 Benavides First Report ¶¶ 81-82.

(2) The Relevant Test

886. The Tribunal agrees with both Dr. Benavides and Mr. Lava that good faith under Article 1362 of the Peruvian Civil Code is a standard of conduct which requires a contractual party to act with qualities such as diligence, honesty, prudence and responsibility.[981]

887. The Tribunal further agrees with Mr. Lava that good faith includes fidelity to what has been agreed between the Parties ("*cumplimiento de la 'palabra dada'*").[982]

888. The Tribunal is not persuaded, however, by Claimants' submission that the standard of good faith applicable to the RER Contract includes the concept of good faith as enshrined in the GLAP.[983] Article IV, paragraph 1.8 of the GLAP provides:[984]

> **Principle of procedural good faith.-** The administrative authority, the administered, their representatives or lawyers and, in general, all participants in the procedure, perform their respective procedural acts guided by mutual respect, collaboration and good faith. The administrative authority cannot act against their own acts, except the cases of *ex officio* review contemplated in the present Law.
>
> No regulations of administrative procedure can be interpreted in such a way as to protect any conduct against procedural good faith.
>
> ***Principio de buena fe procedimental**.- La autoridad administrativa, los administrados, sus representantes o abogados y, en general, todos los partícipes del procedimiento, realizan sus respectivos actos procedimentales guiados por el respeto mutuo, la colaboración y la buena fe. La autoridad administrativa no puede actuar contra sus propios actos, salvo los supuestos de revisión de oficio contemplados en la presente Ley.*
>
> *Ninguna regulación del procedimiento administrativo puede interpretarse de modo tal que ampare alguna conducta contra la buena fe procedimental.*

889. On the plain wording of the above provision, it refers to "procedural acts" ("*actos procedimentales*") in administrative procedures. While the GLAP may be applicable to aspects of Claimants' dealings with the administrative authorities in Peru for the purposes

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981 *See* Benavides First Report ¶ 239; Lava First Report ¶ 6.22.

982 Lava First Report ¶ 6.21.

983 Memorial ¶ 472; *citing* Quiñones First Report ¶¶ 141-142.

984 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. IV, ¶ 1.8. Translation by Claimants at Reply ¶ 847.

of the Mamacocha Project, the Tribunal agrees with Respondent[985] that the concept of good faith under the GLAP is not directly applicable to the contractual relationship under the RER Contract. Even if the RER Contract is an administrative contract, that does not mean that the performance of the RER Contract constitutes an administrative procedure within the meaning of the GLAP.

890. On this basis, the Tribunal will evaluate Claimants' claim by reference to Article 1362 of the Peruvian Civil Code.

(3) Alleged Breaches of Good Faith

891. Claimants allege that Respondent breached the obligation of good faith under the RER Contract in a number of ways. In particular, Claimants submit that: (i) the RGA Lawsuit; (ii) the Criminal Investigation and Criminal Proceedings; (iii) the rejection of the Third Extension Request; (iv) the initiation of the Lima Arbitration; and (v) AAA's measures delaying the issuance of the CWA, were all violations of good faith.[986]

892. The allegations identified as (i), (ii) and (v) in ¶ 891 above are made against State authorities other than MINEM, on the basis of Claimants' view that the conduct of all Peruvian State authorities is attributable to the State of Peru as contractual counterparty to the RER Contract. The Tribunal has rejected this view at ¶ 651 above. Neither the RGA, the RGA Public Prosecutor, the AEP nor the AAA, or other authorities and instrumentalities implicated in the circumstances invoked by Claimants, were assigned a role or obligations in the RER Contract.

893. The RGA Lawsuit was commenced by the RGA Public Prosecutor's Office and not by MINEM (see ¶¶ 146-147 above). Claimants have not successfully established a contractual basis on which the RGA or the RGA Public Prosecutor's Office had been assigned a role or obligations in the RER Contract. The question of whether the RGA Lawsuit was brought in good faith therefore does not arise under the RER Contract, and the allegation is rejected.

985 Rejoinder ¶ 1063.

986 Memorial ¶¶ 474-478; Reply §§ V.D.1.a-e. *See also* C-PHB, Annotated Index, ¶¶ 30-31.

894. The Criminal Investigation and Criminal Proceedings were brought by the AEP against Second Claimant's External Counsel (see ¶¶ 149-150, 183-190 above).[987] In the same way, it has not been established that these proceedings are subject to the contractual relationship in the RER Contract. Second Claimant's claim that there was a breach of good faith under the RER Contract on this basis is rejected.

895. Likewise, the Tribunal finds that the alleged bad faith by the AAA in handling Second Claimant's application for the CWA does not fall under the RER Contract and rejects this submission.[988]

896. Because the alleged actions in respect of the RGA Lawsuit, the Criminal Investigation and Criminal Proceedings and the AAA do not fall under the RER Contract, the Tribunal will not examine the merits of whether there was any breach of good faith associated with those actions. To the extent relevant to Claimants' claims under the TPA, the Tribunal will consider these matters at ¶¶ 1043-1185 below.

(4) The Rejection of the Third Extension Request

897. In relation to the rejection of the Third Extension Request, Claimants assert that MINEM lacked good faith by reversing its prior interpretation of the RER Contract, and specifically for the first time adopting the position that: (i) Second Claimant had assumed all risks concerning the Project, including the unforeseeable and unquantifiable risk that its counterparty would breach the RER Contract and interfere with the Project; (ii) the RER Contract could not be extended for any reason, even if the delays to the Project were exclusively caused by government agencies; and (iii) the suspensions under Addenda 3 to 6 were not actually suspensions and the 17-month suspension period should count entirely against Second Claimant.[989] Claimants additionally assert that the rejection of the Third Extension Request was arbitrary, unreasonable and not based on proper application of Peruvian law.[990]

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987 Reply ¶¶ 854-855.

988 Reply ¶ 867.

989 Memorial ¶ 478; Reply ¶ 858.

990 Reply ¶ 858.

898. For Claimants, this reversal was due to regulatory opportunism, as MINEM believed it was less costly to let the RER projects fail than to pick a fight with the more substantial natural gas industry players.[991] In Claimants' view, the rejection of the Third Extension Request made Second Claimant's performance under the RER Contract impossible.[992]

899. Respondent denies that it violated the principle of good faith by rejecting the Third Extension Request. In its view, it acted within the limits expressly imposed by the RER Regulations, the *Bases Consolidadas*, the RER Contract, and equal competition between bidders in the Third Auction.[993]

900. Respondent further contends that it does not argue that Second Claimant assumed the risk that MINEM would breach the RER Contract. Respondent characterises its arguments as being that: (i) MINEM did not breach its obligations under the RER Contract; (ii) MINEM did not contractually oblige other organs or instrumentalities of the State, which would be legally impossible; and (iii) none of the actions of State entities were in bad faith.[994]

901. The Tribunal has already determined that MINEM did not breach the RER Contract by denying the Third Extension Request (see ¶ 843 above). Those conclusions are also relevant to the allegation that MINEM acted in breach of the principle of good faith under Article 1362 of the Peruvian Civil Code. Among other things, the Tribunal found that neither the RER Contract nor Peruvian law provide an entitlement to an extension of the Actual COS or the Termination Date of the Contract or an obligation on Respondent to grant one. To the contrary, such an extension would have been inconsistent with the terms of the RER Contract and binding provisions of the RER Regulations (see ¶ 843 above).

902. The Tribunal also found that in Addendum 2: (i) MINEM had not accepted the movability of the Termination Date of the RER Contract in light of Article 1.13B of the RER Regulations (see ¶ 818 above);[995] and (ii) the extension was granted on the basis that

991 Memorial ¶ 478; Reply ¶ 860; C-PHB ¶ 12.

992 Reply ¶ 861.

993 Counter-Memorial ¶ 983; Rejoinder ¶ 1093.

994 Rejoinder ¶ 1094.

995 **C-009**, Addendum 2 to the RER Contract, 3 January 2017, p. 10.

MINEM as counterparty had directly caused the delay in question, and not that an extension should be granted for delay caused by any government authority (see ¶ 817 above). The denial of the Third Extension Request was not inconsistent with these prior positions taken by MINEM.

903. Contrary to Claimants' understanding of Addenda 3 to 6, the Tribunal has already found that these Addenda 3 to 6: (i) do not support an alleged obligation to grant the Third Extension Request; (ii) do not themselves modify the Actual COS, nor do they contain any explicit right to the extension of time sought; and (iii) do not refer to a right to compensation for the 17-month period of suspension (see ¶¶ 856-863 above).

904. As noted above, the Tribunal does acknowledge the difficulty posed by MINEM's conduct in entering into Addenda 1 and especially Addenda 2, and subsequently disavowing those Addenda, as a matter of good faith and consistency in interpretation of the RER Contract (see ¶ 823 above). This relates, in particular, to the extension granted in Addendum 2 and the views expressed by MINEM in the Sosa Report and the Ministerial Resolutions accompanying Addenda 1 and 2 mentioned at ¶ 815 above, i.e.: (i) the extension by Addendum 2 of the Actual COS to a date falling more than two years beyond the Reference COS; (ii) the meaning of "for any reason" in Clause 8.4 of the RER Contract; and (iii) the indication in the Ministerial Resolution No. 559-2016-MEM/DM that the Actual COS "does not constitute an essential term."

905. Under different circumstances, the Tribunal would agree with Claimants regarding the agreements reached in Addenda 1 and 2. However, these matters do not render Respondent's conduct a breach of good faith under Article 1362 of the Peruvian Civil Code. The denial of the Third Extension Request was loyal to and consistent with a binding legal regime, which the Tribunal is not at liberty to disregard, and which is equally relevant to assessing the good faith of Respondent's actions (see ¶ 843 above). The denial was therefore not in breach Article 1362 of the Peruvian Civil Code. It has not been established that MINEM acted in bad faith with the intention to destroy the Project, or that MINEM sought to discriminate against the Mamacocha Project or favour the interests of other

players in the energy industry. The Tribunal finds Claimants' allegations to that effect to be speculative and unsubstantiated.

906. For these reasons, the Tribunal rejects Second Claimant's claim that Respondent breached the obligation of good faith under Article 1362 of the Peruvian Civil Code with respect to the denial of the Third Extension Request. In denying the Third Extension Request, MINEM did not fail to act with diligence, honesty, prudence or responsibility.

(5) The Initiation of the Lima Arbitration

907. Claimants submit that by commencing the Lima Arbitration only four days before denying the Third Extension Request, Respondent evidenced procedural bad faith for bringing a claim to a tribunal without jurisdiction, and a reversal of its prior legal position on granting extensions to compensate for its own delays.[996] In Claimants' view, the Lima Arbitration was a "unilateral, unauthorized, and surreptitious attempt to circumvent the Parties' dispute resolution agreement."[997] According to Claimants, the tribunal in the Lima Arbitration found that MINEM's position was "nonsensical" and lacked good faith.[998]

908. Claimants assert that Respondent did not notify them of the claims that would be made while the Parties were in settlement discussions nor why it chose to proceed with this aggressive litigation strategy in late December 2018 rather than to continue negotiation with Second Claimant until the expiry of the standstill agreement on 1 April 2019. The fact that Respondent has not tested its claims in the present arbitration further supports the inference, in Claimants' view, that the Lima Arbitration claims were filed without good faith.[999]

909. In this regard, Claimants rely on the agreement between Claimants and the Special Commission in force at the time that MINEM filed the Lima Arbitration which extended the negotiation period between the Parties in the context of Claimants' request under the

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996 Memorial ¶ 477; Reply ¶ 863.

997 Reply ¶ 862.

998 Reply ¶ 864; *citing* **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020.

999 Reply ¶ 865.

TPA.[1000] This agreement provides, *inter alia*, that the parties pledge "to make their best efforts to find a solution to the Controversy within this extended period" and agree to "maintain the coordination that is necessary for any act or action that they adopt or carry out in order to solve the Dispute."[1001]

910. Respondent contends that the Lima Arbitration is distinct from the present ICSID arbitration, and that it is "absurd" to assert that the exercise of MINEM's contractual right to activate the dispute resolution mechanism in the RER Contract constitutes an action of bad faith.[1002]

911. Respondent further argues that: (i) it was foreseeable for MINEM to seek a declaration of nullity of Addenda 1 and 2 because the Reference COS and Actual COS were immovable;[1003] (ii) MINEM reasonably believed that seeking a declaration of nullity of Addenda 1 and 2 was not susceptible to quantification;[1004] (iii) seeking a declaration of nullity of Addenda 1 and 2 in this arbitration would have had no effect, since the extended dates of the Actual COS under those addenda had already expired by the time of the Counter-Memorial;[1005] and (iv) MINEM was not required to discuss or notify Second Claimant of its contractual claims that would be filed in the Lima Arbitration in the context of the Parties' discussions at that time in relation to claims under the TPA.[1006]

912. The Tribunal has already determined that the filing of the Lima Arbitration was a legitimate exercise of the possibility for domestic arbitration foreseen in the RER Contract, and an option which Claimants were aware of (see ¶ 882 above). Claimants also failed to establish that Respondent's interpretation of Clause 11.3 of the RER Contract was merely an abusive

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1000 Reply ¶ 253; *citing* **C-062**, Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), 21 September 2018.

1001 **C-062**, Direct Negotiations Term Extension Agreement between R. Ampuero (Special Commission), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), 21 September 2018, ¶¶ 3, 5.

1002 Counter-Memorial ¶ 982.

1003 Rejoinder ¶ 1087.

1004 Rejoinder ¶ 1088.

1005 Rejoinder ¶ 1090.

1006 Rejoinder ¶ 1091.

forum shopping exercise as a means of avoiding having this dispute heard before an ICSID tribunal (see ¶ 883 above).

913. With respect to the alleged reversal of Respondent's position on granting extensions under the RER Contract, the Tribunal refers to its reasoning in relation to the rejection of the Third Extension Request at ¶ 823 above.

914. Claimants further refer to the fact that the tribunal in the Lima Arbitration unanimously dismissed the Lima Arbitration for lack of subject matter jurisdiction. In doing so, Claimants submit that the tribunal found that MINEM's interpretation of Clause 11.3 of the RER Contract was not in good faith. Claimants rely on the tribunal's reasoning as follows:[1007]

> In this case, the good faith principle contains the Parties' implied obligation to make their best efforts to define and abide by the economic value of the dispute when determining the agreed-upon forum for the resolution of that dispute. In this regard, determining the amount correlatively requires submitting, along with the complaint, such documents or expert reports as will establish the amount of the disputed matter such that the Arbitral Tribunal may determine its jurisdiction.
>
> The assessment of the value of the disputed matter cannot be left up to the mere will or procedural strategy of one Party alone; rather, it is a reciprocal contractual obligation of the Parties. A contrary argument would mean leaving up to a party's discretion the determination of a forum which could potentially be more favorable to it for the resolution of the dispute, based on whether the Party quantifies the claim and how much it has framed its claims.

915. It is clear that the tribunal in the Lima Arbitration declared that it lacked jurisdiction over MINEM's claims. In reaching its conclusion, the tribunal rejected MINEM's proposed interpretation of the RER Contract and MINEM's position regarding the quantification of MINEM's claims.[1008] The Tribunal is not persuaded, however, that the tribunal in the Lima Arbitration went so far as to make a finding that MINEM had acted contrary to good faith or even that MINEM's proposed interpretation of Clause 11.3 of the RER Contract was not in good faith, as Claimants assert. In the passage extracted at ¶ 914 above, the tribunal in

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1007 Reply ¶ 226, *quoting* **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶¶ 96-67. Translation by Claimants.

1008 *See* **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶¶ 124-126, 138.

the Lima Arbitration was carrying out its good faith interpretation of Clause 11.3 of the RER Contract, after having considered a literal and functional interpretation.[1009] It makes no express finding regarding MINEM's conduct in that passage. Likewise, the dismissal of MINEM's proposal regarding the potential compartmentalisation of the Parties' disputes as "nonsensical" and contrary to procedural efficiency,[1010] is not a finding of lack of good faith by MINEM.

916. The Tribunal notes that at the time of initiating the Lima Arbitration, the Parties were in *trato directo* negotiations (see, *inter alia*, ¶¶ 164 *et seq.* above). While it would have been courteous to inform Claimants of the claim to be filed, the Tribunal does not consider the obligation of good faith, or any specific provision of the agreement between Claimants and the Special Commission in force at the time, to require Respondent to give Claimants advance warning of the filing of those claims.

917. For the above reasons, the initiation of the Lima Arbitration was not a failure to act in good faith as required by Article 1362 of the Peruvian Civil Code. By initiating the Lima Arbitration, MINEM did not fail to act with diligence, honesty, prudence or responsibility.

(6) Conclusion on Good Faith

918. In light of the foregoing, none of Second Claimant's allegations with respect to good faith under the RER Contract are successful and the Tribunal rejects them.

H. ALLEGED BREACH OF THE *ACTOS PROPIOS* DOCTRINE

(1) Applicability

919. Separately to the alleged breach of good faith, Claimants argue that Respondent breached the doctrine of *actos propios*.

920. It is undisputed that the doctrine of *actos propios* is rooted in the concept of good faith in Article 1362 of the Peruvian Civil Code, and prevents a party from taking inconsistent

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1009 **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶ 76.

1010 **C-245**, *MINEM v. CH Mamacocha S.R.L.*, Arbitration Case No. 0669-2018-CCL, Award on Jurisdiction, 24 December 2020, ¶ 125.

positions.[1011] The Tribunal has already determined at ¶ 886 above that Article 1362 of the Peruvian Civil Code applies to the parties' relations under the RER Contract.

921. Claimants argue that the principle of *actos propios* also applies by virtue of Article IV, paragraph 1.8 of the GLAP, which provides that an "administrative authority may not contradict its own acts."[1012] Respondent disagrees with the application of Article IV, paragraph 1.8 of the GLAP to the RER Contract.[1013] The Tribunal has already decided at ¶¶ 888-889 above that it does not consider Article IV, paragraph 1.8 of the GLAP to be directly applicable to the RER Contract.

922. The Tribunal accordingly rejects Article IV, paragraph 1.8 of the GLAP as a basis for an alleged breach of the *actos propios* doctrine under the RER Contract, while accepting that such a claim may be made on the basis of Article 1362 of the Peruvian Civil Code.

(2) The Relevant Test

923. The Parties agree that the following criteria are necessary to establish a violation of the *actos propios* doctrine: (i) a binding act; (ii) a subsequent act contradictory to that act; and (iii) the two acts have the same subject.[1014]

924. Respondent further submits that the doctrine must not be applied automatically, because it does not apply when there is a legally valid reason legitimising the contradictory conduct.[1015] Claimants acknowledge that an exception to the *actos propios* doctrine allows inconsistent positions where not doing so would be akin to validating an objectively illegal act, although they argue that it is a narrow one.[1016] This is confirmed by Claimants' expert

1011 Memorial ¶ 479; *citing* Benavides First Report ¶¶ 246-252; Counter-Memorial ¶ 986.

1012 Memorial ¶ 480; *quoting* Quiñones First Report ¶¶ 141-142. The Tribunal notes that Claimants' submission refers to the TUPA rather than the GLAP. Since the extract from the provision and the relevant citation of the Quiñones First Report refer to the GLAP, the Tribunal understands that Claimants intended to refer to the GLAP.

1013 Counter-Memorial ¶ 987.

1014 Counter-Memorial ¶ 986; Reply ¶ 872.

1015 Counter-Memorial ¶ 986; *quoting* Lava First Report ¶ 6.29.

1016 Reply ¶ 872.

Dr. Benavides, who states that the doctrine of *actos propios* "*no permite convalidar conductas ilegales*" and "*no permite convalidar actos jurídicos viciados de nulidad*."[1017]

925. For present purposes, the Tribunal finds it established that the doctrine is applicable in principle under Peruvian law between the parties to the RER Contract, subject to meeting the relevant test. The Tribunal considers the debate about whether the *actos propios* doctrine is of broad or residual application to be largely an academic one, which does not add to the criteria outlined above.[1018]

(3) Alleged Breaches of Actos Propios

926. According to Claimants, Respondent violated the doctrine of *actos propios* by: (i) reversing its legal position by attempting to annul its prior approval of the environmental permits in the RGA Lawsuit;[1019] (ii) seeking to annul the extensions under Addenda 1 and 2 via the Lima Arbitration;[1020] (iii) denying the Third Extension Request;[1021] and (iv) refusing to accommodate an extension to the contract milestone schedule after agreeing to suspend the RER Contract for 17 months.[1022]

927. Respondent argues that the conduct with respect to the RGA Lawsuit cannot constitute a breach of the RER Contract because it is an action by the RGA and not MINEM.[1023] Consistent with its determination at ¶¶ 892-893 above, the Tribunal agrees and rejects this aspect of Claimants' claim.

928. In relation to the Lima Arbitration, Respondent submits that Addendum 1 was granted on the basis of Second Claimant's misleading and erroneous request, while the extension under Addendum 2 was granted in error contrary to the RER Regulations, the *Bases Consolidadas* and the RER Contract. For Respondent, the Lima Arbitration was initiated in accordance with MINEM's rights under the RER Contract to correct the nullity of

1017 Benavides Second Report ¶ 317.
1018 *See* Lava First Report ¶¶ 6.27-6.28; Benavides Second Report ¶¶ 307-314.
1019 Memorial ¶ 482.
1020 Memorial ¶ 483.
1021 Memorial ¶ 484.
1022 Memorial ¶ 485.
1023 Counter-Memorial ¶ 990.

Addendum 2. In its view, this constitutes a legally valid reason to take this action and does not violate the doctrine of *actos propios*.[1024]

929. Claimants disagree, arguing that it has not been proven that the extension in Addendum 1 was wrongly granted, taking into account the lengthy independent analysis undertaken by MINEM at the time.[1025] Likewise, Claimants submit that Addendum 2 was also correct and consistent with the Sosa Report and Echecopar Reports.[1026]

930. The Tribunal has already found that the Lima Arbitration was a legitimate exercise of the possibility for domestic arbitration foreseen in the RER Contract, and an option which Claimants were aware of (see ¶ 882 above). The Tribunal further determined at ¶ 917 above that the initiation of the Lima Arbitration was not a failure to act in good faith as required by Article 1362 of the Peruvian Civil Code.

931. Specifically, in respect of *actos propios*, the Tribunal considers that the doctrine does not apply to the initiation of the Lima Arbitration because a legally valid reason existed for the contradictory act. As noted at ¶ 904 above, even though it did not breach the obligation of good faith under Peruvian law, MINEM's conduct in entering into Addendum 1 and especially Addendum 2, and subsequently disavowing those Addenda, poses difficulty as a matter of good faith and consistency in interpretation of the RER Contract (see ¶ 823 above). However, there was a valid reason to pursue the arbitration on the basis that MINEM believed Addendum 2 to be issued contrary to the mandatory provisions of the RER Regulations, the *Bases Consolidadas* and the RER Contract. In this regard, the doctrine of *actos propios* does not apply when the original legal act is "*nulo[] de pleno derecho, incapa[z] de ser convalidado[] o subsanado[] por actividades de los sujetos intervinientes*."[1027]

1024 Counter-Memorial ¶ 995.

1025 Reply ¶ 882.

1026 Reply ¶ 883; *citing* **C-012**, MINEM Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, 6 October 2016; **C-235**, First Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), 5 April 2018; **C-236,** Second Legal Report by M. Tovar and I. Vázquez (Echecopar Law Firm), 17 April 2018.

1027 Lava First Report ¶ 6.30; *quoting* **CLC-063,** Castillo Freyre, Mario, Sabroso Minaya, Rita, *La Teoría de los Actos Propios y la Nulidad: ¿Regla o Principio de Derecho?*, Lima-Perú (2008).

932. The Tribunal does not consider it established that Second Claimant's request that led to Addendum 1 was misleading or erroneous. To the extent that there was not a basis under the mandatory provisions of the RER Regulations to challenge Addendum 1, the Tribunal considers this to be an error without legal consequence, as the Lima Arbitration never proceeded beyond the jurisdiction phase. In these circumstances, the Tribunal does not consider *actos propios* to be relevant.

933. Items (iii) and (iv) at ¶ 926 above relate to the denial of the Third Extension Request. For Claimants, these actions reversed years of consistent application of the RER Contract and Peruvian law toward the Project.[1028] Respondent denies that this conduct breached the *actos propios* doctrine, on the basis that it had no obligation to accept the Third Extension Request and could not accept it, since it was contrary to the RER Regulations, the *Bases Consolidadas* and the RER Contract.[1029]

934. It follows from the Tribunal's prior determinations in relation to the Third Extension Request (see, *inter alia,* ¶¶ 843, 863 above) that there was no breach of the *actos propios* doctrine in respect of the denial of the Third Extension Request. The fact that the Third Extension Request could not be granted under the terms of the RER Contract, the RER Regulations and the *Bases Consolidadas* means that Respondent had a legally valid reason for rejecting the request. The Tribunal therefore rejects this aspect of Claimants' claim.

935. With respect to the alleged refusal to "credit" the suspension granted under Addenda 3 to 6,[1030] the Tribunal finds no inconsistent act for the purposes of the *actos propios* doctrine. As found at ¶ 856 above, Addenda 3 to 6 paused performance of the RER Contract, and in particular the upcoming deadlines in the Works Execution Schedule, but did not modify the Actual COS, nor did they contain any explicit right to the extension of time sought under the Third Extension Request. The Addenda were executed for the purpose of allowing negotiations to progress, and only suspended performance of the RER Contract

1028 Reply ¶ 886.

1029 Counter-Memorial ¶ 996.

1030 Reply ¶ 886.

for a specified period (see ¶ 862 above). There is therefore no inconsistency between the suspension granted under Addenda 3 to 6 and the rejection of the Third Extension Request.

I. ALLEGED BREACH OF THE PRINCIPLE OF *CONFIANZA LEGÍTIMA*

(1) Applicability

936. Claimants claim that Respondent violated the principle of *confianza legítima*, or legitimate expectations, enshrined in paragraph 1.15 of Article IV of the Preliminary Title of the GLAP.[1031] This provision is as follows:[1032]

> Principle of predictability or legitimate trust. The administrative authority shall provide private parties or their representatives with true, complete and reliable information regarding each proceeding under its responsibility, so that private parties accurately understand at all times the relevant requirements, procedures, estimated duration and possible results.
>
> The actions by the administrative authority shall be in line with the private party's legitimate expectations reasonably created by practice and administrative precedents, unless it decides to depart therefrom and explains the relevant reasons in writing.
>
> The administrative authority shall comply with the applicable legal system and may not act arbitrarily. Therefore, the administrative authority may not vary its interpretation of the applicable rules in an unreasonable and unjustified way.

937. Respondent argues that the principle of *confianza legítima* does not apply in contractual relations between private parties and the public administration. Relying on the opinion of Mr. Monteza, Respondent submits that as the RER Contract is an administrative contract, the rules of the GLAP only apply in a supplementary manner.[1033] For Respondent, the principle of *confianza legítima* applies to the acts of the administration within an administrative procedure which has the purpose of issuing administrative acts. As such, in its view, the GLAP applies in the pre-contractual stage only, and not generally to contractual performance.[1034]

1031 Memorial ¶ 486; Reply ¶ 890.

1032 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. IV, ¶ 1.15. Translation by Claimants at Memorial ¶ 486. *See* Quiñones First Report ¶ 142.

1033 Counter-Memorial ¶ 1001; *quoting* Monteza First Report ¶ 220.

1034 Counter-Memorial ¶ 1002; *quoting* Monteza First Report ¶ 258(ii).

938. Consistent with its observations in relation to good faith at ¶ 889 above, the Tribunal finds that the concept of *confianza legítima* under the GLAP is not directly applicable to the contractual relationship between MINEM and Second Claimant under the RER Contract. This is reflected in the language of paragraph 1.15 of Article IV of the Preliminary Title of the GLAP, which refers to "each proceeding under [the] responsibility" of an administrative authority.[1035] The RER Contract is not an administrative procedure, but a contract which sets out the rights and responsibilities of each party. As an administrative contract, it is governed by binding provisions of law set out in legislation such as the RER Law and RER Regulations. The GLAP may apply to certain activities relevant to Second Claimant's interactions with the Peruvian authorities in the context of the Mamacocha Project, and in particular in the precontractual stage, as pointed out by Respondent. This does not render it applicable to the performance of the RER Contract.

939. Claimants' allegations of breach of *confianza legítima* all relate to the performance of the RER Contract. Claimants claim, in this regard, that Respondent breached the principle of *confianza legítima* by: (i) filing the RGA Lawsuit; (ii) commencing the AEP criminal proceeding; (iii) delaying the CWA permit; (iv) filing the Lima Arbitration; and (v) denying the Third Extension Request.[1036] In addition to the fact that not all of these acts fall under the contractual relationship in the RER Contract, the Tribunal rejects these allegations on the basis of its finding that the GLAP does not directly apply to the parties' relationship under the RER Contract, and is not relevant in a supplementary sense to the claims made.

J. ALLEGED BREACH OF THE TIMELINESS OBLIGATIONS

940. Claimants submit that Respondent breached its obligations under the GLAP by failing to render timely decisions on applications by Second Claimant that were material to the RER Contract.[1037] This applies, in their view, to: (i) MINEM's failure to rule on Second

1035 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. IV, ¶ 1.15. Translation by Claimants at Memorial ¶ 486.

1036 Reply ¶ 892.

1037 Memorial ¶ 489.

Claimant's Third Extension Request within the relevant time period; and (ii) the AAA's failure to issue the CWA in a timely manner.[1038]

(1) Applicability

941. In the absence of a review period specified in the RER Contract within which Respondent must issue a determination on such requests, Claimants submit that the GLAP and the TUPA are dispositive.[1039] For Claimants, the Parties intended to incorporate all legal obligations contained in Peru's domestic laws that governed the Parties' actions related to the Project.[1040]

942. Respondent contests the applicability of the time limits in the GLAP and the TUPA to the Third Extension Request and the RER Contract.[1041] Relying on the opinion of its expert Mr. Monteza, Respondent argues that the RER Contract does not incorporate the TUPA and the GLAP, as these are rules that regulate administrative procedures.[1042]

943. The provisions of the GLAP invoked by Claimants are Articles 55, 131, 142 and 143 of the GLAP.[1043]

944. Article 55 of the GLAP provides:[1044]

> **Rights of private parties**
>
> Private parties shall have the following rights with respect to administrative proceedings:
>
> …
>
> 7. Observance of the time periods prescribed for each service or action and the possibility to demand its compliance by authorities[.] (emphasis added)

1038 Memorial ¶¶ 495, 498.

1039 Memorial ¶ 489.

1040 Reply ¶ 912.

1041 Counter-Memorial ¶ 1037; Rejoinder ¶ 1141.

1042 Counter-Memorial ¶ 1040; *quoting* Monteza First Report ¶ 324; Rejoinder ¶ 1143; *citing* Monteza First Report ¶ 328.

1043 Memorial ¶¶ 490, 492.

1044 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. 55. Translation by Claimants at Memorial ¶ 490; *quoting* Quiñones First Report ¶ 116.

945. Article 131 of the GLAP sets out:[1045]

> **Binding nature of time periods and terms**
>
> 131.1 Time periods and terms shall be understood as maximum time limits, computed independently of any formality, and they shall be equally binding upon the government and private parties, without compulsion, to the extent applicable to each of them. In administrative proceedings, the time periods for a decision by an entity shall start on the day following submission of the request by the private party, unless a correction is required, in which case they shall start following any such correction.
>
> 131.2 Each authority shall comply and cause those under its control to comply with its respective terms and time periods for each of their levels.
>
> 131.3 Any private party shall be entitled to demand compliance with the time periods and terms prescribed for each action or service. (emphasis added)

946. Article 142 of the GLAP provides for a thirty-day period for resolving an administrative procedure:[1046]

> ***Plazo máximo del procedimiento administrativo***
>
> *No puede exceder de treinta días el plazo que transcurra desde que es iniciado un procedimiento administrativo de evaluación previa hasta aquel en que sea dictada la resolución respectiva, salvo que la ley establezca trámites cuyo cumplimiento requiera una duración mayor*. (emphasis added)

947. Article 143 of the GLAP addresses liability, as follows:[1047]

> **Liability for non-compliance with time periods**
>
> 143.1 If any authority unreasonably fails to comply with the prescribed time periods for its proceedings, it shall incur disciplinary liability, notwithstanding any civil liability incurred for the damage caused…(emphasis added)

1045 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. 131. Translation by Claimants at Memorial ¶ 490; *quoting* Quiñones First Report ¶ 116.

1046 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. 142.

1047 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. 143. Translation by Claimants at Memorial ¶ 492; *quoting* Quiñones First Report ¶ 122.

948. Claimants further rely on paragraph 1.18 of Article IV of the Preliminary Title and Article 238 of the GLAP:[1048]

> 1.18 Principle of liability. Any administrative authority shall be liable for any damage caused to a private party as a result of improper conduct of its administrative proceedings, as set forth herein. Any entity and its officials or servants shall assume the consequences of their actions in accordance with the legal system.
>
> …
>
> Article 238. General Provisions
>
> 238.1 Notwithstanding any liability under ordinary and special laws, entities shall be financially liable to private parties for direct and immediate damage caused by any administrative act or any public service directly provided by such entities.

949. As emphasised by the text underlined by the Tribunal in the above provisions, the GLAP applies to administrative procedures and acts. As already highlighted at ¶ 889 above, while the RER Contract is an administrative contract, that does not mean that the performance of the RER Contract constitutes an administrative procedure or act within the meaning of the GLAP. When making the Third Extension Request, Claimants were not initiating an administrative procedure but a contractual one. MINEM's handling of the Third Extension Request was likewise not an administrative procedure or act but a contractual one. The Third Extension Request is therefore to be handled in accordance with the provisions of the RER Contract. The Tribunal finds no basis to import time limits from the GLAP into a contractual request.

950. The TUPA is likewise a regulation in the context of administrative proceedings, governing the length of time within which an agency can review a permit or concession application.[1049] The Tribunal understands that Claimants' argument based on the TUPA review periods is also linked to the GLAP.[1050] For the same reasons as those applying to

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1048 **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Art. IV, ¶ 1.18; Art. 238. Translation by Claimants at Memorial ¶ 493; *quoting* Quiñones First Report ¶ 122.

1049 *See* Memorial, p. vii.

1050 *See* Memorial ¶¶ 490, 495, 498; *citing* Quiñones First Report ¶ 107; Reply ¶ 911; *citing* **CL-209**, *Decreto Supremo No. 001-2010-AG, Aprueban Reglamento de la Ley No. 29338, Ley de Recursos Hídricos*, 23 March 2010. *See also* Memorial ¶ 74.

the GLAP, the Tribunal finds that the TUPA does not apply directly to the contractual relationship under the RER Contract, and its deadlines are not enforceable under the RER Contract.

951. In relation to the alleged failure of the AAA to issue the CWA in a timely manner, this was not a contractual request and the timeliness or otherwise of AAA's handling of the request is not a matter falling under the scope of the RER Contract. As determined at ¶¶ 892 and 895 above, it has not been established that the AAA was assigned a role or obligations in the RER Contract.

952. Moreover, as highlighted by Respondent,[1051] an importation of time limits from Peruvian administrative law for the purposes of the CWA would be inconsistent with Clause 4.3 of the RER Contract (see ¶ 654 above), pursuant to which MINEM was obliged to "*coadyuvar*" with obtaining necessary permits in the specific circumstances set out therein, one requirement being that the competent government authority had not granted a relevant permit in a "timely" manner ("*en el tiempo debido*"). Clause 4.3 clearly sets out MINEM's foreseen role in relation to obtaining the permits necessary for the RER Contract.

953. The Tribunal therefore dismisses Second Claimant's claim for alleged breach of timeliness obligations under Peruvian administrative law with respect to both the Third Extension Request and the issuance of the CWA, on the basis that the alleged obligations do not fall under the RER Contract.

K. ALLEGED IMPOSSIBILITY OF PERFORMANCE DUE TO RESPONDENT'S CONDUCT

954. Claimants claim that the RER Contract terminated as a matter of law on 31 December 2018 when Respondent "consummated a series of measures that collectively made it impossible for [Second Claimant] to perform its contractual obligations."[1052]

1051 Rejoinder ¶¶ 1147-1148.

1052 Reply ¶ 914. *See also* Memorial ¶ 499.

(1) Applicability

955. Claimants invoke Article 1432 of the Peruvian Civil Code in this respect, which provides:[1053]

> **Resolution by Fault of the Parties**
>
> If the provision is impossible due to the fault of the debtor, the contract is fully terminated and the latter cannot demand the consideration and is subject to compensation for damages.
>
> When the impossibility is attributable to the creditor, the contract is fully terminated. However, said creditor must satisfy the consideration, corresponding to him the rights and actions that have remained related to the provision.

956. Relying on the opinion of Dr. Benavides, Claimants assert that Peru is the "creditor" and Second Claimant is the "debtor" under this provision.[1054]

957. Respondent does not specifically dispute the application of Article 1432 of the Peruvian Civil Code to the parties' relationship under the RER Contract. Rather, Respondent's submissions focus on its view that the requirements of Article 1432 of the Peruvian Civil Code have not been met in this case.[1055]

958. In light of the Parties' views on the potential applicability of Article 1432 of the Peruvian Civil Code, the Tribunal proceeds to examine the relevant test for applying it, and whether it is met in this case.

(2) The Relevant Test

959. According to Claimants, Article 1432 of the Peruvian Civil Code applies where Respondent's actions or inactions made it impossible for Second Claimant to perform the RER Contract. In that case, Second Claimant would be immediately and permanently freed

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1053 Reply ¶ 914; *quoting* **RL-048/CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Art. 1432. Translation by Claimants.

1054 Memorial ¶ 500; *citing* Benavides First Report ¶¶ 210, 213.

1055 Counter-Memorial ¶ 1051; Rejoinder ¶ 1156.

from its contractual obligations to develop, construct, and operate the Mamacocha Project.[1056]

960. Respondent relies on its expert Mr. Lava to submit that an alleged impossibility under Article 1432 of the Peruvian Civil Code must be absolute, in the sense that the impediment cannot be overcome by human strength, regardless of the effort applied.[1057] For Respondent, it is a very high standard and entails more than mere difficulty in compliance.[1058]

961. According to Mr. Lava, the criteria to validly release the debtor is that the impossibility is:[1059]

> *…(i) sobrevenida y no originaria; (ii) causada por el acreedor; (iii) actual (es decir, en el momento de cumplirse la prestación); y (iv) objetiva (es decir, que afecte la prestación misma, haciéndola inejecutable para* cualquier *deudor)*. (emphasis in original)

962. Claimants do not put forward a different interpretation of the word "impossible" in their submissions.[1060] Their expert Dr. Benavides opines that the impossibility must be supervening and irresistible ("*sobreviniente e irresistible*") and that there is no unanimity on whether it must be absolute and objective.[1061]

963. The Tribunal does not consider the interpretations of Mr. Lava and Dr. Benavides to have meaningful differences in the present case. An impossibility within the second paragraph of Article 1432 exists when the situation preventing performance is caused by the creditor (i.e., the State of Peru) and the debtor (i.e., Second Claimant) cannot avoid or overcome

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1056 Memorial ¶ 500; Reply ¶ 915.

1057 Counter-Memorial ¶ 1052; *quoting* Lava First Report ¶ 7.8; **CLC-087**, Osterling Parodi, Felipe, Rebaza González, Alfonso, "*La Equidad y su función cuantificadora de los daños de imposible probanza, a propósito del artículo 1332º del Código Civil Peruano*", *Incumplimiento Contractual. Acciones del acreedor contra el deudor*, 2010, p. 333.

1058 Counter-Memorial ¶ 1052; Rejoinder ¶ 1157.

1059 Counter-Memorial ¶ 1053; *citing* Lava First Report ¶ 7.11.

1060 According to Claimants, Respondent does not dispute their interpretation. *See* Reply ¶ 916.

1061 Benavides Second Report ¶ 271.

the outcome in question. An "impossibility" is by nature a high standard, which is not met in circumstances where performance merely becomes more difficult.

(3) Application of Article 1432

964. In Claimants' view, the RGA Lawsuit, the criminal proceeding, the AAA delays, the Lima Arbitration and the denial of the Third Extension Request all led to the impossibility of performing the RER Contract.[1062] According to Claimants, they are entitled to the full consideration they would have received had Respondent not made it impossible, including the 20 years of "Guaranteed Revenue."[1063]

965. Respondent opposes Claimants' arguments on the basis that: (i) the denial of the Third Extension Request on 31 December 2018 did not cause the impossibility of meeting the Actual COS under Addendum 2 (i.e., 14 March 2020), since construction had not begun and no milestones had been met in the Works Execution Schedule by that date;[1064] (ii) the RGA Public Prosecutor, AEP and the AAA are not parties to the RER Contract, and their measures did not prevent Second Claimant from complying with the RER Contract;[1065] (iii) the absence of financing does not constitute impossibility;[1066] and (iv) the commencement of the Lima Arbitration did not prevent Second Claimant from achieving the Actual COS or make the performance of its obligations impossible, since Addendum 2 remained valid until declared null and void.[1067]

966. In line with its determination at ¶ 892 above, neither the RGA, the RGA Public Prosecutor, the AEP nor the AAA, or other authorities and instrumentalities implicated in the circumstances invoked by Claimants, were assigned a role or obligations in the RER Contract. As such, their conduct does not enliven the second paragraph of Article 1432 of

1062 Memorial ¶¶ 502-503; Reply ¶ 915.
1063 Memorial ¶¶ 501, 505; Reply ¶ 915.
1064 Counter-Memorial ¶ 1054.
1065 Counter-Memorial ¶¶ 1056-1061.
1066 Counter-Memorial ¶ 1063.
1067 Counter-Memorial ¶ 1064.

the Peruvian Civil Code. Actions or omissions by these authorities are not conduct of a creditor within the meaning of that provision for purposes of the RER Contract.

967. With respect to the denial of the Third Extension Request, the Tribunal is not persuaded that this action by MINEM rendered it impossible for Second Claimant to perform the RER Contract. According to Claimants, the denial left 15 months to complete the Works Execution Schedule, while construction alone was projected to take approximately 26 months.[1068] However, the fact that construction had not already commenced at the time the Third Extension Request was denied obviously played a large role in determining the feasibility of meeting the Actual COS in that timeline. Claimants have not established that they could not move forward with the Project while the Third Extension Request was pending for reasons attributable to MINEM.

968. In seeking to assign responsibility for the delays exclusively to MINEM, Claimants conflate the "measures" which they submit "made it impossible for CHM to advance the Project," referring to the events cited at ¶ 964 collectively. It is these "measures" which in their view resulted in the suspension of the RER Contract under Addenda 3 to 6 and Claimants' inability to achieve Financial Closing.[1069]

969. The Tribunal finds this characterisation of the course of events to be unpersuasive, and revealing of the fact that the denial of the Third Extension Request was not the determining factor in whether Second Claimant was able to perform the RER Contract. As already mentioned, the RGA Lawsuit, the Criminal Investigation and Criminal Proceedings, and the AAA issues were not conduct by MINEM at all. The Tribunal must apply Article 1432 of the Peruvian Civil Code in accordance with its terms, which specify that the impossibility is caused by the creditor.

970. Claimants further submit that Second Claimant could not achieve Financial Closing as a result of the measures which "would have prevented any rational financial institution,

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1068 Memorial ¶ 503; Reply ¶ 915. *See also* Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1951:11-1954:2 in response to Tribunal Question 11: "What is Claimants' response to Respondent's argument that Claimants could not have completed construction by Actual COS or COS under Addendum 2?"

1069 Reply ¶¶ 919-920.

investor, and sponsor from financing the Project."[1070] However, under the RER Contract it was Second Claimant's responsibility to obtain financing necessary to perform the Mamacocha Project.[1071] To the extent that Claimants' inability to move forward with the Project was due to a failure to secure financing, this falls within the sphere of responsibility of Second Claimant under the RER Contract. Moreover, the Tribunal is not satisfied that the absence of financial means to perform an obligation qualifies as an "impossibility" under Article 1432 of the Peruvian Civil Code.

971. Elsewhere in their submissions Claimants deny that they were solely responsible for the risk of financing the Project. They argue that Second Claimant did not assume the risk that the government of Peru would interfere with Second Claimant's efforts to obtain financing.[1072] Claimants further assert that Second Claimant's financing obligations must be interpreted in accordance with the applicable laws, including the Peruvian Civil Code, GLAP and Political Constitution.[1073] For Claimants, the "normal commercial allocation of risks" for a large-scale energy or infrastructure project is that the developer may take on the obligation to attract financing, but must rely upon the credibility of the government to uphold the rule of law and make the required payments under the contract.[1074]

972. The Tribunal accepts that MINEM may be obliged not to interfere with Second Claimant's efforts to obtain financing. This does not translate, however, to an obligation on the entire Peruvian government and every individual agency and instrumentality thereof. The plain wording of Clause 3.3 of the RER Contract places responsibility on Second Claimant to "provide the financing and supply the goods and services required to build, operate and maintain the power generation plant…"[1075]

973. As for as the alleged inconsistency with good faith because MINEM Resolution No. 320-2015-MEM/DM had stated that "delays in the administrative procedures made it

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1070 Reply ¶ 920.

1071 **C-002**, RER Contract, Clause 3.3: "The Concessionaire Company shall…provide the financing and supply the goods and services required to build, operate and maintain the power generation plant…"

1072 Reply ¶¶ 757, 761, 762.

1073 Reply ¶ 757.

1074 Reply ¶ 758.

1075 **C-002**, RER Contract, Clause 3.3.

impossible to achieve Financial Closing for the project,"[1076] the Tribunal does not find such a statement in a Resolution to alter its decision, in light of the considerations above.

974. Claimants have also failed to establish that the initiation of the Lima Arbitration rendered it impossible for Second Claimant to perform the RER Contract. Claimants assert that "[Second Claimant] could not have performed while, its counterparty, Peru was actively seeking to terminate the RER Contract."[1077] However, Respondent was unsuccessful in its attempt to annul Addenda 1 and 2 by way of the Lima Arbitration. The Tribunal is not satisfied that the mere commencement of that arbitration meets the high threshold of an "impossibility" preventing Second Claimant from performing the RER Contract while it was ongoing. The Tribunal agrees with Respondent in this respect[1078] that the decision not to proceed during the Lima Arbitration falls into the sphere of Claimants' business decisions.

975. While the denial of the Third Extension Request and the Lima Arbitration may have created additional challenges for Second Claimant to perform the RER Contract, it did not render such performance impossible. Importantly, the Tribunal is not satisfied that in the absence of MINEM's rejection of the Third Extension Request and the initiation of the Lima Arbitration, Second Claimant would have been in a position to timely perform the RER Contract. The Tribunal refers to its reasoning at ¶ 967 above, to the effect that the fact that construction had not already commenced at the time the Third Extension Request was denied obviously played a large role in determining the feasibility of meeting the Actual COS.

976. The Tribunal therefore rejects Second Claimant's claim under Article 1432 of the Peruvian Civil Code and declines to declare that the RER Contract was terminated as a result of an impossibility created by Respondent.

1076 Reply ¶ 759; *quoting* **C-008**, Addendum No. 1 to the RER Contract, 22 July 2015, p. 8.

1077 Memorial ¶ 504.

1078 Counter-Memorial ¶ 1064.

L. ALLEGED TERMINATION FOR FAILURE TO ACHIEVE ACTUAL COS AND EXECUTION OF PERFORMANCE BOND

977. The Tribunal has rejected Claimants' assertion that the RER Contract terminated on 31 December 2018 due to an impossibility created by Respondent (see ¶ 976 above). However, this does not exclude that the RER Contract may have terminated on the same date for other reasons.

978. Respondent submits that the RER Contract terminated as a matter of law on 31 December 2018 because Second Claimant failed to achieve COS by the Actual COS deadline.[1079] As a consequence, Respondent asserts that it is entitled to execute the Performance Bond upon termination of this arbitration, in accordance with Clause 8.4 of the RER Contract and subject to the Tribunal's decision in this arbitration.[1080]

979. Claimants contest Respondent's submission that the RER Contract can be terminated and the Performance Bond taken regardless of whether the RER concessionaire did anything wrong.[1081]

980. In line with the Tribunal's analysis in Section VIII.DD(2) above, and taking into account its conclusions reached in relation to the various other matters raised in relation to the RER Contract, the Tribunal confirms that the RER Contract terminated automatically ("*de pleno derecho*") on 31 December 2018 when Second Claimant failed to achieve the Actual COS. The question that follows from this determination is the consequences for the Performance Bond in favour of MINEM. Under Clauses 1.4.25 and 8 of the RER Contract, this bond had the purpose of guaranteeing the fulfilment of the Works Execution Schedule.[1082]

981. In their most recent request for relief in the Reply, Claimants request that the Tribunal (see ¶ 236 above):[1083]

1079 Rejoinder ¶ 1164.

1080 Counter-Memorial ¶ 473; Rejoinder ¶¶ 1164, 1211.

1081 Reply ¶ 36.

1082 **C-002**, RER Contract, Clause 1.4.25.

1083 Reply ¶ 1045(i).

> ORDER that Peru may not call or collect any bond put up by either Claimant in relation to the Mamacocha and Upstream Projects, including the US$ 5 million bond under the RER Contract and the US$ 71,500 bond that CHM put up to obtain the final concession for the transmission line.

982. In their Memorial, Claimants additionally request that the Tribunal (see ¶ 235 above):[1084]

> DECLARE that all bonds put up by either Claimant as part of the Mamacocha and Upstream Projects be returned to CHM, including the US $5 million performance bond under the RER Contract[.]

983. While the same declaration is not sought in the prayers for relief section of Claimants' Reply, the request is repeated at ¶ 25 of the Reply which contains a summary of Claimants' requests for relief as follows:[1085]

> … Claimants seek the following relief: … (ii) return of the US $5 million performance bond under the RER Contract and the US $71,500 performance bond for the transmission line[.]

984. Claimants make further reference to this request in their submissions on quantum in the Reply, arguing that "neither Peru nor Versant have stated that Peru does not expect to execute the Performance Bonds when this arbitration is concluded, unless the Tribunal issues the Declaratory Relief requested by Claimants requiring MINEM to release the bond to Claimants."[1086] In these circumstances, in the absence of any indication that Claimants have abandoned or withdrawn the request for return of the Performance Bond, the Tribunal understands that its omission from the request for relief section of the Reply (at ¶ 1045 thereof) is an oversight and that the request for relief that Respondent must return the Performance Bond to Second Claimant is maintained.[1087]

985. The Tribunal notes with respect to the USD 71,500 bond that Second Claimant put up to obtain the final concession for the transmission line that Claimants have not established that this bond was required by the RER Contract. According to Claimants, this bond is associated with the transmission line from the Mamacocha Project to the Chipmo

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1084 Memorial ¶ 547(d).

1085 Reply ¶ 25.

1086 Reply ¶ 1004.

1087 Memorial ¶ 547(d).

substation.[1088] Respondent objects that this Performance Bond is governed by the terms of the Final Concession Contract for the Transmission Line, the interpretation of which is beyond the Tribunal's jurisdiction.[1089]

986. For present purposes, the Tribunal is considering Claimants' claims covered by the RER Contract only. The Tribunal does not consider it established that it has jurisdiction over the bond for the transmission line as a matter of the RER Contract, and upholds Respondent's objection with respect to the Tribunal's jurisdiction over that bond. Accordingly, the Tribunal excludes the performance bond for the transmission line from the present analysis under the RER Contract. The Tribunal reserves the question of whether First Claimant's claims made under the TPA may provide a basis for the order sought in relation to the bond for the transmission line, to be addressed at ¶ 1280 below. The present analysis concerns the USD 5 million Performance Bond issued under the RER Contract only.[1090]

987. For the same reason, the Tribunal excludes from consideration any performance bond in relation to the Upstream Projects. While Claimants make reference in their request for relief to "any bond put up by either Claimant in relation to the Mamacocha and Upstream Projects" (see ¶ 235(i) above), they have not substantiated the existence of a performance bond in relation to the Upstream Projects or a basis for the Tribunal's jurisdiction over such a bond under the RER Contract.

988. While Clause 8.4 of the RER Contract mentions that "the Performance Bond shall be enforced" in circumstances of termination under that provision, a careful reading of the clause reveals that the execution of the Performance Bond is not automatic upon termination of the RER Contract. The termination of the agreement "automatically" ("*de pleno derecho*") occurs when "for any reason, Commercial Operation Start-up of the RER Generation Project…has not taken place by December 31, 2018."[1091] However, the "any

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1088 Reply ¶ 999, fn 1563. *See* BRG First Report, ¶ 134; *citing* **BRG-065**, *Carta Fianza No 623742 de Banco de Crédito de Perú*, 8 May 2015.

1089 Counter-Memorial ¶ 1212; Rejoinder ¶ 1383.

1090 **BRG-063**, Letter of Credit from Wells Fargo to *Banco de Crédito de* Perú, 11 February 2014; **BRG-064**, *Carta Fianza No. G706797 de Banco de Crédito de Perú*, 12 February 2014; **BRG-074**, Private Banking Market Rate Savings, Account Number 3243881079, Statements from December 2014 and July 2020.

1091 **C-002**, RER Contract, Clause 8.4.

reason" does not naturally apply to the final part of the sentence: "and the Performance Bond shall be enforced" (see ¶ 733 above). In this sense, the termination of the RER Contract is automatic in the circumstances provided for in Clause 8.4 but the execution of the Performance Bond is not.

989. The same result is clear from Article 1.2.31 of the *Bases Consolidadas* ("*caso contrario el Contrato quedará automáticamente resuelto y se ejecutará la Garantía de Fiel Cumplimiento*").[1092]

990. The Tribunal is unable to assume that MINEM is entitled to recover the Performance Bond in the absence of fault by Second Claimant in the performance of the RER Contract. Should the parties to the RER Contract have intended that consequence, it must be reflected in clear language to that effect. The Tribunal has made no finding, and does not consider, that the termination of the RER Contract occurred due to fault on the part of Second Claimant. The termination of the RER Contract took effect automatically upon fulfilment of the condition in Clause 8.4 of the RER Contract. In these circumstances, the Tribunal finds that Second Claimant is entitled to the declarations sought for return of the USD 5 million Performance Bond under the RER Contract, and preventing MINEM from calling upon or collecting it.

991. The Tribunal further notes that while Respondent objects that the Performance Bond was paid by Mr. Jacobson and Mr. Bengier in their personal capacities rather than by First or Second Claimant, the Tribunal is satisfied that the Performance Bond was paid pursuant to Clause 1.4.25 of the RER Contract "for the purpose of guaranteeing compliance with the Works Execution Schedule by [Second Claimant]."[1093] Claimants have further provided evidence that in the event of the release of the Performance Bond, it would have been contributed to First Claimant as additional capital contribution. This is recorded in First Claimant's Amended and Restated Operating Agreement as follows:[1094]

1092 **R-001**, *Bases Consolidadas para la Subasta de Suministro de Electricidad con Recursos Energéticos Renovables*, September 2013, Art. 1.2.31.

1093 **C-002**, RER Contract, Clause 1.4.25.

1094 **BRG-101**, LATAM Hydro LLC Amended and Restated Operating Agreement, dated 31 December 2015, p. 24.

> The original Operating Agreement provided that the two Members would each be credited with $2.5 million that was used to collateralize the standby letters of credit required by OSINERGMIN for a completion bond associated with HLA's [i.e., Second Claimant's] power purchase agreement. It further provided that when the collateralization was reduced or eliminated (whether pursuant to the terms of the OSINERGMIN bond or to a take out by a third party), the amounts released would be contributed to the Company [i.e., First Claimant]. These provisions continue in effect, provided that any amount contributed to the Company pursuant to this provisions [*sic*] are treated as "Future Capital Contributions," and any amount contributed as "Future Capital Contributions" serves to reduce the amount that needs to be contributed upon reduction of collateralization.

992. While not binding on this Tribunal, and on the basis of a different reasoning applicable in the specific circumstances of each case, the Tribunal observes that in the *Electro Zaña*, *Santa Lorenza,* and *Sur Medio* cases the respective arbitral tribunals all likewise concluded that termination of the RER contract did not automatically entitle MINEM to the execution of the performance bond. [1095]

M. CONCLUSION ON LIABILITY UNDER THE RER CONTRACT

993. In the above Sections, the Tribunal has reached a number of determinations with respect to the Parties' dispute, including:

(i) Respondent did not breach Clauses 1.4.26, 1.4.37 or 6.3 of the RER Contract with respect to Guaranteed Revenue under the RER Contract (see ¶ 843 above);

(ii) Respondent did not breach Clause 2.2.1 of the RER Contract in relation to the authorisation of MINEM to act under the Contract (see ¶ 875 above);

(iii) Respondent did not breach Clause 4.3 of the RER Contract regarding the obligation to "*coadyuvar*" in relation to Second Claimant's permits (see ¶ 705 above);

[1095] **CLC-102**, *Electro Zaña S.A.C. c. Republica del Perú*, Caso Arbitral No. 0677-2018-CLL, Laudo, 21 December 2020, ¶¶ 345-349; **RL-098**, *Santa Lorenza* Award, ¶¶ 242-243; **CLC-103**, *Concesionaria Hidroeléctrica Sur Medio S.A. c. Republica del Perú*, Caso Arbitral No. 0330-2019-CLL, Laudo, 31 May 2021, ¶¶ 388-394.

(iv) Respondent did not breach Clause 11.3 of the RER Contract in relation to the dispute resolution provision (see ¶ 884 above);

(v) Respondent did not breach Addenda 3 to 6 of the RER Contract in relation to suspensions granted therein (see ¶ 866 above);

(vi) Respondent did not breach the Peruvian law doctrines of good faith, *actos propios*, and *confianza legítima* (see ¶¶ 918, 934 and 939 above);

(vii) The GLAP and the TUPA do not directly govern the contractual relationship under the RER Contract and any time periods specified therein are not enforceable as a matter of the RER Contract (see ¶¶ 889, 921, 938, 949, 950 above).

994. The Tribunal therefore rejects Claimants' request for a declaration in respect of the matters set out in ¶ 993 above.

995. The Tribunal has found at ¶ 980 above that the RER Contract is terminated, although not on the basis that Claimants had argued. The Tribunal therefore grants Claimants' request for a declaration to that effect (see ¶¶ 235(c) and 236(c) above), while declining the language "and, with it, all of CHM's obligations and duties owed thereunder," which the Tribunal considers to be overly broad. This request has not been demonstrated to be justified with respect to every obligation and duty of Second Claimant under the RER Contract.

996. Based on the Tribunal's determination in relation to the Performance Bond (see ¶¶ 986, 987, 990 above), the Tribunal further partially grants the declarations sought by Claimants in relation to that Bond (see ¶¶ 235(d), 235(j) and 236(i) above). Specifically, the orders that (i) the USD 5 million Performance Bond under the RER Contract is to be returned to Second Claimant; and (ii) Respondent may not call or collect the Performance Bond under the RER Contract are granted. The part of the order sought in respect of any bond put up for the Upstream Projects or the final concession for the transmission line is rejected, for the reasons stated at ¶¶ 986-987.

997. In light of the foregoing, the Tribunal partially grants the orders sought by Claimants as per ¶¶ 995-997 above, and rejects the remainder of Second Claimant's claims under the RER Contract against Respondent. None of the Tribunal's findings entail a breach of the RER Contract by Respondent.

998. Because the Tribunal rejects Second Claimant's claims that Respondent has breached the RER Contract, it follows that First Claimant's claims on behalf of Second Claimant under TPA Article 10.16(1)(b)(i)(C) for Peru's alleged breaches of an investment agreement are also rejected.[1096]

999. There being no breach of the RER Contract by Respondent, it is unnecessary to address the scope of any damages with respect to the Mamacocha Project or the Upstream Projects.

1000. The Tribunal further notes that it is not necessary to receive an update from Claimants in relation to the calculation of their damages claim. Claimants had requested the opportunity to provide such an update in the event that they would prevail on any of their claims (see ¶ 67 above). The Tribunal considers this request to be moot.

IX. ALLEGED BREACHES OF THE TPA

1001. In this Section, the Tribunal addresses First Claimant's claims under the TPA, which includes claims made on behalf of Second Claimant.

1002. Under the TPA, First Claimant claims that Respondent has: (i) breached the obligation to accord fair and equitable treatment ("**FET**") under TPA Article 10.5; (ii) indirectly expropriated the Mamacocha Project in violation of TPA Article 10.7; and (iii) breached the most-favoured-nation ("**MFN**") provision in TPA Article 10.4.[1097]

1003. The Tribunal notes that in the context of the TPA claims to be decided under international law, Respondent is the Republic of Peru as a State. Peru is responsible for the acts of its government authorities and instrumentalities which are attributable to the State under

[1096] *See* Memorial ¶ 188; Reply ¶ 314.

[1097] Memorial §§ IV.B, IV.C, IV.D; Reply §§ IV.A, IV.B, IV.C.

international law. As such, unlike the claims made under the RER Contract, in the context of the TPA the Tribunal is not limited to considering whether any given government authority or instrumentality had a specific role or task set out in the RER Contract (see ¶ 651 above). This does not mean that the RER Contract is irrelevant to the claims made under the TPA. As will be discussed below as appropriate, the contractual relationship between Second Claimant and Respondent is an important contextual factor to certain of the claims.

1004. In this Section, the Tribunal will first set out the relevant provisions of the TPA (Section A). In Section B, the Tribunal will decide upon Claimants' claim for breach of the FET standard. Section C concerns the alleged expropriation of Claimants' investment. In Section D, the Tribunal will address the claim under the MFN clause. Section E concludes on liability under the TPA.

A. RELEVANT PROVISIONS

1005. Article 42(1) of the ICSID Convention states:[1098]

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

1006. TPA Article 10.4 is entitled "Most-Favoured-Nation Treatment" and provides as follows:[1099]

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment,

1098 **RL-092**, ICSID Convention, Art. 42(1).

1099 **C-001/RL-051**, TPA, Art. 10.4.

acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[1100]

1007. TPA Article 10.5 is entitled "Minimum Standard of Treatment"[1101] and provides: [1102]

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

1008. TPA Article 10.7 is entitled "Expropriation and Compensation"[1103] and provides:[1104]

> 1. No party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

[1100] Footnote 2 to Article 10.4 states: "For greater certainty, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements."

[1101] Footnote 3 to Article 10.5 states: "Article 10.5 shall be interpreted in accordance with Annex 10-A."

[1102] **C-001/RL-051**, TPA, Art. 10.5.

[1103] Footnote 4 to Article 10.7 states: "Article 10.7 shall be interpreted in accordance with Annex 10-B."

[1104] **C-001/RL-051**, TPA, Art. 10.7.

(a) for a public purpose[1105];

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law and Article 10.5.

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Sixteen (Intellectual Property Rights).

[1105] Footnote 5 to Article 10.7 states: "For greater certainty, for purposes of this article, the term 'public purpose' refers to a concept in customary international law. Domestic law may express this or a similar concept using different terms, such as 'public necessity,' 'public interest,' or 'public use.'"

1009. TPA Annex 10-A is entitled "Customary International Law," and provides:[1106]

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

1010. TPA Annex 10-B is entitled "Expropriation," and provides: [1107]

> The Parties confirm their shared understanding that:
>
> 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
>
> 2. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
>
> 3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.
>
> (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.

1106 **C-001/RL-051**, TPA, Annex 10-A.

1107 **C-001/RL-051**, TPA, Annex 10-B.

B. ALLEGED BREACH OF FAIR AND EQUITABLE TREATMENT UNDER TPA ARTICLE 10.5

1011. The Tribunal shall use the term "**FET**" to describe the standard set out in TPA Article 10.5, giving further precision as to the content of that standard below, and without assuming the identity of that standard with any autonomous standard of FET. The FET standard under the TPA being the minimum standard of treatment under customary international law, it may also be referred to as "**MST**."

1012. In order to decide upon First Claimant's FET claim, the Tribunal will consider the applicable standard in Section (1). Section (2) summarises the United States' NDP submission and comments thereon by the Parties. Section (3) considers and decides upon the various alleged breaches of FET.

(1) Applicable Standard

1013. Pursuant to TPA Article 10.5.2 (see ¶ 1007 above), it is clarified that the FET standard of treatment is "the customary international law minimum standard of treatment of aliens," and not beyond that standard. The Parties disagree on the interpretation of this standard.

1014. Both Parties further rely on TPA Annex 10-A,[1108] which is entitled "Customary International Law" and states:

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

1015. For Claimants, customary international law has evolved such that the minimum standard of treatment contains the same substantive protections as those under the autonomous fair and equitable treatment standard.[1109] In their view, TPA Article 10.5 provides the following protections: (i) preserving an investor's legitimate expectations; (ii) acting with

[1108] Memorial ¶ 269; Reply ¶ 444; Counter-Memorial ¶ 586.

[1109] Memorial ¶ 272; *quoting* **CL-059**, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154; Reply ¶ 441. *See also* Memorial ¶¶ 273-276.

transparency; (iii) not engaging in arbitrary conduct; (iv) refraining from discriminatory conduct; and (v) acting in good faith.[1110]

1016. Respondent disagrees that the minimum standard of treatment and the autonomous standard of FET are the same.[1111] Respondent denies that legitimate expectations and the obligation to act transparently or in good faith form part of the minimum standard of treatment under customary international law.[1112] Respondent also submits that the concepts of arbitrariness and discrimination under the minimum standard of treatment require a high threshold.[1113]

1017. Respondent argues that it is Claimants' burden to prove what the minimum standard of treatment requires under customary international law, by reference to state practice and *opinio juris*.[1114] Claimants argue that investment tribunal decisions are the most legitimate source for interpreting the content of customary international law in relation to FET.[1115]

1018. For the purposes of establishing the legal standard, the Tribunal does not consider it useful to speak of a burden of proof. It is for the Tribunal to determine the content of the law, taking into account the materials presented by the Parties to persuade the Tribunal of their respective views. In determining the content of TPA Article 10.5, the Tribunal shall have a healthy regard for previous decisions of investment arbitration tribunals as relied upon by the Parties. The Tribunal is mindful that it is not bound by such decisions, and undue fidelity to the decisions of past arbitral tribunals may lead to a situation of "once wrong, always wrong."

1019. In the present case, having reviewed the Parties' submissions, the Tribunal does not consider it necessary or helpful to enter into detailed discussion of the different interpretations of the FET standard under customary international law. Both Parties have invoked the standard as described by the NAFTA arbitral tribunal in *Waste Management*

1110 Memorial ¶ 270; Reply ¶ 441.

1111 Counter-Memorial ¶ 589. *See also* Counter-Memorial ¶¶ 590-595.

1112 Counter-Memorial ¶¶ 611, 621, 650; Rejoinder ¶¶ 625, 657, 687.

1113 Counter-Memorial ¶¶ 629, 638; Rejoinder ¶¶ 648, 670.

1114 Counter-Memorial ¶ 587.

1115 Reply ¶ 457.

II.[1116] The Tribunal finds this standard to be an accurate statement of the fair and equitable treatment standard under customary international law and therefore reflective of the standard under TPA Article 10.5:[1117]

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

1020. The Tribunal will address some key disputed aspects of the FET standard between the Parties.

1021. As Respondent argues, it can still be controverted whether the FET standard under customary international law includes protection of the legitimate expectations of an investor (see ¶ 1016 above). The Tribunal does not consider it necessary to decide this point, because even if legitimate expectations would be considered a part of the FET standard under the TPA, those expectations were not breached in this case (see ¶ 1228 below). However, without recognising legitimate expectations as part of the FET standard under the TPA, in order to do justice to the arguments presented by the Parties, the Tribunal will give consideration to Claimants' alleged legitimate expectations in the context of their FET claim.

1022. In relation to transparency, the *Waste Management II* standard references "a complete lack of transparency and candour in an administrative process" as an example of "a lack of due

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1116 Memorial ¶ 273; Counter-Memorial ¶ 591.

1117 **CL-065**, *Waste Management Inc. v. The United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 98-99.

process leading to an outcome which offends judicial propriety."[1118] Claimants make the argument, however, that the obligation to act transparently is a standalone element of the FET standard.[1119] Claimants cite a number of examples of breaches of transparency found by other arbitral tribunals, *inter alia*: (i) taking inconsistent positions with respect to key permits;[1120] (ii) adopting measures that put a project in "contractual limbo";[1121] (iii) invoking domestic laws and regulations or government structure to deny an investor its right to be dealt with transparently;[1122] (iv) adopting contradictory and inconsistency conduct, contrary to the elements of stability and predictability of the State's legal order;[1123] and (v) failure to sign a crucial document without any explanation.[1124]

1023. Respondent, on the other hand, submits that the Supreme Court of British Columbia annulled the award in *Metalclad v. Mexico* precisely for having incorrectly based its decision on a transparency obligation under NAFTA.[1125]

1024. The Tribunal does not find it helpful to conceive of transparency as a separate or independent obligation under NAFTA or to speak of a "transparency component" of FET.[1126] A failure to act transparently may, however, be inconsistent with the obligation to treat an investor fairly and equitably, in the circumstances of a case. One such example is a complete lack of transparency in an administrative process cited by the *Waste Management* tribunal. Another would be a failure to ensure that "…the legal framework for the investor's operations is readily apparent and that any decision affecting the investor

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1118 **CL-065**, *Waste Management Inc. v. The United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

1119 Memorial ¶ 303; Reply ¶ 492.

1120 Memorial ¶ 304; *citing* **CL-037**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 85-101.

1121 Memorial ¶ 305; *citing* **CL-066**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶¶ 276, 379-380.

1122 Reply ¶ 487; *quoting* **CL-026**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 591, 597.

1123 Reply ¶¶ 489-490; *quoting* **CL-246**, *Rupert Joseph Binder v. The Czech Republic,* UNCITRAL, Final Award, 15 July 2011, ¶ 446.

1124 Reply ¶ 491; *quoting* **CL-031**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 591.

1125 Rejoinder ¶ 661; *quoting* **RL-152**, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, Reasons for Judgment of the Honourable Mr. Justice Tysoe, 2 May 2001, ¶¶ 70-72.

1126 *See* Memorial ¶¶ 303, 305, 319, 327, 341; Reply ¶ 483.

can be traced to that legal framework," being the characterisation of transparency proposed by Respondent.[1127]

1025. Claimants have provided examples of other cases in which arbitral tribunals have referred to a lack of transparency in State conduct. Upon review, those cases do not necessarily support the existence of transparency as a standalone obligation, but consider it in the context of or in combination with other aspects of the FET standard.[1128] One of the cases relied on does not find a lack of transparency at all, but rather that the government conduct in question was "unfair and inequitable within the meaning of Article 1105(1) of NAFTA."[1129]

1026. The Tribunal does not consider it necessary to make a definitive decision on whether the FET standard includes an obligation of transparency. Without recognising an independent obligation of transparency, in order to do justice to the arguments presented by the Parties, the Tribunal will give consideration to Claimants' submissions on an alleged lack of transparency in the context of their FET claim. Even if transparency were to be considered a part of the FET standard under the TPA, there was no breach in this case (see ¶ 1228 below).

1027. Similarly, in respect of good faith, the Tribunal accepts Claimants' submission that good faith is inextricably linked to the fair and equitable treatment standard.[1130] That being said, the Tribunal finds it a stretch of FET to assert a free-standing positive obligation to act in

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1127 Counter-Memorial ¶ 626; *quoting* **RL-153**, Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice, The Journal of World Investment and Trade, June 2005, p. 374.

1128 *See*, *e.g.*, Reply ¶ 487; *quoting* **CL-026**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 591, 597: "…the way they were put forward…presents significant elements of arbitrariness and evidences a lack of transparency and consistency"; Reply ¶ 491, *quoting* **CL-031**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 591: "…amount to conduct evidencing…a lack of transparency, consistency and good faith in dealing with an investor"; Reply ¶ 490; *quoting* **CL-246**, *Rupert Joseph Binder v. The Czech Republic*, UNCITRAL, Final Award, 15 July 2011, ¶ 446: "[t]he elements of stability and predictability of the state's legal order go hand in hand with the need that the state act with reasonable consistency and transparency…"

1129 *See* Memorial ¶ 305; *citing* **CL-066**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 379. The only reference to transparency in that award is a statement that "…the conduct of the Ontario Government during the period leading up to the moratorium could have been more transparent…" *Id*., ¶ 376.

1130 Reply ¶ 503.

good faith separate from or additional to the standard encapsulated in the minimum standard of treatment. To the extent that the State's failure to act in good faith is conduct which is "arbitrary, grossly unfair, unjust or idiosyncratic," (see ¶ 1019 above) it may be conduct that violates the FET standard. Bad faith conduct may likewise breach the FET standard. Without recognising a separate obligation of good faith, in order to do justice to the arguments presented by the Parties, the Tribunal will give consideration to Claimants' submissions on an alleged lack of good faith in the context of their FET claim.

1028. The Tribunal considers the standard for a breach of FET to be a high one, as reflected in the various examples set out by the *Waste Management II* tribunal. This includes the standard for arbitrary conduct and discrimination, which Respondent has highlighted as a high threshold to meet. Other than its finding that the standard is generally a high one, the Tribunal does not find it useful to enter into abstract debates or issue directives about the relative height of the standard divorced from the specific facts in which they will be applied.

1029. The Parties have each cited some of the same formulations on discriminatory treatment drawn from arbitral practice, such as the statement in *Parkerings-Compagniet AS v. Lithuania* that discriminatory conduct "unduly treats differently investors who are in similar circumstances."[1131] The Tribunal endorses this definition of discrimination. Differential treatment being the essence of discrimination, a comparator will typically be relevant and necessary to establish the existence of discriminatory treatment.

1030. Claimants further argue that a differential impact of the measure on the investment is sufficient and it is not required to prove discriminatory intent.[1132] The Tribunal accepts that it is not required to establish subjective bad faith or malicious intent of the State.[1133] However, the Tribunal does not understand Respondent to argue that it is required to prove discriminatory intent. Respondent's submission is rather that the differential treatment in

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1131 **CL-044**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 368. *See* Memorial ¶ 281; Counter-Memorial ¶ 640.

1132 Memorial ¶ 281; *citing* **CL-057**, *Siemens v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 321.

1133 *See* **CL-044**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 368.

question must be on the basis of the foreign character of an investor.[1134] In respect of the FET standard under the TPA, the Tribunal finds no specific requirement that discrimination constituting a breach of the standard is limited to discrimination on that basis.

1031. Respondent argues that arbitral tribunals have recognised a "margin of appreciation" ("*margen de apreciación*") for States in public policy matters, in particular when adopting measures related to the protection of health and the environment.[1135] For Claimants, the margin of appreciation is a human rights law concept with no relevance to investor-State arbitration.[1136]

1032. The Tribunal considers that in applying TPA Article 10.5, States are to be afforded due deference in taking regulatory measures, in particular when such measures are taken to protect public interests such as health and the environment. This is also clear from TPA Article 10.11, which provides:[1137]

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The Tribunal shall take this into account as appropriate in reaching its decisions.

1033. The Tribunal will proceed to carry out the highly fact-specific exercise of applying the FET standard, and will consider different aspects in more detail as required in the course of its analysis.

1134 Counter-Memorial ¶ 641; *quoting* **CL-028**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 306.

1135 Counter-Memorial ¶ 605; *citing*, *inter alia*, **RL-144**, *Gemplus, S.A. et al v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶¶ 6-26.

1136 Reply ¶ 507.

1137 **C-001/RL-051**, TPA, Art. 10.11.

(2) NDP Submission

a. The U.S. NDP Submission

1034. In its NDP Submission, the United States provided its interpretation regarding the content of the MST and its connection with the FET standard (TPA Article 10.5).

1035. The United States sets forth its interpretation of the content and outer limits of the MST protection contained in TPA Article 10.5.[1138] In this regard, the United States submits, *inter alia*, that: (i) customary international law is the standard applicable to the MST protection and Annex 10-A to the Treaty provides for a two-element approach to determine the existence of a rule of customary international law, which requires a State practice and *opinio juris*;[1139] (ii) other treaties' autonomous standards that expand the MST protection are irrelevant for interpreting TPA Article 10.5, which expressly ties the definition of such protections to the customary international law minimum standard of treatment;[1140] (iii) the burden of establishing that a rule of customary international law exists and has been violated lies on the claimant, noting that a violation of domestic law does not necessarily constitute a violation of Article 10.5;[1141] and (iv) the FET standard is part of the MST protection as expressly recognized by TPA Article 10.5(2)(a), unlike other concepts such as legitimate expectations, transparency, good faith, and non-discrimination which are not part of the FET standard under customary international law and thus cannot give rise to independent obligations for the host State.[1142]

b. Claimants' Comments on the U.S. NDP Submission

1036. Claimants reject the United States' interpretation regarding the FET standard contained in the MST protection under TPA Article 10.5, which they describe as unduly restrictive and not supported by case law.[1143] Claimants introduce their argument by submitting the following three general observations: (i) the United States' restrictive interpretation on this

1138 NDP Submission ¶¶ 17-30.
1139 NDP Submission ¶¶ 18-20.
1140 NDP Submission ¶¶ 21-22.
1141 NDP Submission ¶¶ 23-24.
1142 NDP Submission ¶¶ 25-30.
1143 Claimants' NDP Observations, Section VI.

matter reflects its practice of serving States' interests and thus is neither authoritative nor binding;[1144] (ii) the NDP Submission is "internally inconsistent";[1145] and (iii) the NDP does not consider the consistent arbitral case law that finds a convergence between the autonomous FET standard and the FET component of the MST.[1146]

1037. In addition, Claimants submit that: (i) the United States' position erroneously excludes arbitral decisions as evidence of the content of customary international law and ignores that it is State practice to look to arbitral decisions as a source of customary international law;[1147] (ii) the distinction made by the United States between the FET component of the MST and the autonomous FET standard is "artificial" given that the FET under customary international law provides the same level of protection as the autonomous FET standard and the United States' restrictive position is inconsistent with Article 31 of the VCLT which provides that treaty provisions must be interpreted "neither liberally nor restrictively";[1148] (iii) contrary to the NDP's unsupported observations, the concepts of legitimate expectations, transparency, discrimination, and good faith form part of the FET standard under TPA Article 10.5, based on the findings of prior tribunals;[1149] and (iv) the State's failure to comply with its own domestic law may amount to a violation of FET, as opposed to the NDP's interpretation.[1150]

c. Respondent's Comments on the U.S. NDP Submission

1038. Respondent argues that the United States and Respondent concur regarding the identification and general application of the customary international law MST under TPA Article 10.5.[1151]

1039. In support of this conclusion, Respondent contends that the NDP Submission confirmed that: (i) the customary international law MST cannot be established through arbitral

1144 Claimants' NDP Observations ¶ 39.
1145 Claimants' NDP Observations ¶ 40.
1146 Claimants' NDP Observations ¶ 41.
1147 Claimants' NDP Observations ¶¶ 42-53.
1148 Claimants' NDP Observations ¶¶ 55-58.
1149 Claimants' NDP Observations ¶¶ 59-71.
1150 Claimants' NDP Observations ¶¶ 72-76.
1151 Respondent's NDP Observations ¶¶ 31-40.

decisions as they are not themselves instances of 'State practice', which is one of the elements of customary international law (except where the arbitral decision includes an examination of State practice); [1152] (ii) any arbitral decisions that apply autonomous FET standards do not carry any weight for interpreting TPA Article 10.5, as they do not evidence the content of customary international law;[1153] (iii) the concepts of legitimate expectations, transparency and good faith invoked by Claimants are not component elements of the FET standard under TPA Article 10.5 and, contrary to Claimants' assertions, they cannot give rise to independent host State obligations;[1154] and (iv) concerning the two other alleged components of the MST, arbitrariness and discrimination, these are subject to a high threshold for proving any violation.[1155]

(3) Alleged Breaches of FET

1040. Claimants submit that Respondent carried out at least seven measures that violated the FET standard by breaching their legitimate expectations, as well as being arbitrary, discriminatory, contrary to the principle of good faith, and lacking transparency.[1156] The measures contested by Claimants are:[1157]

(i) The RGA's commencement of the RGA Lawsuit on 14 March 2017, seeking to annul the environmental permits for the Mamacocha Project;

(ii) The AEP's commencement of an investigation and subsequent criminal proceeding on 24 March 2017, based on the allegations in the RGA Lawsuit;

(iii) The AAA's issuance of a resolution dated 16 May 2017 denying Second Claimant's application for the CWA for the Mamacocha Project;

1152 Respondent's NDP Observations ¶¶ 31-33.
1153 Respondent's NDP Observations ¶¶ 34-36.
1154 Respondent's NDP Observations ¶¶ 37-40.
1155 Respondent's NDP Observations ¶¶ 38-40.
1156 Reply ¶ 509.
1157 Reply ¶ 509.

(iv) The AAA's issuance of a materially defective CWA for the Mamacocha Project dated 5 July 2017, which caused substantial further delay and required intervention from central government authorities to remedy the defect;

(v) The AEP's decision of 2 February 2018 to "formalize and continue" the Criminal Proceedings and name Second Claimant's External Counsel as a formal criminal suspect, impacting the viability of the Project at a reputational, political and economic level;

(vi) MINEM's commencement of the Lima Arbitration on 27 December 2018 which, in their view, violated the dispute resolution agreement in the RER Contract and sought to terminate the RER Contract by, *inter alia*, nullifying the prior extensions under Addenda 1 and 2 and declaring Second Claimant in material breach; and

(vii) MINEM's denial of Second Claimant's Third Extension Request dated 31 December 2018, which failed to acknowledge and provide a compensatory extension for what Claimants see as Respondent's interferences in the Mamacocha Project, including the 17-month suspension of all obligations under the RER Contract.

1041. Respondent opposes each of Claimants' allegations with respect to the breach of the FET standard.[1158]

1042. In the following Sections, the Tribunal will determine whether Respondent has breached the FET standard in TPA Article 10.5 with respect to the above measures. The Tribunal will group certain of the alleged breaches and address in turn: (i) the RGA Lawsuit; (ii) the Criminal Investigation and Criminal Proceedings; (iii) the CWA; (iv) the commencement of the Lima Arbitration; and (v) the denial of the Third Extension Request.

a. Filing of the RGA Lawsuit

1043. The Tribunal notes that the filing of the RGA Lawsuit did not fall under the parties' contractual relationship in the RER Contract, and therefore the Tribunal made no

[1158] Counter-Memorial ¶ 657.

determinations with respect to this conduct in relation to Second Claimant's contractual claims.

1044. Claimants submit that Respondent breached their legitimate expectations and acted arbitrarily, discriminatorily, inconsistently and without good faith when it filed the RGA Lawsuit on 14 March 2017.[1159] Respondent disagrees.[1160]

1045. The Tribunal will first focus on the alleged breach of legitimate expectations before turning to the other aspects of Claimants' FET claim based on the RGA Lawsuit.

(i) Legitimate Expectations

1046. For Claimants, the filing of the RGA Lawsuit breached their legitimate expectations that they had relied on, being: (i) the Mamacocha Project was a Category I project and, consequently, Second Claimant only required a DIA to secure its Generation Plant Environmental Certification (see ¶ 109(ii) above); (ii) ARMA had authority to grant the Environmental Certifications for the Mamacocha Project; (iii) ARMA's resolutions granting the Project's Environmental Certifications had been vetted, tested, and approved by ARMA and were not subject to change; (iv) the RGA would not commence or continue for nearly a year a baseless lawsuit that brought the Project to a halt; and (v) MINEM would partner with Second Claimant to protect and ensure the validity of the Project's permits.[1161]

1047. In Claimants' view, the RGA Lawsuit attempted to change long-held requirements for the Environmental Certifications, based on rules that had never been applied to the Project, nor any other RER project.[1162]

1048. Although the RGA Lawsuit was ultimately withdrawn, Claimants argue that Respondent failed to restore the year it took away from the Project, which "proved to be fatal."[1163]

1159 Memorial § IV.B.1.

1160 Counter-Memorial ¶ 659.

1161 Memorial ¶ 288.

1162 Memorial ¶ 291.

1163 Memorial ¶ 288. *See also* C-PHB, Annotated Index, ¶ 5.

1049. Respondent objects to the RGA Lawsuit as a basis for Claimants' claim, arguing that the lawsuit was withdrawn as a result of good faith actions taken by the Peruvian State in the context of the negotiations between the Parties.[1164] By withdrawing their First Notice of Intent after the RGA Lawsuit's withdrawal, Respondent argues that Claimants acknowledged that the act had ceased.[1165] In Respondent's view, Claimants have not proven a causal link between the RGA Lawsuit and the failure of the Mamacocha Project.[1166]

1050. Respondent further argues that: (i) Claimants' expectations are neither reasonable nor legitimate;[1167] (ii) it has not been established that the expectations correspond to commitments by Respondent or were relied upon;[1168] (iii) administrative acts relating to environmental impact assessments are not exempt from challenge in the administrative courts;[1169]and (iv) Claimants could not have been unaware of the illegality of the mechanism used to process their Environmental Certifications which they had been warned about by third parties.[1170]

1051. The Tribunal recalls that in October 2013, ARMA initially classified the Mamacocha Project as a Category III project, requiring a more comprehensive EIA.[1171] Second Claimant appealed this decision and in February 2014 obtained a reclassification as Category I (see ¶ 109(ii) above).[1172]

1164 Counter-Memorial ¶ 659.

1165 Counter-Memorial ¶ 659.

1166 Rejoinder ¶¶ 159, 189.

1167 Counter-Memorial ¶¶ 661-666.

1168 Counter-Memorial ¶ 668.

1169 Rejoinder ¶ 698. *See also* R-PHB ¶ 43.

1170 Rejoinder ¶ 701(c)-(e); *citing* Monteza Second Report ¶ 227; *also quoting* **C-247**, Report from CMS Grau Law Firm to DEG setting forth analysis of certain legal proceedings related to the Mamacocha project, 21 December 2018, p. 4; **R-140/C-229**, Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), 5 December 2017, p. 2, ¶ (h).

1171 **C-184**, *Oficio No. 748-2013-GRA/ARMA/SG de la Autoridad Regional Ambiental a HLA*, 11 October 2013, p. 5.

1172 **C-185**, *Informe No. 009/2014-GRA/ARMA-SG-EA-E*, 17 February 2014, p. 6. *See also* C-PHB, Annotated Index, ¶ 6.

1052. The RGA Lawsuit was commenced following an investigation by the RGA Council into Claimants' Environmental Certifications, and specifically the reclassification from Category III to Category I of the Generation Plant Environmental Certification (see ¶ 146 above). The RGA Lawsuit argued that ARMA erred when it reclassified the permit as Category I because of the Project's expected environmental impact.[1173]

1053. The RGA Lawsuit was withdrawn following the filing of Claimants' First Notice of Intent and interactions between the Special Commission, the RGA Regional Attorney General, ARMA, and Governor Osorio (see ¶¶ 169-179 above). The Special Commission had also obtained legal advice in the form of the Morón Report indicating, *inter alia* that the RGA Lawsuit would have little chance of success (see ¶ 170 above).

1054. For the purposes of assessing the fair and equitable treatment of First Claimant by the Peruvian authorities, the Tribunal finds it key that the Special Commission participating in negotiations with Claimants under the TPA undertook specific efforts to intervene on Claimants' behalf with the relevant authorities which resulted in the withdrawal of the lawsuit. This conduct is equally part of Respondent's treatment of First Claimant and its investment which must be evaluated as a whole. Claimants contend that the RGA Lawsuit was ordered to be withdrawn by Governor Osorio not for reasons of good faith but due to the risk of exposure to significant liability.[1174] Undoubtedly, a desire to avoid exposure to liability plays a role in parties' conduct when seeking to resolve a dispute. The Tribunal does not consider this alone to constitute evidence of bad faith on the part of Respondent, and will evaluate the Parties' conduct in all the circumstances.

1055. In these circumstances, the focus of the claim falls on whether the fact of filing the RGA Lawsuit on 17 March 2017 and its continuation until the court accepted its withdrawal on 8 March 2018[1175] breached the FET standard of the TPA.

1173 **C-087**, *Demanda Contencioso-Administrativa del Gobierno Regional de Arequipa*, 14 March 2017. *See* Memorial ¶ 102.

1174 *See* Reply ¶¶ 139-141.

1175 On 27 December 2017, the RGA Governor issued a Regional Executive Resolution authorising withdrawal of the RGA Lawsuit, which was subsequently accepted by the Court in March 2018. *See* **C-010**, Regional

1056. In respect of First Claimant's alleged legitimate expectations (see ¶ 1046 above), the Tribunal considers that its expectations regarding the Project go beyond what is reasonable in the circumstances.

1057. First Claimant asserts an expectation that the Mamacocha Project was a Category I project and, consequently, Second Claimant only required a DIA to secure its plant environmental permit. However, such an expectation is not founded in representations by Respondent or in Peruvian law.

1058. Claimants rely on a categorisation issued by MINEM on 31 January 2012 indicating that run-of-the-river hydroelectric projects located in the mountains and not specifically protected by environmental laws would be subject to a DIA only.[1176] As Respondent points out,[1177] on 18 June 2012, however, MINEM issued an updated report on categorisation specifying that with respect to the categorisations provided on 31 January 2012, these are merely for reference and could differ from the categorisation given to a specific plant:[1178]

> *...debemos señalar que el Informe N° 026-2012-MEM-AAE/NAE-MEM...es un informe que contiene una clasificación meramente referencial, es decir, es posible que a algunos proyectos de inversión se les pueda otorgar otra clasificación diferente a la señalada en el referido informe, dependiendo de los impactos a generarse, las áreas donde se realizarán los proyectos, las poblaciones involucradas, etc.*

1059. At the relevant time, Claimants were carrying out a pre-feasibility study which was finalised in October 2012.[1179] The permit application was filed by the predecessor of Second Claimant in July 2013. At the time of filing, therefore, both MINEM reports were available and the Tribunal finds no basis for Claimants to rely on one without the other. Accordingly, the Tribunal finds no guarantee by MINEM or other Peruvian authorities that

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Executive Resolution No. 665-2017-GRA/GR, 27 December 2017; **C-192**, *Resolución No. 12 Expediente No. 1554-2017-0-0401-JR-CI-04, Corte Superior de Justicia Arequipa*, 8 March 2018.

1176 **C-088**, MINEM's Report No. 0026-2012-MEM-AAE-NAE/MEM regarding the updating of environmental electrical regulations and categorization of activities, 31 January 2012, p. 2. *See* Memorial ¶ 43.

1177 Rejoinder ¶ 703.

1178 **R-146**, *Informe No. 0196-2012-MEM-AA-NAE/KCV*, MINEM, 18 June 2012, p. 3.

1179 **C-100(a)**, *CESEL Ingenieros, Estudio de Prefactibilidad – Vol. I Resumen Ejecutivo*, 26 October 2012. *See* Memorial ¶ 46.

the Mamacocha Project would be considered a Category I project and rejects this as a basis for First Claimant's legitimate expectations.

1060. As such, the Tribunal does not consider the cases of *RDC v. Guatemala* or *Tethyan Copper v. Pakistan* relied on by Claimants to provide relevant guidance for the present case,[1180] as those tribunals made findings about the existence of legitimate expectations regarding the contractual and legal framework in those cases which are not applicable here.

1061. Claimants further submit that they legitimately expected that ARMA had authority to grant the Environmental Certifications for the Mamacocha Project and its resolutions were not subject to change, and that the RGA would not commence or continue a "baseless lawsuit" (see ¶ 1046 above).

1062. Respondent argues, in response, that: (i) ARMA's competence to issue the Environmental Certifications cannot be confused with their legality;[1181] (ii) the Environmental Certifications contained only two short paragraphs analysing the formal requirements, contrary to Claimants' submission that they "had been vetted, tested and approved" by ARMA;[1182] and (iii) the RGA's filing of the lawsuit was a legitimate exercise of the control of legality of administrative acts and did not bring the Project to a halt.[1183]

1063. The Tribunal does not consider there to be any doubt that ARMA had authority to grant the Environmental Certifications for the Mamacocha Project. However, this does not mean that the permits were insulated from measures available under Peruvian law to challenge or alter those permits, including by Peruvian authorities. Respondent made no representation to Claimants otherwise.

1064. In circumstances where Second Claimant's permit was originally classified as Category III and was only reclassified as Category I following a recourse procedure by Claimants, the

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1180 *See* Reply ¶ 520; *citing* **CL-049**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012; **CL-062**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017.

1181 Rejoinder ¶ 706.

1182 Rejoinder ¶ 707.

1183 Rejoinder ¶¶ 709, 710.

Tribunal has difficulty concluding that only this second administrative decision was immune from challenge. Just as Second Claimant had recourse to applicable procedures under Peruvian law to apply for reconsideration of the original classification, the decision to reclassify the Project as Category I was subject to challenge under Peruvian law. Respondent did not, and could not, have guaranteed or insulated Claimants from any such challenge.

1065. The Tribunal therefore does not accept the legitimacy of the expectations put forward by First Claimant as item (iii) and (iv) at ¶ 1046 above, and does not consider the expectation at item (ii) to assist it, since ARMA's competence does not mean that the permit may not be challenged.

1066. In respect of First Claimant's expectation that MINEM would partner with Second Claimant to protect and ensure the validity of the Project's permits (see item (v) at ¶ 1046 above), the Tribunal finds First Claimant's expectation to go beyond what is legitimate in the circumstances. Respondent's representations to Claimants with respect to MINEM's role in the validity of the Project's permits are clearly set out in the RER Contract. The Tribunal has considered MINEM's role under Clause 4.3 of the RER Contract at ¶¶ 663-679 above. It follows that MINEM's role was not to ensure the validity of the Project's permits.

(ii) Arbitrariness, Bad Faith

1067. Claimants further submit that the RGA Lawsuit breached good faith and was arbitrary, as it was brought for the bad faith purpose of destroying the Mamacocha Project. According to Claimants, the RGA Council had been responsible for political attacks against the Project and had publicly made it clear that it would do anything to thwart it.[1184] Claimants contend as a basis for this alleged breach that: (i) the RGA Attorney General advised against filing the lawsuit because it lacked merit; (ii) Regional Council members admitted that 109 similar permits for other projects may have had identical irregularities but were not challenged; (iii) the report of the Regional Investigative Commission lacked any basis

[1184] Memorial ¶ 292.

in scientific or environmental studies; and (iv) the RGA Lawsuit was filed after the applicable statute of limitations had expired.[1185]

1068. Respondent denies acting arbitrarily or deliberately to destroy or frustrate the investment in bad faith.[1186] Respondent further contends that: (i) the Morón Report did not confirm that the RGA Lawsuit was without merit;[1187] (ii) the recommendation of the RGA Attorney General to discontinue the RGA Lawsuit confirms the Peruvian State's good faith conduct;[1188] (iii) Claimants incorrectly rely on a MINEM report which provides for referential environmental classification of the Project only;[1189] and (iv) the Amparo Judgment confirms the reasonableness of the RGA Lawsuit, since it challenged the same ARMA resolutions on nearly identical grounds.[1190]

1069. The scope of the question before the Tribunal is whether the act of bringing the RGA Lawsuit and maintaining it for one year before its withdrawal was arbitrary or in bad faith. The fact of bringing a legal challenge to the Mamacocha Project's permits is not *per se* arbitrary conduct, even if that challenge is brought by the State authorities. In order to be arbitrary, the Tribunal agrees with Claimants that the conduct in question must have no rational relationship with the purported goal of that measure or is otherwise unreasonable, prejudicial or capricious.[1191]

1070. It is not the task of this Tribunal to decide upon the merits of the RGA Lawsuit. The Tribunal inquires into the grounds for the RGA Lawsuit only for the purpose of determining whether it had no rational relationship with its stated goals, or was otherwise unreasonable, prejudicial or capricious.

1071. The RGA Lawsuit was brought upon the recommendation of a Regional Investigative Commission created by the RGA Council, which approved its report and

1185 Reply ¶ 523. *See also* C-PHB, Annotated Index, ¶¶ 9-10.

1186 Counter-Memorial ¶¶ 669, 671, 672.

1187 Counter-Memorial ¶ 670. *See also* Rejoinder ¶¶ 170-181; R-PHB ¶¶ 59-62.

1188 Counter-Memorial ¶ 671.

1189 Counter-Memorial ¶ 673.

1190 Rejoinder ¶ 716.

1191 *See* Memorial ¶ 280; Reply ¶ 476.

recommendation.[1192] The Regional Investigative Commission concluded that there were a series of irregularities with respect to the Environmental Certifications obtained by Second Claimant. Among other things, the Regional Investigative Commission found: (i) the Mamacocha Lagoon is the habitat of the Pacific otter (a species at risk of extinction) and river shrimp, and is an environmentally fragile area; (ii) the initial environmental evaluation of the Project concluded that it should be classified as Category III; (iii) the re-categorisation to Category I following the request of Second Claimant was based only on a legal report, without a technical evaluation; (iv) there were indications that the authorities deliberately favoured Second Claimant's Environmental Certification without carrying out duly detailed analysis considering the circumstances of the location of the Project and without due formal consultation of the population; and (v) the office within ARMA that issued the permits lacked legal authority.[1193]

1072. The Regional Investigative Commission recommended that the RGA Public Prosecutor's Office initiate legal action to obtain a declaration of nullity of the resolutions approving the environmental impact statements for the generation plant and transmission line of the Project.[1194]

1073. On 12 December 2016, ARMA issued a resolution stating that the resolutions linked to the approval of the environmental impact statements for the generation plant and transmission line violated administrative legality (*la legalidad administrativa*) and the public interest. It was further resolved that since the time for filing an administrative proceeding for nullity had expired, it would be necessary to do so in a judicial proceeding.[1195]

1192 **C-049**, *Acta de Sesión Ordinaria del Consejo Regional de Arequipa*, 21 October 2016, p. 24.

1193 **R-137**, *Informe final de la Comisión Especial Investigadora encargada de fiscalizar la emisión de las Resoluciones Sub Gerenciales No. 1102014-GRA/ARMA-SG y No. 158-2014-GRA/ARMA-SG y otras, emitidas por la Autoridad Regional Ambiental-ARMA*, pp. 83-88. *See also* **C-049**, *Acta de Sesión Ordinaria del Consejo Regional de Arequipa*, 21 October 2016, pp. 19-20, 23-24.

1194 **R-137**, *Informe final de la Comisión Especial Investigadora encargada de fiscalizar la emisión de las Resoluciones Sub Gerenciales No. 1102014-GRA/ARMA-SG y No. 158-2014-GRA/ARMA-SG y otras, emitidas por la Autoridad Regional Ambiental-ARMA*, p. 88. *See* Counter-Memorial ¶ 209.

1195 **C-085**, *Resolución Gerencial Regional No. 033-2016-GRA/ARMA*, 12 December 2016. *See* Counter-Memorial ¶ 211.

1074. Claimants assert that the RGA Lawsuit was a pretext for destroying the Project and was politically motivated.[1196] In their view, the environmental allegations put forward in the RGA Lawsuit were debunked or discredited, by:[1197] (i) an apparently recorded conversation of an RGA official involved in the lawsuit who said that certain of the allegations were "really wrong";[1198] (ii) a November 2017 report by international otter specialists finding that during construction of the Project, there may not be permanent disturbances to the lagoon fauna, and once in operation the plant would have no impact on the otter population;[1199] (iii) an interview with Mr. Benigno Sanz, of ARMA, stating that he would like to see an expert report evidencing the alleged ecological damage;[1200] and (iv) the RGA Attorney-General Office's report stating that they had recommended against filing it (see ¶ 1081 below).[1201]

1075. Respondent, on the other hand, submits that Claimants deceived ARMA by "illegally" submitting separate applications for the generation plant and transmission line, as opposed to a single application for the whole Project.[1202] In its view, Claimants mischaracterise the contemporaneous documents and the statements of public officials they rely upon have no legal weight.[1203]

1076. Based on the materials before it, the Tribunal is unable to conclude that the RGA Lawsuit was politically motivated. On the face of the Regional Investigative Commission's report, as approved by the RGA Council and followed up by ARMA, the Tribunal does not find evidence of an intent to destroy the Project. While Claimants contest and rebut the

1196 Memorial ¶¶ 80, 292; Reply ¶¶ 107, 523, 525, 531.

1197 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1958:8-1960:6; **CD-06**, Claimants' Closing Presentation, slides 57-60; C-PHB, ¶¶ 7, 9. *See* Tribunal Question 14A: "The Parties are invited to provide any context, based on the evidence on the record, for the greater number of environmental issues that were raised with respect to the Mamacocha Project from 2016 onwards, as compared to the years prior to that."

1198 **C-084**, Email from R. Mamani to C. Diez Canseco, 24 April 2017, p. 2.

1199 **C-227**, IUCN / SSC Otter Specialist Group Opinion Letter, 17 November 2017, p. 2.

1200 **C-218**, Benigno Sanz Interview, Diario Correo, 19 July 2017, p. 1.

1201 **C-095**, Report No. 278-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, 21 December 2017, pp. 4-5.

1202 R-PHB ¶ 13.

1203 R-PHB ¶ 45.

environmental concerns raised by the Regional Investigative Commission,[1204] the Tribunal does not find the concerns to be unreasonable, prejudicial or capricious. In particular, it is not unreasonable to hold concerns for flora and fauna of the site which include an endangered species of otter, and to inquire into the circumstances around the reclassification of the level of environmental risk of the Mamacocha Project. The same applies to the concerns raised by the Regional Investigative Commission regarding the authority of ARMA officials.

1077. To be clear, the Tribunal is not suggesting that the allegations made in the RGA Lawsuit are well-founded or could not have been refuted. Nor does the Tribunal consider it established that Claimants were attempting to deceive ARMA by submitting two separate applications for Environmental Certification.

1078. The records of press interviews with RGA Council members, Mr. Sanz of ARMA and Governor Osorio, relied on by Claimants, do not evidence bad faith or arbitrariness in the RGA Lawsuit.[1205]

1079. Leaving aside Respondent's comment regarding the RGA Council interview transcripts, which were submitted only in English,[1206] Councilman James Posso's primary objection to Second Claimant's environmental approval related to the potential destruction of the habitat of the endangered species of otter.[1207] The focus of Councilman Edy Medina, on the other hand, was on alleged irregularities in administrative action by ARMA.[1208] Neither of the interview transcripts evidence animosity towards Second Claimant or political motivations against the Mamacocha Project. Rather, the focus of attention is ARMA's

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1204 Reply ¶¶ 115-121.

1205 *See* **C-089**, Transcript of Councilman Edy Medina Interview, 11 April 2017; **C-090**, Transcript of Councilman James Posso Interview, 11 April 2017; **C-011**, Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, 30 December 2017; **C-218**, Benigno Sanz Interview, Diario Correo, 19 July 2017. The Tribunal notes that the interview transcripts in **C-089** and **C-090** have been submitted in English only, without an identifying source.

1206 Rejoinder ¶ 1068.

1207 Question: "Is that the only objection? The presence of otters?" Answer: "In my case at least." **C-090**, Transcript of Councilman James Posso Interview, 11 April 2017, p. 2.

1208 **C-089**, Transcript of Councilman Edy Medina Interview, 11 April 2017, pp. 1-5.

conduct.[1209] The fact that ARMA issued 109 other resolutions, which in the Councilmen's view suffered from the same alleged irregularities, does not establish political targeting of the Mamacocha Project. Contrary to Claimants' assertion, it is not known that the 109 resolutions granted Environmental Certifications, as they could have dealt with any subject matter, as stated by Councilman Posso.[1210] In addition, this does not undermine the environmental concerns held by the Councilmen specific to the granting of Second Claimant's permit.

1080. Claimants further rely on a chain of documentation referring to the Morón Report as evidence that "Peru always knew the RGA Lawsuit lacked merit":[1211] (i) the Minutes of the Special Commission meeting of 13 December 2017;[1212] (ii) the letter from the Special Commission to the RGA dated 14 December 2017;[1213] (iii) the letter from the RGA Governor to the RGA Council dated 18 December 2017;[1214] (iv) the RGA Attorney-General's Report dated 21 December 2017;[1215] and (v) the RGA Governor's Executive Resolution dated 27 December 2017.[1216]

1081. The Morón Report is dated 5 December 2017. Within weeks of its issuance, the above chain of correspondence ensued and on 30 December 2017, Governor Osorio ordered the immediate withdrawal of the RGA Lawsuit.[1217] The only indication that a member of

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1209 *See* **C-089**, Transcript of Councilman Edy Medina Interview, 11 April 2017. Question, p. 1: "So, it is not a claim against Laguna Azul but, rather, against ARMA?" Answer: "It should not be against Laguna Azul."

1210 **C-090**, Transcript of Councilman James Posso Interview, 11 April 2017, p. 4:

Question: "My concern is, if in this case there was a suspiciously expedited resolution, then what about the other resolutions and who did they benefit?"

Answer: "We would have to look into it."

Question: "And they only concerned the environmental impact study and investments?"

Answer: "Well, they may have addressed many issues, internal matters too, but what is certain is that the subdivision did not have the necessary powers because it had not been recognized by the regional board."

1211 Reply ¶¶ 850-851.

1212 **C-230**, Dr. Moron Urbina's presentation of his legal report's conclusions, 13 December 2017.

1213 **C-231**, Letter from R. Ampuero to Y. Osorio (Regional Governor of Arequipa), 14 December 2017.

1214 **C-232**, Official Notice No. 1135-2017-GRA/GR from Y. Osorio (Regional Governor of Arequipa) to A. Roncalla (Chairman of the Regional Council), 18 December 2017.

1215 **C-095**, Report No. 287-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, 21 December 2017.

1216 **C-010**, Regional Executive Resolution No. 665-2017-GRA/GR, 27 December 2017.

1217 **C-010**, Regional Executive Resolution No. 665-2017-GRA/GR, 27 December 2017.

Respondent's authorities or instrumentalities may have had an earlier view that the RGA Lawsuit lacked merit was the RGA Attorney-General, who mentions in December 2017 that "this Office had already pointed out that the likelihood of succeeding in this Proceeding…would be minimal."[1218] Claimants themselves refer to this statement as an "on-the-record 'finger-pointing' exercise."[1219]

1082. Both sides rely on different parts of the Morón Report, which provided a legal opinion on the merits and chances of success of different aspects of the RGA Lawsuit.[1220] While the Morón Report does raise certain queries about Second Claimant's Environmental Certifications, its overall opinion was that the RGA Lawsuit was unlikely to result in a declaration of nullity of them.[1221] It did not find, as Claimants assert, that the RGA Lawsuit "was a meritless strike suit designed to destroy the Mamacocha Project."[1222]

1083. When notified of the Morón Report, the RGA Attorney General's Office (which had filed the RGA Lawsuit) distanced itself from the report of the Special Investigative Commission, stating in an opinion dated 21 December 2017 to Governor Osorio that it had "already pointed out that the likelihood of succeeding in this Proceeding…would be minimal," that "we share the statements put forth [in the Morón Report] regarding the low likelihood of obtaining a nullity declaration," and that the RGA Council had taken an "evasive position" by failing to provide support for an defend the validity of its Report.[1223]

1084. In sum, none of these documents establish that the RGA Lawsuit was commenced in bad faith or arbitrarily. Nor do they establish that Respondent admitted or acknowledged that the RGA Lawsuit was baseless. At most, they demonstrate that the RGA Lawsuit had low prospects of success. Those prospects were principally identified by Dr. Morón in December 2017, and his opinion was swiftly acted upon by the Special Commission, the

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1218 **C-095**, Report No. 287-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, 21 December 2017, p. 1.

1219 Reply ¶ 140.

1220 **R-140/C-229**, Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), 5 December 2017.

1221 **R-140/C-229**, Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), 5 December 2017, p. 1.

1222 Memorial ¶ 293.

1223 **C-095**, Report No. 287-2017-GRA/PPR from RGA Regional Attorney General's Office to Y. Osorio, Governor of Arequipa, 21 December 2017, pp. 1, 2.

RGA Attorney General and the RGA Governor to result in the withdrawal of the RGA Lawsuit.

1085. In all the circumstances, while the Tribunal shares Claimants' concerns regarding the merits of the RGA Lawsuit, the Tribunal is unable to conclude that the RGA Lawsuit was unreasonable, prejudicial or capricious. The fact of bringing a lawsuit that may ultimately be unsuccessful is not, on its own, sufficient to constitute arbitrary or bad faith conduct in breach of the FET standard.

1086. In reaching the above conclusions, the Tribunal emphasises that beyond an inquiry into whether there was conduct inconsistent with the FET standard, it is not for this Tribunal to assess the merits of the original or revised Environmental Certification by the Peruvian authorities,[1224] or the merits or prospects of success of the RGA Lawsuit or the Amparo Action (see ¶¶ 129-134 above). This Tribunal's determination is limited to assessing whether the filing of the RGA Lawsuit itself violated the FET standard, whether because it breached First Claimant's legitimate expectations, was arbitrary, discriminatory, non-transparent or in bad faith.

1087. Having reached this conclusion, the Tribunal does not need to address the Parties' respective arguments on whether the RGA Lawsuit did in fact cause the destruction of the Project, noting that this is a contested issue.[1225]

1088. The Tribunal notes that at least two other challenges to Second Claimant's environmental permits were pursued by different parties in the Peruvian courts in addition to the RGA Lawsuit. One was an administrative lawsuit filed by Mr. David Gerónimo Miranda Soto on 17 February 2017.[1226] The other was the Amparo Action, which was filed by a private citizen against a number of respondents including Second Claimant and MINEM (see ¶¶ 129-134 above). Neither of these lawsuits is alleged by First Claimant to constitute a breach

1224 *See* Reply ¶ 515; Rejoinder ¶ 699.

1225 *See*, *e.g.*, Reply ¶¶ 93-100; Rejoinder ¶¶ 189-199.

1226 **R-065**, *Demanda Contencioso Administrativa de David Geronimo Miranada Soto*, 14 February 2017. *See* Counter-Memorial ¶¶ 207, 1133; Reply fn 181.

of the TPA or international law.[1227] In Claimants' view, "because the project was dead when [the Amparo Judgment] occurred CHM had no actionable claim under either the treaty or the contract."[1228]

1089. While the RGA Lawsuit was withdrawn, the Amparo Action was ultimately successful in obtaining a declaration of nullity of the Environmental Certifications of the Mamacocha Project and the final concession of the generation plant.[1229] The Specialised Constitutional Court of Arequipa ("*Juzgado Especializado Constitucional de Arequipa*") found, among other things, that the drastic change of environmental classification of the Project was surprising, considering the significant environmental harm that could be caused to the Mamacocha Lagoon and its surroundings, including a protected species.[1230] It also found a violation of the principle of "indivisibility" ("*indivisibilidad*") in Second Claimant's Environmental Certifications for the Mamacocha Project, which were applied for as two separate permits for (i) the power plant; and (ii) the transmission line.[1231]

1090. Two attempts by Second Claimant to challenge the Amparo Judgment in court were unsuccessful: (i) an appeal of the Amparo Judgment;[1232] and (ii) a petition for an *amparo* action against the Amparo Judgment and the appeal rejection.[1233] A third appeal against the adverse decision on the petition for an *amparo* action remained pending as at the Hearing (see ¶ 134 above).

1091. Claimants submit that the Amparo Action is completely irrelevant to the outcome of this arbitration, the Amparo Judgment is not *res judicata* between the Parties, is subject to

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1227 Reply ¶ 652, fn 1106.

1228 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1968:12-14. *See* Tribunal Question 17(i): "Is it Claimants' position that Respondent is in breach of the RER Contract or the Treaty, or both, in respect of the Amparo Action?"

1229 **R-070**, *Sentencia No. 29-2020, Resolución No. 33, Juzgado Especializado Constitucional de Arequipa*, 30 January 2020, pp. 62-63.

1230 **R-070**, *Sentencia No. 29-2020, Resolución No. 33, Juzgado Especializado Constitucional de Arequipa*, 30 January 2020, § 3.3.

1231 **R-070**, *Sentencia No. 29-2020, Resolución No. 33, Juzgado Especializado Constitucional de Arequipa*, 30 January 2020, § 3.2.

1232 **C-295**, Judgment No. 72-2021 from the Superior Court of Arequipa, First Civil Chamber, 4 February 2021.

1233 **R-182**, *Resolución No. 1: Proceso de Amparo, Exp. No. 2059-2021*, 5 July 2021.

revocation, and is not binding on the Tribunal.[1234] In their view: (i) the Amparo Action was nothing more than "background noise" at the relevant time;[1235] (ii) it was founded on baseless assertions;[1236] (iii) Second Claimant "never got a fair shake" in the Arequipa courts;[1237] (iv) the division of the Environmental Certifications into the generation plant and transmission line was not contrary to the indivisibility rules under Peruvian environmental law;[1238] (v) the Amparo Action had no impact on the Project because the adverse court decisions took place after the Project was already "dead";[1239] (vi) the Amparo Judgment may have reached a different conclusion if the Project was still alive when it was rendered;[1240] and (vii) at the relevant time, MINEM and ARMA (who were respondents in the Amparo Action) filed pleadings in the Amparo Action arguing that it was without merit.[1241]

1092. Respondent asserts, on the other hand, that the Amparo Judgment is important and the Tribunal should have special deference to it with respect to the application of Peruvian environmental law.[1242] It argues that: (i) Claimants admit that the grounds of the RGA Lawsuit are nearly identical to those of the Amparo Action;[1243] (ii) the Amparo Action shows that the environmental concerns that prompted the RGA Lawsuit were

1234 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1968:15-19, 1960:17-1961:20. *See* Tribunal Question 17(ii): "Does the issue of whether the Amparo Action is challenged or not in this arbitration have any relevance to its outcome?" and Tribunal Question 18: "More in general, what is the significance, if any, of the 'Amparo Action', and in particular the decision of the Arequipa Superior Court of 30 January 2020 (**R-070**), for Claimants' claims on liability and damages?" *See also* C-PHB ¶¶ 13-16; C-PHB, Annotated Index, ¶¶ 14, 32.

1235 Reply ¶ 104.

1236 Reply ¶ 300. *See also* C-PHB, Annotated Index, ¶ 16.

1237 Reply ¶ 301.

1238 C-PHB, Annotated Index, ¶ 8; *citing* **C-032**, Latam Hydro's Investor Presentation prepared by Equitas Partners, August 2014; **R-140/C-229**, Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), 5 December 2017.

1239 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1968:12.

1240 C-PHB, Annotated Index, ¶ 15.

1241 Reply ¶ 293.

1242 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2070:2-5, 2083:12-2086:12. *See* Tribunal Question 17(ii): "Does the issue of whether the Amparo Action is challenged or not in this arbitration have any relevance to its outcome?" and Tribunal Question 18: "More in general, what is the significance, if any, of the 'Amparo Action', and in particular the decision of the Arequipa Superior Court of 30 January 2020 (**R-070**), for Claimants' claims on liability and damages?" *See also* R-PHB ¶¶ 53-56.

1243 Rejoinder ¶ 160; *citing* Reply ¶ 301.

legitimate;[1244] (iii) the Amparo Judgment is *res judicata* and has retroactive effect to invalidate Second Claimant's permits;[1245] and (iv) the Morón Report mentioned several grounds for invalidating Second Claimant's Environmental Certifications which were ultimately adopted in the Amparo Judgment, and were also flagged by a law firm commissioned by Claimants' potential financier.[1246]

1093. Since it has already found no arbitrary or bad faith conduct in breach of the FET standard in relation to the RGA Lawsuit, the Tribunal does not consider it necessary to analyse additional implications of the Amparo Action for present purposes. The Tribunal takes into account that the RGA Lawsuit and the Amparo Action are different types of legal proceedings brought on independent legal bases. The Tribunal notes, however, that the overlap in certain grounds of the RGA Lawsuit and the Amparo Action, some of which were ultimately upheld in the Amparo Judgment and in further instances in court, does undermine Claimants' argument that the RGA Lawsuit was arbitrary conduct.

(iii) Transparency

1094. According to Claimants, the RGA Lawsuit breached the transparency component under the FET standard because the RGA never substantiated the basis for its "drastic reversal in policy with respect to the Project's environmental permits."[1247] In their view, it lacked transparency because: (i) the basis for the RGA Lawsuit was an internal, *ex parte* investigation by the RGA Council; (ii) the RGA Lawsuit contains only conclusory allegations without citing any policy changes, environmental studies or evidentiary documents; and (iii) the RGA Council never disclosed the findings of the investigation or legal bases for the Lawsuit.[1248]

1095. For Claimants, the RGA Lawsuit can be compared to other cases where arbitral tribunals have found that a government taking inconsistent positions regarding key permits or

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1244 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2049:22-2050:2; Rejoinder ¶ 168.

1245 **RD-01**, Respondent's Opening Presentation, slides 45-46; R-PHB ¶ 19.

1246 Rejoinder ¶ 170; *citing* **R-140/C-229**, Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), 5 December 2017, pp. 1, 18-19. *See also* Rejoinder ¶¶ 171-181, 182-187.

1247 Memorial ¶ 303.

1248 Memorial ¶ 303; Reply ¶ 534.

putting a project in "contractual limbo" is a violation of the transparency component of FET.[1249]

1096. Respondent denies that there was a drastic reversal in policy or that the RGA Lawsuit had no merit. It argues that the analysis on what environmental assessment will be required for a project depends on the corresponding technical studies, and was not pre-established by the MINEM memorandum of January 2012.[1250] Respondent further submits that Claimants have not established a causal link between the RGA Lawsuit and the failure of the Mamacocha Project.[1251]

1097. The Tribunal refers to its findings at ¶¶ 1024-1026 above regarding the existence of a separate transparency obligation under the FET standard.

1098. It follows from the Tribunal's reasoning in relation to legitimate expectations, arbitrariness and lack of good faith that the transparency ground of First Claimant's claim must also be rejected. On the 2012 MINEM memorandum regarding the classification of the Project, the Tribunal refers to its observations at ¶¶ 1058-1059 above. In relation to the inconsistent position taken by first granting and subsequently challenging the Environmental Certification, the Tribunal refers to its observations at ¶¶ 1063-1065 above.

1099. Moreover, it has not been demonstrated that the conduct of the investigation by the RGA Council or the submissions filed by the authorities in the RGA Lawsuit breached any transparency requirements applicable to such procedures, or that any decision taken affecting Claimants or their investments cannot be traced to the applicable legal framework.

1249 Memorial ¶¶ 304-306; *citing* **CL-037**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 85-101; **CL-066**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶¶ 376, 379, 380. *See also* Reply ¶¶ 532-533, 535.

1250 Counter-Memorial ¶ 675; Rejoinder ¶¶ 717-718.

1251 Rejoinder ¶ 719.

1100. In sum, the Tribunal does not find the circumstances around the filing and subsequent withdrawal of the RGA Lawsuit to lack transparency such as to amount to a breach of the FET standard under the TPA.

(iv) Discrimination

1101. Claimants submit that the RGA Lawsuit is *per se* discriminatory because it specifically targeted the Mamacocha Project. While every hydro project in the RER Promotion received its plant Environmental Certification using a DIA, only the Mamacocha Project was sued for using a DIA instead of an EIA. In addition, Claimants assert that the RGA Council members admitted that the RGA Lawsuit was the first challenge to ARMA's authority to issue the Project's environmental permits, while ARMA had previously issued 109 Environmental Certifications for other projects.[1252]

1102. In the absence of a reasonable justification for a differential treatment, Claimants argue that arbitral practice has found a breach of FET.[1253] In Claimants' view, what is decisive to show discrimination is not discriminatory intent, but the impact of the measure on the investment.[1254]

1103. For Respondent, Claimants have not identified a comparator in like circumstances, which is required to establish discrimination.[1255] Respondent submits that other RER projects cannot act as general comparators for environmental classification because each one has specific circumstances and differences such as location, area affected, technologies, and nearby population.[1256]

1252 Memorial ¶ 307.

1253 Memorial ¶ 308; *citing* **CL-052**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 498.

1254 Reply ¶ 537.

1255 Counter-Memorial ¶ 676; Rejoinder ¶ 720.

1256 Counter-Memorial ¶ 676.

1104. Respondent further contends that Claimants have not proven that every other hydroelectric project received environmental approval for a DIA, and in any event that would not establish that the projects were in like circumstances.[1257]

1105. The Tribunal refers to its reasoning at ¶¶ 1028-1030 above with respect to the standard for discriminatory treatment. The Tribunal notes that Claimants have not identified a comparator for the purposes of establishing discriminatory treatment.

1106. Further and in any event, the Tribunal does not find the claim of discriminatory treatment to be made out in this case. As discussed at ¶¶ 1069-1086 above, the filing of the RGA Lawsuit was not arbitrary or without rational basis. For the same reason, Claimants have failed to establish that there was no reasonable justification for the RGA Lawsuit, assuming without deciding that it was different to the treatment given to other hydropower projects. The environmental situation for each hydropower project is specific to its geography, flora and fauna and other circumstances, meaning that there is a basis for differential treatment of hydropower projects arising from their different circumstances. The fact that the RGA Lawsuit also included allegations about the validity of ARMA's decisions which have not been raised against other hydropower projects is insufficient to establish discrimination, since the specific environmental circumstances of the Mamacocha Project may have brought to light other legal inquiries such as this.

(v) Conclusion

1107. For the above reasons, the Tribunal rejects the allegation that the filing of the RGA Lawsuit constitutes a breach of Article 10.5 of the TPA.

b. Criminal Investigation and Criminal Proceedings

1108. The Tribunal notes that the Criminal Investigation and Criminal Proceedings did not fall under the parties' contractual relationship in the RER Contract, and therefore the Tribunal made no determinations with respect to this conduct in relation to Second Claimant's contractual claims.

[1257] Rejoinder ¶ 721.

1109. The Tribunal further notes that this ground of First Claimant's claim involves a criminal investigation into Second Claimant's External Counsel (see ¶ 183 above). Claimants have previously sought redaction of the name of the individual in question from material to be published in relation to this case, which redactions Respondent had agreed to.[1258] For the purposes of making its determinations under this ground, the Tribunal does not consider it necessary to identify any of the individuals under investigation by name in this Award, and will refrain from doing so.

1110. Claimants submit that Respondent violated the FET standard when: (i) the AEP included Second Claimant in the Criminal Investigation regarding the Project's Environmental Certifications; and (ii) on 2 February 2018, when the AEP announced it had decided to formalise and continue the investigation, naming Second Claimant's External Counsel as a criminal suspect in the Criminal Proceedings.[1259] Claimants contend that the investigation was brought only on the basis of the allegations in the RGA Lawsuit, which Respondent has admitted are baseless.[1260] In addition, Claimants argue that the AEP failed to provide proper notice of the proceeding and applied a criminal statute that was not in existence at the time of the alleged wrongdoing.[1261]

1111. In Claimants' view, these measures deprived First Claimant of its legitimate expectations, violated Respondent's obligation to act in good faith, were arbitrary, lacked transparency, and were discriminatory.[1262]

1112. Respondent argues, in response, that Second Claimant's External Counsel is distinct from the investor and its investment and Claimants have not proven that he is covered by the protections under the TPA, or that measures taken in relation to third parties can engage the State's liability under the TPA.[1263]

1258 *See* Letter from Claimants to A. Conover, 22 May 2020; Letter from Respondent to A. Conover, 22 May 2020.

1259 Memorial ¶¶ 309, 310.

1260 Memorial ¶ 309.

1261 Memorial ¶ 310.

1262 Memorial ¶¶ 311-312, 314, 316, 318, 320. *See also* Reply ¶¶ 539-550.

1263 Counter-Memorial ¶ 680.

1113. Respondent further submits that it has a margin of appreciation in criminal investigations, being a most obvious and undisputed part of its sovereign right to enforce national law.[1264] Respondent denies that the contested measures breached Claimants' legitimate expectations, were contrary to good faith, were arbitrary, lacked transparency or were discriminatory.[1265]

(i) Legitimate Expectations

1114. According to Claimants, like the RGA Lawsuit, the commencement of the Criminal Investigation and the Criminal Proceedings deprived First Claimant of its expectations that: (i) the Mamacocha Project was a Category I project only requiring a DIA to secure its environmental permit; (ii) ARMA had authority to grant the Environmental Certifications for the Project; and (iii) ARMA's resolutions granting the permits had been vetted, tested and approved by ARMA and were not subject to change.[1266]

1115. Claimants argue that the formalisation and continuation of the Criminal Proceedings further breached First Claimant's expectation to be treated fairly, reasonably and in good faith, on the basis that: (i) it was brought based on the same meritless allegations as the RGA Lawsuit, and the AEP refused to close the investigation when the RGA admitted its allegations were without merit; (ii) Second Claimant's External Counsel has been subjected to potential criminal liability for signing a legitimate application asking ARMA to reconsider a prior administrative decision; and (iii) the AEP was relying on a retroactive application of the law.[1267]

1116. Reflecting its arguments made in relation to Claimants' legitimate expectations in respect of the RGA Lawsuit, Respondent disputes the basis of Claimants' expectation that the Project would be classified as Category I, and argues that it was not reasonable or legitimate

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1264 Counter-Memorial ¶ 681; *quoting* **RL-116**, *PNG Sustainable Development Program Ltd v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on Claimant's Request for Provisional Measures, 21 January 2015, ¶ 145.

1265 Counter-Memorial ¶¶ 686, 695, 699, 703, 705. *See also* Rejoinder ¶¶ 742-744.

1266 Memorial ¶ 311.

1267 Memorial ¶ 312; **CD-01**, Claimants' Opening Presentation, slide 89.

for Claimants to assume that their environmental permits would never be questioned or that Peruvian criminal law would not be enforced in relation to a suspected wrongdoing.[1268]

1117. In addition, Respondent contends that the AEP should not have closed the Criminal Investigation merely because the RGA Lawsuit was withdrawn.[1269] In Respondent's view, Claimants misrepresent the basis for the Criminal Proceedings, which is that Second Claimant's External Counsel is accused of being part of a fraudulent agreement for ARMA officials to approve an illegal granting of rights based on a preliminary environmental assessment.[1270]

1118. Respondent further denies that Second Claimant's External Counsel was charged on the basis of a statute that was not in force at the time of the conduct. According to Respondent, while the paragraph in question was introduced after the relevant conduct by Second Claimant's External Counsel, the same legal principle was already being applied by the courts before its formal incorporation, and Claimants' argument on this ground was already rejected by the Judge of the Preparatory Investigation (*Juez de la Investigación Preparatoria*).[1271]

1119. The Tribunal has found that First Claimant's alleged legitimate expectations in respect of the RGA Lawsuit, which are also relied on in relation to the Criminal Investigation, go beyond what is reasonable in the circumstances (see ¶¶ 1056-1065 and 1114 above). For the same reasons, the Tribunal rejects them as a basis for Claimants' arguments in relation to the Criminal Investigation and Criminal Proceedings.

1120. In relation to the expectations put forward at ¶ 1115 above, the Tribunal confirms the legitimacy of an expectation to be treated fairly, reasonably and in good faith. However,

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1268 Counter-Memorial ¶¶ 688-689; *citing* **R-146**, *Informe No. 0196-2012-MEM-AA-NAE/KCV*, MINEM, 18 June 2012.

1269 Counter-Memorial ¶ 691.

1270 Counter-Memorial ¶ 692.

1271 Counter-Memorial ¶ 693; *citing* **R-119**, *Resolución No. 18-2020, Quinto Juzgado de la Investigación Preparatoria de Arequipa*, 4 November 2020.

First Claimant has not established a breach of that expectation with respect to the Criminal Investigation and Criminal Proceedings.

1121. In this regard, as for the RGA Lawsuit (see ¶ 1070 above), it is not for the Tribunal to make a determination on the merits of the Criminal Investigation or Criminal Proceedings. The Tribunal is being asked to decide whether these proceedings are unfair, unreasonable or lacking in good faith. In making this assessment, the Tribunal is mindful of the State's sovereign power to investigate and prosecute potential crimes committed under national law. Being treated fairly, reasonably and in good faith does not confer immunity from legal proceedings or criminal investigations.

1122. The Criminal Investigation which led to the Criminal Proceeding was brought following a complaint of 8 March 2017 by two private citizens to the AEP for potential environmental crimes related to the Mamacocha Project.[1272] The AEP subsequently concluded that there was sufficient evidence for an investigation into a number of ARMA officials.[1273] In this regard, the AEP referred to the reclassification of the Generation Plant Environmental Certification from Category III to Category I, and specifically alleged irregularities by officials of ARMA in that procedure, as investigated by the RGA Council.[1274]

1123. On 2 February 2018, the AEP announced that its formal investigation would continue against three ARMA officials, with Second Claimant's External Counsel named as a suspect as a secondary accomplice.[1275]

1272 **R-066**, *Oficio No. 001-2017, Denuncia presentada por Roberto Nieves Molina Llerena y Flavio W. Mejía Begazo ante la Fiscalía Ambiental de Arequipa*, 8 March 2017.

1273 **C-188**, *Disposición Fiscal No. 01-2017-0-FPEMA-MP, Fiscalía Ambiental de Arequipa*, 24 March 2017; **R-067**, *Disposición Fiscal No. 03-2017-FPEMA-MP-AR, Fiscalía Ambiental de Arequipa*, 5 September 2017.

1274 **C-188**, *Disposición Fiscal No. 01-2017-0-FPEMA-MP, Fiscalía Ambiental de Arequipa*, 24 March 2017, pp. 3-4.

1275 **C-193**, *Disposición No. 04-2018-O-FPEMA-MP-AR, Fiscalía Provincial Especializada en Materia Ambiental, Distrito Fiscal de Arequipa*, 2 February 2018, pp. 9, 13.

1124. In a document dated 29 March 2019 and received on 13 June 2019, the AEP notified Second Claimant's External Counsel that he was under investigation.[1276]

1125. On 2 May 2019, the AEP declared the end of its investigation and indicated that formal charges would be brought.[1277] These followed on 18 October 2019.[1278]

1126. Claimants submit that there were irregularities in the timing of notice of the Criminal Investigation provided to Second Claimant's External Counsel and that the AEP was reprimanded by two separate courts for that failure. Because their lawyer was not given full details of the basis for the Criminal Investigation until after the investigation was closed, they argue that he was prevented from providing his testimony to the criminal file.[1279]

1127. The Tribunal has reviewed the court decisions in question which confirm that as at 19 July 2018 and 17 October 2018, the notice provided to Second Claimant's External Counsel of the Criminal Investigation was considered by those courts to be inadequate.[1280] However, as is evident from these decisions, subsequent motions filed by Second Claimant's External Counsel,[1281] and further decisions issued by Peruvian courts,[1282] Second Claimant's External Counsel sought relief and had access to the Peruvian courts, which addressed these due process concerns and any implications for the Criminal Proceedings under Peruvian law. In circumstances where Claimants and their legal counsel had access to and

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1276 **C-284**, *Disposición No. 06-2019-FPEMAMP-AR, Fiscalía Provincial Especializada en Materia Ambiental, Distrito Fiscal de Arequipa*, 29 March 2019; **R-068**, *Disposición No. 07-2019-FPEMA-MP-AR, Fiscalía Ambiental de Arequipa*, 29 March 2019.

1277 **R-113**, *Disposición Fiscal No. 08-2018-FPEMA-MP-AR, Fiscalía Ambiental de Arequipa*, 2 May 2019.

1278 **R-069**, *Acusación Fiscal, Fiscalía Ambiental de Arequipa*, 18 October 2019.

1279 Memorial ¶ 134; Reply ¶ 196.

1280 **C-285**, *Resolución No. 04-2018, Corte Superior de Justicia de Arequipa, 5to Juzgado de Investigación Prep. Delitos Aduaneros, Trib., Mcdo. y Amb. de Arequipa*, 19 July 2018, p. 4; **C-286**, *Resolución No. 14-2018, Corte Superior de Justicia de Arequipa, Primera Sala Penal de Apelaciones*, 12 October 2018, p. 6.

1281 *See*, *e.g.*, **R-117**, *Solicitud de Tutela de Derecho ante el Juez del Quinto Juzgado de Investigación Preparatoria de Arequipa*, 4 July 2019; **R-118**, *Solicitud de Auto de Sobreseimiento presentado ante el Juez del Quinto Juzgado de Investigación Preparatoria de Arequipa*, 11 November 2019; **R-120**, *Excepción de improcedencia de acción presentado ante el Juez del Quinto Juzgado de Investigación Preparatoria de Arequipa*, 12 November 2019.

1282 *See*, *e.g.*, **R-114**, *Resolución No. 03-2019, Quinto Juzgado de Investigación Preparatoria de Arequipa*, 15 July 2019; **R-119**, *Resolución No. 18-2020, Quinto Juzgado de la Investigación Preparatoria de Arequipa*, 4 November 2020.

sought recourse to the Peruvian courts on these procedural irregularities, it is not the role of this Tribunal constituted under the TPA to substitute its own assessment.

1128. Nor is it the task of this Tribunal to decide upon the merits of the charges against Second Claimant's External Counsel, or to second-guess whether they have been sufficiently particularised or supported.[1283] The legal proceedings relating to those charges were ongoing as at the date of the Hearing[1284] and shall be duly determined by the Peruvian courts.

1129. Claimants further object that Second Claimant's External Counsel has been subjected to the retroactive application of criminal law, since he was charged under a legal provision that was not in effect at the time of the alleged wrongdoing.[1285] Respondent argues, on the other hand, that the legal provision in question is not essential for the qualification of the crime of complicity, and in any event reflects a principle that was applied by the Peruvian courts long before its formal incorporation in the Criminal Code.[1286]

1130. The assertion regarding retroactive application of the law was also raised by Second Claimant's External Counsel before the Peruvian courts, which rejected the argument on the grounds referred to by Respondent.[1287] The Tribunal is thus satisfied that the legal basis for the charges against Second Claimant's External Counsel already existed at the time of the conduct and was not retroactively applied.

1131. The Tribunal is further unable to accept Claimants' assertion that the Criminal Investigation and Criminal Proceedings should have been closed upon withdrawal of the RGA Lawsuit.[1288] The two legal proceedings have different legal characters: one is a contentious administrative proceeding and the other is criminal. While the proceedings relate to the same circumstances, i.e., the granting of Second Claimant's environmental

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1283 *See* Reply ¶¶ 183-187.

1284 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 2002:7-8.

1285 Reply ¶ 192.

1286 Counter-Memorial ¶¶ 409-412; *quoting* **RL-094**, *Acuerdo Plenario No. 2-2011/CJ-116, Corte Suprema de Justicia de la República de Perú*, 6 December 2011, ¶¶ 10-11.

1287 **R-119**, *Resolución No. 18-2020, Quinto Juzgado de la Investigación Preparatoria de Arequipa*, 4 November 2020, p. 34.

1288 *See* Reply ¶¶ 188; Memorial ¶ 314.

permits, this does not mean that they have the same prospects of success, or that there is an obligation to have the Criminal Proceedings halted.

1132. In the same way, contrary to Respondent's submission,[1289] the ultimate success of the Amparo Action does not weigh into the Tribunal's assessment of the reasonableness of the Criminal Investigation and Criminal Proceedings.

1133. On the basis of the materials on record, the Tribunal is unable to conclude that the Criminal Investigation and Criminal Proceedings breached Claimants' legitimate expectation to be treated fairly, reasonably and in good faith. As mentioned above, it is the prerogative of every State to investigate potential crimes under national law. It would be a serious matter to interfere in the assessment of investigating authorities that there is a potential crime to be investigated, the circumstances of which have not been established in the present case.

1134. While Claimants cite examples of other arbitral tribunals that have found a violation of the FET standard arising from a criminal investigation,[1290] such an assessment is a highly fact-specific one, and the Tribunal does not consider the conclusions of those arbitral tribunals to translate to the circumstances of the present case.

(ii) Good Faith, Arbitrariness, Transparency, Discrimination

1135. Claimants further allege that the Criminal Investigation and Criminal Proceedings lacked good faith, were arbitrary, lacked transparency and were discriminatory.[1291]

1136. The Tribunal reconfirms its views expressed at ¶¶ 1022-1030 above about the role of good faith, transparency and discrimination in FET and the relevant standards.

1137. The Tribunal's considerations on legitimate expectations related to the Criminal Investigation and Criminal Proceedings are equally relevant to Claimants' other arguments

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1289 Rejoinder ¶ 219.

1290 Memorial ¶ 315; Reply ¶ 546; *citing* **CL-058**, *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012; Memorial ¶ 317; *quoting* **CL-017**, *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, PCA Case No. AA518, Award, 24 October 2014; Reply ¶ 544; *quoting* **RL-169**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013; Reply ¶ 545; *citing* **CL-235**, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014.

1291 *See* Memorial ¶¶ 314-320; Reply ¶¶ 539-550.

on FET. The Tribunal has already decided that these proceedings did not breach First Claimant's legitimate expectation to be treated fairly, reasonably and in good faith. For completeness, the Tribunal will address Claimants' additional arguments raised specifically on these points.

1138. Claimants assert that the Criminal Investigation was "beset with due process vulnerabilities that themselves constitute breaches of FET."[1292] Claimants further submit that the Criminal Investigation was "shrouded in conduct lacking transparency," infringing the due process rights of Second Claimant and its lawyer by failing to take their statements, attempting to criminalise a legally protected act, and using a retroactive application of a criminal statute.[1293] For the same reasons as those set out at addressed by the Tribunal at ¶¶ 1126-1133 above with respect to legitimate expectations, the Tribunal rejects the assertion that these arguments establish a breach of FET on the basis of lack of due process or lack of transparency to Second Claimant and Second Claimant's External Counsel.

1139. Claimants submit that the Criminal Investigation and Criminal Proceedings violated good faith as they were brought on the basis of the unsubstantiated and meritless allegations by the RGA Council.[1294] In respect of the RGA Lawsuit, the Tribunal has held that RGA Council's concerns that were the subject of its special investigation and the RGA Lawsuit were not unreasonable, prejudicial or capricious, including with respect to the circumstances around the reclassification of the level of environmental risk of the Mamacocha Project (see ¶¶ 1076, 1084 above). These same considerations are relevant to the Criminal Investigation and Criminal Proceedings. The Tribunal is not in a position to find that there was no basis for them, and does not consider that the AEP "should have never commenced" the Criminal Investigation, as Claimants submit.[1295]

1140. Claimants further assert that the AEP acted arbitrarily, *inter alia*, because the substance of the charges against Second Claimant's External Counsel concerned the "mere act of signing an application for reconsideration on behalf of his client," which offends common

1292 Reply ¶ 548.
1293 Memorial ¶ 318.
1294 Memorial ¶ 314.
1295 Memorial ¶ 314.

sense and the Peruvian Constitution.[1296] Respondent argues, on the other hand, that the charges against Second Claimant's External Counsel were not for filing the application in question, but for wilfully collaborating with public officials in the commission of a crime against the environment.[1297]

1141. As set out at ¶ 1069 above, arbitrary conduct has no rational relationship with the purported goal of that measure or is otherwise unreasonable, prejudicial or capricious. Claimants have not established that the Criminal Investigation or Criminal Proceedings have no rational relationship with the goal of enforcing Peruvian law. Claimants' submissions, in this respect, require the Tribunal to make assumptions about the purpose of the Criminal Investigation and Criminal Proceedings that are not supported by the evidence on the record.

1142. The Tribunal is further not persuaded that the Criminal Proceedings are frivolous or a discriminatory measure targeted at "killing" the Project.[1298] Like the RGA Lawsuit, Claimants have failed to establish that there was no reasonable justification for the Criminal Proceedings, assuming without deciding that it was different to the treatment given to other hydropower projects. The fact that the RGA Lawsuit and the Criminal Proceedings include allegations about the validity of ARMA's decisions which have not been raised against other hydropower projects is insufficient to establish discrimination, since the specific environmental circumstances of the Mamacocha Project may have brought to light other legal inquiries such as this.

1143. For these reasons, the Criminal Investigation and Criminal Proceedings were not a violation of the FET standard for lack of good faith, arbitrariness, lack of transparency or discriminatory treatment. Aside from Claimants' other requests for relief that will be addressed below, the Tribunal finds no basis for Claimants' request for an order that Respondent "cease and desist" its harassment of Second Claimant and Second Claimant's External Counsel by terminating the Criminal Proceedings (see ¶ 235(g) above).

1296 Memorial ¶ 316.

1297 Counter-Memorial ¶ 701.

1298 Memorial ¶¶ 317, 320.

1144. The Tribunal therefore does not need to decide upon Respondent's other arguments and objections, including that the Criminal Investigation and Criminal Proceedings did not prevent Claimants from reaching the Actual COS, and that the protections of the TPA do not extend to Second Claimant's External Counsel.[1299]

c. Civil Works Authorisation Permit

1145. Claimants contend that Respondent's measures with respect to the Project's CWA breached the FET standard.[1300] For Claimants, the "obstructive measures" by the AAA and MINEM in the delayed and defective issuance of the CWA breached Claimants' legitimate expectations, violated transparency, were arbitrary, and were not undertaken in good faith but as part of a discriminatory effort to kill the Mamacocha Project.[1301] Respondent denies the allegations.[1302]

1146. The CWA was required in order to begin construction on the Project since the Project was located on natural water sources.[1303] The factual circumstances relating to the CWA were briefly set out at ¶¶ 151-158 above. Before considering the Parties' legal arguments, the Tribunal finds it helpful to address the factual background in more detail in the following paragraphs, as well as some of the Parties' disagreements on those events.

1147. The application for the CWA was filed on 29 November 2016.[1304] Additional information was sought by the AAA, and Second Claimant requested additional time to provide the

1299 *See* Counter-Memorial ¶¶ 416, 680; Rejoinder ¶ 221.

1300 Memorial ¶ 321.

1301 Memorial ¶¶ 321-332. *See also* Reply ¶¶ 551-559.

1302 Counter-Memorial ¶¶ 709 *et seq*.

1303 *See* Counter-Memorial ¶ 170.

1304 **R-041**, *Formulario No. 001, Solicita Autorización para la Ejecución de Obras de Aprovechamiento Hídrico*, 29 November 2016.

information requested.[1305] Second Claimant provided additional information in February and April 2017.[1306]

1148. Second Claimant's application for the CWA was denied on 16 May 2017. In the denial, it was stated that certain information necessary to make relevant assessments was missing from the application.[1307]

1149. On 29 May 2017, Second Claimant applied to the AAA for reconsideration of the denial, submitting an additional technical report in support.[1308]

1150. On 5 July 2017, the AAA granted Second Claimant's application for reconsideration and issued the CWA.[1309]

1151. On 18 July 2017, Second Claimant requested a rectification of the CWA on the basis that the granted permit contained material errors regarding the term date and physical structures.[1310] According to Claimants, the defects rendered the CWA unusable.[1311] Respondent disagrees.[1312]

1152. On 11 August 2017, the AAA issued an internal report recommending that the CWA be rectified as requested by Second Claimant.[1313]

1305 **R-044**, *Carta No. 089-2017-ANA-AAA I C-O de la Autoridad Nacional del Agua a HLA*, 31 January 2017; **R-045**, *Carta de HLA (C. Diez) a la Autoridad Nacional del Agua (A. Osorio)*, 7 February 2017; **R-047**, *Carta de HLA (C. Diez) a la Autoridad Nacional del Agua (A. Osorio)*, 14 February 2017.

1306 *See*, *e.g.*, **R-061**, *Carta de HLA (C. Diez et al.) a la Autoridad Administrativa del Agua (C. Ocoña)*, 28 February 2017; **R-051**, *Carta de HLA (C. Diez) a la Autoridad Administrativa del Agua (I. Martínez)*, 24 April 2017.

1307 **C-121**, *Resolución Directoral Nro. 1480-2017-ANA-AAA I C-O*, 16 May 2017.

1308 **R-053**, *Recurso de Reconsideración*, 29 May 2017, p. 6.

1309 **C-122**, *Resolución Directoral Nro. 1928-2017-ANA/AAA I C-O*, 5 July 2017.

1310 **R-056**, *Carta de HLA a la Autoridad Administrativa del Agua*, 18 July 2017, p. 1.

1311 Reply ¶ 203.

1312 Counter-Memorial ¶¶ 346-349.

1313 **R-088**, *Informe Técnico No. 062-2017-ANA-AAA I C-O*, 11 August 2017, p. 2.

1153. Also on 11 August 2017, two individual citizens filed an application with the AAA requesting the nullity of Second Claimant's CWA, as evidenced by the AAA's letter to those individuals regarding their request dated 24 August 2017.[1314]

1154. Claimants assert that the AAA refused to fix the CWA in spite of correspondence and in-person meetings.[1315] Respondent denies this account, which it argues is a conspiracy theory.[1316]

1155. On 12 September 2017, the AAA transmitted the administrative file concerning Second Claimant's CWA to the Water Tribunal (*Tribunal Hídrico*).[1317] On 26 September 2017, the AAA further transmitted Second Claimant's request for rectification of the CWA "*para anexar a expediente principal*."[1318]

1156. On 28 November 2017, the AAA addressed the Water Tribunal with respect to the request for rectification.[1319] This letter's reference is "*Carta S/N de fecha 22 de noviembre*," and states, in part:

> *Tengo el honor de dirigirme a usted para saludarlo y remitir en (03) folios el documento de la referencia, presentado por el señor Ronald Ibarra Gonzales representante de la Hidroeléctrica Lagua Azul en cual reiteran su solicitud de rectificación de error material de la Resolución Directoral No. 1928-2017-ANA-AAA-CO.*
>
> *Cabe precisar, que dicho expediente administrativo, fue remitido a su despacho con Oficio Nro. 2604-2017-ANA-AAA-CO I el 12 de setiembre, en tal sentido al haber perdido competencia para emitir un pronunciamiento se remite para la prosecución del trámite*.

1314 **R-057**, *Carta No. 381-2017-ANA/AAA I C-O de la Autoridad Nacional del Agua a C. Vera y Á. Chacabana*, 24 August 2017. *See also* **C-126**, *Resolución No. 053-2018-ANA/TNRCH*, 24 January 2018, ¶ 4.8, referencing the date of the request as 11 August 2017.

1315 Memorial ¶ 108; *citing* Bartrina First Statement ¶¶ 66-70.

1316 Counter-Memorial ¶ 335.

1317 **R-058**, *Oficio No. 2604-2017-ANA/AAA I C-O de la Autoridad Nacional del Agua (V. Manuel) al Tribunal Nacional de Resolución de Controversia Hídricas (J. Aguilar)*, 12 September 2017.

1318 **R-092**, *Oficio No. 2773-2017-ANA-AAA I C-O de la Autoridad Administrativa del Agua (C. Ocoña) al Tribunal Nacional de Resolución de Controversias Hídricas (J. Aguilar)*, 26 September 2017.

1319 **R-093**, *Oficio No. 3449-2017-ANA-AAA I C-O de la Autoridad Nacional del Agua (A. Osorio) al Tribunal Nacional de Resolución de Controversias Hídricas (J. Aguilar)*, 28 November 2017.

1157. On 20 December 2017, the Water Tribunal returned the administrative file to the AAA.[1320] The relevant communication of 20 December 2017 references two documents, being a) *Oficio No. 2773-2017-ANA-AAA I C-0* and b) *Oficio No. 2604-2017-ANA-AAA-I-C-O*. It states:

> *Me dirijo a usted en atención al documento a) de la referencia, mediante el cual remitió la solicitud de rectificación de error material de la Resolución Directoral N° 1928-2017-ANA/AAA I C-O, presentada por la empresa CH Mamacocha S.R.L.*
>
> *Asimismo, mediante el documento b) de la referencia, su Despacho nos remitió la solicitud de nulidad de la Resolución Directoral N° 1928-2017-ANA/AAA I C-O, presentada por los señores Celso Albino Vera Aguirre y Ángel Chacabana Huayna, quienes señalaron ser representantes del "Frente de Defensa de los Recursos Naturales y Culturales del distrito de Ayo – Arequipa".*
>
> *En ese sentido, correspondiendo que su Despacho emita un pronunciamiento respecto a la solicitud de rectificación de error material antes señalada, al amparo de lo establecido en el articulo 210° del Texto Único Ordenado de la Ley del Procedimiento Administrativo General...; se le devuelve el documento a) de la referencia, así como el documento ingresado en fecha 24.11.2017, mediante el cual la empresa CH Mamacocha reiteró que se rectifique el error material antes señalado, acompañados de una copia fedateada del expediente administrativo con CUT 185300-2017 que dio origen a la Resolución Directoral N° 1928-2017-ANA/AAA I C-O.*

1158. On 24 January 2018, the Water Tribunal rejected the request for nullity of the CWA.[1321]

1159. On 25 January 2018, the AAA approved Second Claimant's request for rectification of the CWA.[1322]

(i) Legitimate Expectations

1160. Claimants argue that First Claimant reasonably expected that the AAA would adhere to a 30 business day TUPA review period, which was amended to 20 business days in December 2016.[1323] The AAA's failure to adhere to the required period, in their view: (i)

1320 **R-141**, *Memorándum No. 2121-2017-ANA-TNRCH de ANA (R. Dalí) a la Autoridad Administrativa de Agua (A. Osorio)*, 20 December 2017.

1321 **C-126**, *Resolución No. 053-2018-ANA/TNRCH*, 24 January 2018, p. 1.

1322 **HKA-035**, *Resolución Directoral Nro. 151-2018-ANA/AAA*, 25 January 2018, p. 5.

1323 Memorial ¶¶ 321, 324; Reply ¶ 199.

further delayed Second Claimant's ability to close on its financing obligations; and (ii) was a material cause of the eventual impossibility and termination of the Mamacocha Project. For Claimants, the issuance of a defective permit by AAA also deprived First Claimant of its legitimate expectation derived from the TUPA regulations that the permitting authorities would issue permits that are valid and free from defects.[1324]

1161. Respondent argues that the delays in the CWA process were largely due to deficiencies in Second Claimant's application and the nullity motion filed by private citizens.[1325] It further submits that Claimants were already aware that there could be delays in the administrative process, including in relation to the AAA, due to delays that had already occurred before signing the RER Contract.[1326] Respondent also disputes an expectation that the permit would be free from defects, citing the existence of an established procedure for rectifying errors as evidence against a standard of perfection.[1327]

1162. The Tribunal finds in favour of Respondent on the reasonability of Claimants' expectations, in particular regarding the issuance of an error-free permit. The FET standard does not operate as a guarantee of error-free administrative decisions by government authorities. Importantly, in the present case, the permit in question was rectified following Second Claimant's request.

1163. Nor does the FET standard guarantee strict compliance by authorities with deadlines for processing permitting applications. While the legal frameworks and deadlines therein are relevant to an investor's expectations, it is necessary to examine the circumstances of a specific case to determine what is reasonable and when those reasonable expectations have been violated. Not every administrative deadline exceeded will be conduct which is "arbitrary, grossly unfair, unjust or idiosyncratic" as required to establish a breach of the FET standard (see ¶ 1019 above).

1324 Memorial ¶ 324.

1325 Counter-Memorial ¶ 711; R-PHB ¶¶ 41-42.

1326 Counter-Memorial ¶ 712.

1327 Counter-Memorial ¶ 714.

1164. In the present case, Claimants' account that the AAA "exceeded its review deadlines" by more than five months omits at least two occasions on which Second Claimant itself requested an extension of time for providing information that had been requested, first by 30 days,[1328] followed by a request for suspension of the calculation period altogether (see ¶ 1147 above).[1329]

1165. For Claimants, the evaluation for the CWA should have been straightforward, and AAA's "constant requests for further information" were not necessary and were pretextual grounds to delay a decision.[1330] Respondent argues that the requests for further information were necesary due to omissions and defects in the application, and Second Claimant was late to provide the addditional information.[1331]

1166. The Tribunal rejects Claimants' characterisation that the AAA's requests for information were pretexts for delay, there being no basis for such a finding in the materials put before the Tribunal.

1167. Respondent acknowledges that the originally-granted CWA was defective, contending that these were "*errores inocentes.*"[1332] Claimants have not asserted that the errors were deliberate. They argue that it is not necessary for the Tribunal to determine whether the errors were a reflection of administrative negligence or intentional sabotage, as in either case they are a breach of AAA's responsibility to approve permit applications diligently and within the timing of administrative regulations.[1333] The Tribunal has already found First Claimant's expectations in this respect to exceed what is reasonably expected by an investor for treatment under the FET standard. Aside from exceeding statutory time limits, it has not been established that Respondent treated Claimants unfairly or failed to follow applicable procedures in the course of the CWA permitting process.

1328 Memorial ¶ 322; **R-045**, *Carta de HLA (C. Diez) a la Autoridad Nacional del Agua (A. Osorio)*, 7 February 2017.

1329 **R-047**, *Carta de HLA (C. Diez) a la Autoridad Nacional del Agua (A. Osorio)*, 14 February 2017.

1330 Reply ¶ 202.

1331 Counter-Memorial ¶¶ 330-332.

1332 Rejoinder ¶ 228.

1333 Reply ¶ 203.

1168. In addition, the record shows that for almost the entire duration that Second Claimant's application for rectification of the CWA was pending (from 18 July 2017 to January 2018), Respondent's authorities were addressing an application for nullity against Second Claimant's CWA brought by private citizens (from 11 August 2017 to 24 January 2018) (see ¶¶ 1151, 1153, 1158, 1159 above).

1169. Respondent submits that due to the application for nullity, the AAA was obliged to refer the administrative file to the Water Tribunal and it was legally impossible to accept the request for rectification while the file was transferred.[1334] Claimants dispute that the AAA was prevented from issuing the CWA while it was under challenge by a private third party, and submit that there is no evidence of any injunction to that effect.[1335] Claimants further dispute Respondent's submission that while the administrative file was with the Water Tribunal, the AAA was prevented from issuing a decision on the application for rectification.[1336]

1170. The Tribunal does not consider it necessary to decide whether the AAA was legally prevented from deciding on Second Claimant's application for reconsideration while the application for nullity was pending, because the failure to decide on Second Claimant's application for reconsideration while the application for nullity was pending would not meet the standard for a breach of FET in either scenario. The Tribunal notes, however, that contemporaneous correspondence from the AAA to the Water Tribunal does refer to the AAA having lost competence to handle that matter ("*...en tal sentido al haber perdido competencia para emitir un pronunciamiento se remite para la prosecución del trámite...*") (see ¶ 1156 above).

1334 Counter-Memorial ¶ 337; *citing*, *inter alia*, **R-058**, *Oficio No. 2604-2017-ANA/AAA I C-O de la Autoridad Nacional del Agua (V. Manuel) al Tribunal Nacional de Resolución de Controversia Hídricas (J. Aguilar)*, 12 September 2017; **MQ-002**, *Ley No. 27444, Ley del Procedimiento Administrativo General*, 1 October 2008, Arts. 202.1-202.2: "*En cualquiera de los casos enumerados en el Artículo 10, puede declararse de oficio la nulidad de los actos administrativos, aun cuando hayan quedado firmes, siempre que agravien el interés público... La nulidad de oficio solo puede ser declarada por el funcionario jerárquico superior al que expidió el acto que se invalida...*"

1335 Reply ¶ 205.

1336 Reply ¶ 205. *See* Counter-Memorial ¶ 337.

1171. In all the circumstances of the present case, in which Respondent's authorities: (i) initially denied the CWA; (ii) upon application by Second Claimant, revised the initial determination and granted the CWA; and (iii) subsequently granted Second Claimant's request for rectification of the CWA, immediately after disposing of a challenge to the permit by private citizens, the Tribunal finds that Respondent's conduct does not rise to the threshold of constituting a breach of FET for failure to protect legitimate expectations. Crucially, the permit was granted and rectified.

1172. For these reasons, the Tribunal does not find the prior arbitral decisions cited by Claimants to be analogous to, or be instructive for, the present case.[1337]

1173. Claimants further submit that if the AAA exceeded its review period, Second Claimant had the legitimate expectation that MINEM would issue an extension to the RER Contract such as those issued in Addenda 1-2, which "became the course of dealing" between Second Claimant and Respondent under the RER Contract.[1338] The Tribunal does not consider this expectation to be a reasonable one, and refers to its findings above on MINEM's role under the RER Contract in relation to permitting (see ¶¶ 663-677 above).

1174. Having rejected Claimants' arguments about the reasonability of First Claimant's expectations in relation to the CWA and finding no breach of FET in that regard, the Tribunal does not consider it necessary to enter into further consideration of the arguments made about whether Claimants were delayed in filing the CWA application, whether the application was flawed, or whether the delayed granting of the CWA actually prevented Claimants from achieving financial closing or Actual COS.[1339]

1337 *See* Memorial ¶ 325; *citing* **CL-020**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; Memorial ¶ 326; *citing* **CL-062**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017.

1338 Reply ¶ 199.

1339 *See*, *inter alia*, Counter-Memorial ¶¶ 327-330, 341-356; Reply ¶¶ 198, 200-201, 207-211; Rejoinder ¶¶ 238-246.

(ii) Transparency, Arbitrariness, Good Faith

1175. With respect to First Claimant's TPA claims, Claimants also submit that Respondent's conduct in respect to the CWA lacked transparency,[1340] was arbitrary,[1341] and lacked good faith.[1342]

1176. The Tribunal is not persuaded that the circumstances around the CWA meet the threshold for a breach of FET on any of the grounds invoked by First Claimant.

1177. In relation to transparency, the Tribunal recalls its findings above with respect to the role of transparency in FET (see ¶ 1024 above).

1178. The present circumstances are not ones which the Tribunal finds to reflect a lack of transparency arising to a breach of FET, for example where there was a complete lack of transparency in an administrative process or a failure to ensure that the legal framework is readily apparent and that any decision affecting the investor can be traced to that legal framework (see ¶ 1024 above). Claimants assert that they were not kept fully informed of the status of the CWA, in the sense that their requests for updates were faced with administrative silence.[1343] However, based on the record before it, the Tribunal is able to trace the administrative procedure and the legal framework within which it was made. To the extent that Claimants were not made aware at all times of the status of the proceedings before the Water Tribunal brought by private citizens, the Tribunal does not consider this to be conduct of the necessary seriousness to meet the high threshold for a breach of the FET standard (see ¶¶ 1147-1159 above).

1179. In addition, Claimants' assertion in support of the alleged lack of transparency that "every measure that AAA took was ultimately reversed by ANA"[1344] is not an accurate representation of the record. Claimants' account is that following the initial rejection of the CWA in May 2017, "upon appeal", the central government's water authority, the ANA

1340 Memorial ¶ 327.
1341 Memorial ¶ 330.
1342 Memorial ¶ 332.
1343 Reply ¶ 558.
1344 Memorial ¶ 327.

"sided with CHM, rejected AAA's baseless challenge, and ordered AAA to reverse its decision and grant the permit."[1345] Respondent disputes this account, asserting that the ANA never intervened to order that the CWA be granted.[1346]

1180. The Tribunal is unable to find support for Claimants' allegation based on the evidence in the record. Pursuant to the documents on record, Second Claimant's application for reconsideration was submitted to, and answered by, the AAA and not the ANA.[1347] Even the evidence of Mr. Bartrina relied on by Claimants in support of this assertion does not state that the ANA ordered the AAA to reverse its decision and grant the permit. The relevant evidence of Mr. Bartina is that Second Claimant met with the ANA, which "agreed that AAA's rejection of our permit request was unfounded and recommended that we file a motion for reconsideration."[1348] That application was accordingly filed with the AAA, entailed further communication with the AAA, and was granted by the AAA.[1349]

1181. Claimants further submit that in December 2017, the Water Tribunal ordered the AAA to reissue the permit without defects.[1350] Respondent denies that the Water Tribunal ordered AAA to reissue the permit without its defects.[1351]

1182. In support of their assertion that the Water Tribunal ordered the AAA to reissue the permit without defects, Claimants also rely on the evidence of Mr. Bartrina.[1352] Mr. Bartrina, in turn, references an email from Mr. Sillen to Mr. Jacobson and others (copying Mr. Bartrina) dated 22 December 2017. The email contains updates concerning a number

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1345 Memorial ¶ 107; *citing* Bartrina First Statement ¶ 65.

1346 Counter-Memorial ¶ 333.

1347 **R-053**, *Recurso de Reconsideración*, 29 May 2017; **C-122**, *Resolución Directoral Nro. 1928-2017-ANA/AAA I C-O*, 5 July 2017.

1348 Bartrina First Statement ¶ 65.

1349 **R-054**, *Carta de HLA (C. Diez) a la Autoridad Administrativa del Agua (I. Martinez)*, 3 July 2017; **R-053**, *Recurso de Reconsideración*, 29 May 2017; **C-122**, *Resolución Directoral Nro. 1928-2017-ANA/AAA I C-O*, 5 July 2017.

1350 Memorial ¶ 108; *citing* Bartrina First Statement ¶ 70. *See also* Memorial ¶ 330.

1351 Counter-Memorial ¶ 340.

1352 Memorial ¶ 108; *citing* Bartrina First Statement ¶ 70, which states: "…On December 20, 2017, the ANA Water Court administrative judge issued a ruling that acknowledged that the permit we had received was materially flawed and ordered AAA to issue a new permit."

of ongoing matters related to the Project and associated legal proceedings. One of the items provides as follows:[1353]

> As you have noted from Carlos' email, the files are now back to AAA from the water tribunal with an express request to resolve the material defects in the resolution for the works authorization. Julian Li will follow up with the general manager, Mr. Osorio, and we may have more information in the coming week provided that there is an opportunity to speak to Mr. Osorio[.]

1183. The Tribunal is unable to identify the "express request" from the Water Tribunal referred to by Mr. Sillen, whether in December 2017 or otherwise, by which the Water Tribunal ordered the AAA to reissue the permit. The evidence on file in this arbitration shows an internal AAA report in August 2017 recommending that the permit be revised as Second Claimant had requested, and that this reconsideration was ultimately granted.[1354]

1184. For the same reasons as those outlined at ¶¶ 1162-1171 and 1179-1183, the Tribunal also finds that Respondent's handling of the CWA permit was not arbitrary, and that Claimants' description of the events does not correspond to the evidence on record.

1185. The Tribunal likewise rejects the assertion that Respondent's conduct in relation to the CWA was in bad faith or part of a discriminatory effort to kill the Project.[1355] There is insufficient basis on the record to support Claimants' arguments that the real reason for intransigence with respect to the permit was due to the RGA Lawsuit,[1356] that the initial denial of the CWA in May 2017 was premised on a "bogus claim",[1357] or that the AAA used its licensing authority to prevent the Project from moving forward.[1358]

1353 **C-124**, Email from S. Sillen to M. Jacobson, et al., 22 December 2017.

1354 **R-088**, *Informe Técnico No. 062-2017-ANA-AAA I C-O*, 11 August 2017, p. 2; **HKA-035**, *Resolución Directoral Nro. 151-2018-ANA/AAA*, 25 January 2018.

1355 Memorial ¶ 332; Reply ¶ 559.

1356 Memorial ¶ 332. *See also* Bartrina First Statement ¶ 67; Bartrina Second Statement ¶ 55: "…in late 2017, we learned through members of our team that…AAA's then-manager, was reluctant to correct the defective [CWA] Permit because of the pending RGA Lawsuit."

1357 Reply ¶ 559. *See also* Bartrina First Statement ¶ 64.

1358 Memorial ¶ 332.

d. Commencement of the Lima Arbitration

1186. Claimants submit that Respondent breached the FET standard when MINEM commenced the Lima Arbitration on 27 December 2018.[1359] Respondent denies this ground of First Claimant's claim.[1360]

(i) Implications of Findings under the RER Contract

1187. The Tribunal notes its finding in relation to the RER Contract that MINEM did not breach the RER Contract by initiating the Lima Arbitration (see ¶ 884 above). Specifically, the Tribunal held that the filing of the Lima Arbitration was "a legitimate exercise of the possibility for domestic arbitration foreseen in the RER Contract, and an option which Claimants were aware of" (see ¶ 882 above).

1188. The Tribunal further recalls Tribunal Question 12 to the Parties (also extracted at ¶ 570 above), as follows:

> Assuming without admitting the jurisdiction of the Arbitral Tribunal over Claimants' claims under the Treaty and the RER Contract, should the Arbitral Tribunal consider and decide first on the contractual claims of Second Claimant?
>
> (i) If so, what is the relevance, if any, of such considerations and decisions on the BIT claims of Latam Hydro?
>
> (ii) Conversely, if the BIT claims are decided first, what is the relevance, if any, of the decisions on the BIT claims for the contractual claims of Second Claimant?

1189. Claimants argue that these two claims are "independent branches or approaches to liability" and their preference is for the Tribunal "to decide both in the interests of justice and a complete resolution of the dispute."[1361]

1190. Respondent submits that if the Tribunal concludes that MINEM did not violate the RER Contract, then First Claimant's treaty claims on this ground must fail.[1362] Respondent

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1359 Memorial ¶ 334; Reply ¶ 560.

1360 Counter-Memorial ¶ 731; Rejoinder ¶ 723.

1361 Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1970:15-22.

1362 Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2090:13-18.

further submits that for any of First Claimant's claims under the TPA to succeed, it needs to prove that Respondent violated the RER Contract, acting in its sovereign capacity, and in breach of the applicable TPA provisions.[1363]

1191. The Tribunal agrees with Claimants that Second Claimant's claims under the RER Contract and First Claimant's claims under the TPA have an independent legal basis, and are decided as such by the Tribunal. In this Award, the Tribunal has first set out its decisions in relation to the RER Contract before turning to the TPA. However, the existence of the RER Contract, the contractual relationship between Second Claimant and Respondent, and the Tribunal's determinations in relation thereto has relevance for the Tribunal's decisions on First Claimant's claims under the TPA, beyond the overlapping factual scenario.

1192. In the present case, the Tribunal has already reached a number of determinations under the RER Contract which have entailed the rejection of Second Claimant's contractual claims. The question is therefore not whether a breach of a contract may in addition constitute a breach of a treaty. The question is rather whether, in the absence of a breach of contract, Respondent can be held to violate the TPA in relation to the same conduct.

1193. Provided that the conduct in question is carried out under the RER Contract (and not independently of the RER Contract as an exercise of sovereign authority), the Tribunal agrees with Respondent that if a specific ground of Second Claimant's contractual claim has failed, the corresponding claim for breach of the TPA based on the same circumstances falls away. If the Tribunal has held that Respondent acted within the bounds of its contractual rights and obligations, that same conduct cannot meet the threshold of unfair or inequitable treatment contrary to the FET standard under the TPA.

1194. This echoes a finding of the arbitral tribunal in *Ríos v. Chile*:[1364]

> *...para comprometer la responsabilidad internacional del Estado por la violación de un tratado de inversión el Estado debe haber actuado en ejercicio de prerrogativas soberanas, y no como parte en una relación contractual. La*

[1363] Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2091:6-13. *See also* Counter-Memorial ¶¶ 783-786.

[1364] **RL-046**, *Carlos Ríos y Francisco Ríos c. República de Chile*, Caso CIADI No. ARB/17/16, Laudo, 11 January 2021, ¶ 259.

razón es que, como regla general, los estándares sustantivos de los tratados de inversión tienen por objeto proteger a los inversionistas de riesgos soberanos y no riesgos comerciales.

1195. As further stated in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[t]he breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant..."[1365]

1196. In the present case, Respondent was in a contractual relationship with Second Claimant, which relationship was governed by the terms of the RER Contract and applicable law. The Tribunal does not consider that Respondent entered into the RER Contract in its sovereign capacity.

1197. It is not excluded that in specific circumstances, a sovereign may be held in breach of a treaty for conduct that purportedly took place under a contractual relationship. That would typically be the case in the situation of an appropriately worded umbrella clause. While other examples of responsibility under a treaty for contractual conduct are very limited, in the case of *Crystallex v. Venezuela* relied on by Claimants,[1366] the arbitral tribunal found that while the disputed measure was a termination of a contract for an alleged contractual ground, "the true nature of the act...was one of exercise of sovereign authority."[1367] In order to give due consideration to this possibility, the Tribunal will consider whether each disputed measure in question was a contractual one or an exercise of sovereign authority by Respondent. Subject to that assessment, where the conduct in question is undertaken by Respondent in the context of the contractual relationship under the RER Contract, it will ordinarily be in the capacity of contracting party to the RER Contract.

1365 **CL-072**, Articles on State Responsibility for Internationally Wrongful Acts with Commentary, Art. 4, ¶ 6.

1366 Reply ¶ 605; *quoting* **CL-026**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 700.

1367 **CL-026**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 700.

1198. The Tribunal will therefore examine the nature of the conduct being challenged, as well as the Tribunal's findings in relation to the RER Contract, to determine the implications for the TPA claims on a case by case basis.

(ii) Application of the TPA

1199. Claimants claim that, with the initiation of the Lima Arbitration, Respondent failed to accord them FET by, *inter alia*: (i) depriving First Claimant of its legitimate expectation that the extensions under Addenda 1 and 2 were properly executed;[1368] (ii) depriving First Claimant of its legitimate expectation that disputes valued at more than USD 20 million would be arbitrated at ICSID;[1369] (iii) putting the Project in "contractual limbo" by attempting to nullify Addenda 1 and 2;[1370] (iv) relying on arbitrary reasons as a basis for the Lima Arbitration;[1371] and (v) commencing the Lima Arbitration while settlement negotations were ongoing, contrary to good faith.[1372]

1200. The Lima Arbitration was commenced by Respondent as contractual counterparty to the RER Contract.

1201. According to Claimants, the commencement of the Lima Arbitration was part of a "sudden and complete reversal" of Respondent's legal approaches to the Mamacocha Project and a "classic illustration of regulatory opportunism."[1373] In their view, Respondent's measures were taken through the exercise of sovereign authority as public administrative acts.[1374]

1202. The Tribunal is not persuaded that this is the case. On the basis of the evidence before it, the Tribunal finds that the true nature of the act of commencing the Lima Arbitration was as a contractual party and not as a sovereign. The arbitration proceedings were initiated, carried out and decided upon within the framework of the RER Contract. The Tribunal

1368 Memorial ¶ 337.
1369 Memorial ¶ 338.
1370 Memorial ¶ 340.
1371 Memorial ¶¶ 342-343.
1372 Memorial ¶ 344.
1373 Reply ¶216.
1374 C-PHB ¶ 24.

finds the assertion of a State policy to destroy the Mamacocha Project to be unsubstantiated, either in general or specifically by way of the Lima Arbitration.

1203. As a matter of contract, the Tribunal has found that the Lima Arbitration was "a legitimate exercise of the possibility for domestic arbitration foreseen in the RER Contract, and an option which Claimants were aware of" (see ¶ 882 above). Also relevant are other findings made in relation to the RER Contract, including that: (i) the initiation of the Lima Arbitration was not a failure to act in good faith as required by Article 1362 of the Peruvian Civil Code (see ¶ 917 above); (ii) commencement of the Lima Arbitration was not a breach of the *actos propios* doctrine, since there was a valid reason to pursue the arbitration on the basis that MINEM believed Addendum 2 to be issued contrary to the mandatory provisions of the RER Regulations, the *Bases Consolidadas* and the RER Contract (see ¶ 931 above); and (iii) while it would have been courteous to inform Claimants of the claim to be filed in the Lima Arbitration, the Tribunal does not consider the obligation of good faith, or any specific provision of the agreement between Claimants and the Special Commission in force at the time, to require Respondent to give Claimants advance warning of the filing of those claims (see ¶ 916 above). In the Tribunal's view, these findings are inconsistent with a conclusion that Respondent failed to accord fair and equitable treatment to Claimants on the grounds put forward.

1204. The Tribunal further notes its acknowledgement at ¶¶ 823 and 904-905 above regarding the difficulty posed by MINEM's conduct in entering into Addenda 1 and especially Addenda 2, and subsequently disavowing those Addenda, as a matter of good faith and consistency in interpretation of the RER Contract. This relates, in particular, to the extension granted in Addendum 2 and the views expressed by MINEM in the Sosa Report and the Ministerial Resolutions accompanying Addenda 1 and 2 mentioned at ¶ 815 above, i.e.: (i) the extension by Addendum 2 of the Actual COS to a date falling more than two years beyond the Reference COS; (ii) the meaning of "for any reason" in Clause 8.4 of the RER Contract; and (iii) the indication in the Ministerial Resolution No. 559-2016-MEM/DM that the Actual COS "does not constitute an essential term."

1205. However, as noted, this difficulty does not give the Tribunal liberty to rewrite the agreement reached in the RER Contract, or to disregard the binding provisions of the RER Regulations to the effect that the Actual COS was required to take place by a date two years beyond the Reference COS, and that the Termination Date of the Contract could not be moved beyond 31 December 2036. Respondent's conduct in initiating the Lima Arbitration and challenging Addenda 1 and 2 was loyal to and consistent with the applicable binding legal regime, which is equally relevant to assessing the good faith of Respondent's actions. While lacking in full consistency, Respondent's conduct in challenging those Addenda by way of the Lima Arbitration therefore does not rise to the level of treatment contrary to the FET standard.

1206. In light of these findings and all of the conclusions reached in relation to the RER Contract, the Tribunal considers that MINEM's initiation of the Lima Arbitration was not lacking in transparency, arbitrary, lacking in good faith or contrary to First Claimant's legitimate expectations. The Tribunal therefore rejects First Claimant's claim for breach of the FET standard on this ground.

1207. Claimants have further raised an argument based on the customary international law principle of estoppel.[1375] According to Claimants, the principle of estoppel obliges a State to be consistent with regard to a factual or legal situation.[1376] In their view, this prevents Respondent from contending that Addenda 1 and 2 of the RER Contract are invalid, because Respondent, through its representative, executed the Addenda, creating an expectation of validity.[1377]

1208. In response, Respondent submits that: (i) Claimants' estoppel argument is inadmissible as it was only made in the Reply, which should be confined to responding to the first round of submissions;[1378] (ii) by a plain reading of TPA Article 10.5 (see ¶ 1007 above), it does not include the principle of estoppel;[1379] and (iii) the customary international law

1375 *See* Reply ¶¶ 642 *et seq*.
1376 Reply ¶ 643; *quoting* Schreuer Report ¶ 42.
1377 Reply ¶ 650.
1378 Rejoinder ¶¶ 903-904.
1379 Rejoinder ¶ 909.

requirements to establish estoppel are not met because the Peruvian State did not benefit from the extensions set forth in Addenda 1 and 2, and those Addenda were adopted in good faith.[1380]

1209. Claimants submit that estoppel applies in circumstances where there is a statement or representation made by one party to another and reliance upon it by that party to its detriment or to the advantage of the party making it.[1381] Respondent's criteria are not materially different, i.e., that: (i) there was a clear and unequivocal statement of fact; (ii) the statement must have been voluntary, unequivocal and authorised; (iii) the party receiving the statement has acted to its detriment on the basis of the statement and/or that the party that formulated the declaration has benefited.[1382]

1210. Both Parties further emphasise the connections between estoppel and good faith.[1383]

1211. Even if Claimants' estoppel argument is considered admissible, the Tribunal does not find it to be successfully made out. In light of the Tribunal's other conclusions reached in this Award with respect to the legal regime applicable to Addenda 1 and 2, good faith considerations under the RER Contract, the denial of the Third Extension Request, and the initiation of the Lima Arbitration, the Tribunal is not persuaded that Respondent should be estopped from making "various arguments in this arbitration concerning the alleged invalidity of Addenda 1 and 2," as Claimants request.[1384] Claimants' mere assertion that the Addenda "induced Claimants to invest further" in the Project is further insufficient to establish an estoppel. Moreover, it is unclear that the estoppel sought by Claimants would be determinative for the conclusions reached in relation to Claimants' claims.

1380 Rejoinder ¶ 916.

1381 Reply ¶ 644; *quoting* **CL-238**, *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application to Intervene*, Judgment, ICJ Reports 1990, 13 September 1990.

1382 Rejoinder ¶ 913; *citing* **RL-149**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶ 111.

1383 Reply ¶ 646; *quoting* **CL-240**, I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L.Q. 468 (1958), pp. 468-469; Rejoinder ¶ 914; *quoting* **CL-211**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, ¶ 483.

1384 Reply ¶ 651.

e. Denial of CH Mamacocha's Third Extension Request

1212. Claimants submit that Respondent breached the FET standard when it denied Second Claimant's Third Extension Request under the RER Contract.[1385] Claimants argue that this measure denied First Claimant's legitimate expectations, lacked transparency, was arbitrary, and lacked good faith.[1386] Respondent denies a breach of the FET standard on this ground.[1387]

1213. In relation to the denial of Second Claimant's Third Extension Request, the Tribunal made a number of findings under the RER Contract, including that the RER Contract contained no guaranteed 20-year term of validity in respect of the Guaranteed Revenue (see ¶ 725 above). In addition, the Tribunal held at ¶ 843:

> Respondent did not breach the RER Contract by rejecting Second Claimant's Third Extension Request. Neither the RER Contract nor Peruvian law provide an entitlement to an extension of the Actual COS or the Termination Date of the Contract or an obligation on Respondent to grant one. To the contrary, such an extension would have been inconsistent with the terms of the RER Contract and binding provisions of the RER Regulations.

1214. It follows from the Tribunal's findings on the denial of the Third Extension Request in relation to the RER Contract that this same denial is not a breach of the FET standard. The denial of the Third Extension Request was consistent with, and required by, the applicable legal regime at that time.

1215. According to Claimants, the denial of the Third Extension Request was part of a "sudden and complete reversal" of Respondent's legal approaches to the Mamacocha Project and a "classic illustration of regulatory opportunism."[1388] In their view, this measure was taken through the exercise of public authority. They argue that the governmental, rather than

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1385 Memorial ¶¶ 345-355; Reply ¶¶ 566-578.

1386 Memorial ¶¶ 347, 350, 352, 354.

1387 Counter-Memorial ¶¶ 742-755; Rejoinder ¶¶ 761-786.

1388 Reply ¶ 216. *See also* Memorial ¶ 352.

commercial, nature of the acts is evidenced by the fact that the Addenda to the RER Contract were approved through a series of government approvals and authorisations.[1389]

1216. The Tribunal is not persuaded that this is the case. On the basis of the evidence before it, the Tribunal finds that the true nature of the act of denying the Third Extension Request was as a contractual party and not as sovereign. The denial of the Third Extension Request (like the execution of the Addenda to the RER Contract) was carried out within the framework of the RER Contract. The fact that there are procedural and administrative formalities of contracting with a sovereign does not translate those contractual acts into governmental ones.

1217. In addition, the denial of the Third Extension Request was consistent with the law. Being consistent with the law, it was not an arbitrary decision without a rational decision-making process, as Claimants allege.[1390]

1218. Claimants have further not successfully established that the real reason for the denial of the Third Extension Request was because it was a politically advantageous way to avoid an over-supply crisis in the energy sector.[1391] Nor were MINEM's actions sovereign "government meddling" as alleged by Claimants.[1392]

1219. Claimants' reliance on the Statement of Reasons published by MINEM in relation to the Draft Supreme Decree is likewise misplaced.[1393] The Draft Supreme Decree will be further discussed at ¶¶ 1225-1227 below. The Statement of Reasons does not affirm an obligation under Peruvian and international law to grant extensions to projects to rectify government interferences. It merely includes a general objective to "[a]void the diversion of resources in national and international arbitrations" and "reduce the liability of the entities involved."[1394] The fact that Respondent prepared the Draft Supreme Decree but following public consultation ultimately did not proceed with the legislation, or the fact that the

1389 C-PHB ¶ 24.

1390 Memorial ¶ 353.

1391 Memorial ¶ 354.

1392 *See* Memorial ¶ 352.

1393 Memorial ¶ 350; Reply ¶ 574.

1394 **C-018**, Proposed Supreme Decree No. 453-2018-MEM/DM, 11 November 2018, p. 5.

Statement of Reasons included these statements but the extension was not granted is not a *volte face* on risk allocation or a flip-flop on the extension.[1395] Claimants appear to invoke the Statement of Reasons as a public statement of MINEM's position rather than the Draft Supreme Decree legislation itself.[1396] In either case, the denial of the Third Extension Request was not unfair or inequitable treatment contrary to the FET standard.

1220. For the above reasons, the denial of the Third Extension Request was not a violation of First Claimant's legitimate expectations, lacking in transparency, arbitrary, or lacking in good faith in a manner which is grossly unfair, unjust or idiosyncratic, or otherwise contrary to the standard set out at ¶¶ 1013-1014 and 1019 above.

f. Circumstances as a Whole

1221. In addition to examining each ground of First Claimant's FET claim individually, the Tribunal has considered the circumstances as a whole as presented to the Tribunal, including all of the alleged individual bases of the FET claim. Taken together, the Tribunal maintains its conclusion that Respondent's treatment of Claimants was not contrary to the FET standard of the TPA.

1222. While Claimants faced several obstacles in the course of the Mamacocha Project, these can fundamentally be traced back to constraints imposed by mandatory provisions of law relevant to the deadlines under the RER Contract. These deadlines were agreed to by Second Claimant at the relevant time, in full knowledge of the potential for delays and the "hard stop" set out in Clause 8.4 thereof.

1223. As the record demonstrates, over the course of the Mamacocha Project, MINEM and the Special Commission made efforts to support Claimants in certain of the challenges they faced. Ultimately, the efforts were not successful. The Tribunal does not find Claimants' characterisation of Respondent's conduct as a "pivot" in late 2018 from its "long-held interpretation" of the RER Contract to measures which killed the Project to add to the

[1395] Memorial ¶ 350; Reply ¶ 574.

[1396] *See* Reply ¶ 574.

analysis.[1397] Even after December 2018, MINEM continued to support the legality of Second Claimant's environmental permits in the Amparo Action, even if those submissions are not aligned with the position taken by Respondent in this arbitration (see ¶¶ 135-136 above).[1398]

1224. While the Tribunal has expressed its concerns with respect to certain aspects of Respondent's conduct in the course of this Award, among other things by entering into and subsequently disavowing Addenda 1 and 2, Claimants' attempt to link the various obstacles suffered by the Mamacocha Project as a concerted or deliberate plan by Respondent to destroy the Project is not borne out by the evidence on record.

1225. The Tribunal further wishes to note that while Claimants have not invoked the circumstances around the non-passage of the Draft Supreme Decree as a basis for First Claimant's FET claim, in other parts of their submissions Claimants have referred to the Draft Supreme Decree as forming part of Respondent's alleged "multi-prong litigation strategy to unwind the RER projects,"[1399] and argue that it was part of a "sudden and complete reversal of [Respondent's] legal approaches to the Mamacocha Project" and "a classic illustration of regulatory opportunism."[1400] According to Claimants, the Draft

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1397 *See* **CD-06**, Claimants' Closing Presentation, slide 95; C-PHB ¶ 10; C-PHB, Annotated Index, ¶¶ 11-12.

1398 *See* Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2115:15-2116:8; R-PHB ¶¶ 12-14; Claimants' Closing Statement, Transcript (Day 9), 18 March 2022, 1969:5-12. *See also* Tribunal Question 18A:

"The Tribunal understands that the Amparo Action was initiated on 13 September 2016 by a private citizen, P. J. Begazo López, against various authorities of Respondent. In those proceedings, Claimants argue that some of the defendant authorities took positions in support of the validity of the environmental permits on which Claimants rely (*see* Reply ¶ 293), and that authorities of Respondent continued to take that position on appeal, but were ultimately overruled in 2020 and 2021 (*see* **CD-01**, Claimants' Opening Presentation, Slides 48-49, **C-305/R-070**, **C-295**).

On the other hand, the Tribunal understands that Respondent's authorities: (i) on 27 December 2018, decided not to proceed with the draft Supreme Decree to amend the RER Regulations (**C-175/R-104**); (ii) on 27 December 2018, commenced the "Lima Arbitration" against Second Claimant, *inter alia*, seeking the annulment of Addenda 1 and 2 to the RER Contract (**C-097**); and (iii) on 31 December 2018, rejected Second Claimant's request for an extension under the RER Contract to the COS date and the Termination Date (**MQ-026**).

Is there a difference in position taken by Respondent's authorities with respect to the above? If so, what is the significance, if any, for this arbitration?"

1399 Reply ¶ 14. *See also* Reply ¶ 224.

1400 Reply ¶ 216. *See also* Reply ¶ 234.

Supreme Decree was further not necessary because the existing legal regulations allowed MINEM to grant extensions, so it would only have "codified what was already accepted legal jurisprudence."[1401]

1226. Respondent opposes Claimants' characterisation of the Draft Supreme Decree, denying that there was any assurance that it would be approved.[1402] According to Respondent, following public consultation, MINEM concluded that the Draft Supreme Decree would have unlawfully affected the rights of and legal certainty for third parties, by retroactively modifying the premises on which investors had made a decision whether or not to participate in the Third Auction.[1403]

1227. The Tribunal has difficulty with Claimants' position that, on the one hand, the Draft Supreme Decree was unnecessary while, on the other hand, relying on Respondent's alleged acknowledgement that it *was* a necessary amendment of the legal regime.[1404] In any event, the Tribunal does not accept that the non-passage of the Draft Supreme Decree was part of a strategy to destroy the Project. This legislative process came to a halt following a transparent process of public consultation[1405] and there is no evidence to support Claimants' contention that it was abandoned for political reasons.

(4) Conclusion on FET

1228. For the above reasons, the Tribunal finds that Respondent did not breach the FET standard of the TPA and rejects First Claimant's claims to that effect. The Tribunal accordingly denies Claimants' request for a declaration that Respondent has breached Article 10.5 of the TPA (see ¶ 236(a) above).

1401 Reply ¶ 234.

1402 Rejoinder ¶ 305.

1403 Rejoinder ¶¶ 307-308. *See also* Counter-Memorial ¶¶ 278-284; R-PHB ¶ 77.

1404 *See* Reply ¶ 215.

1405 *See* comments received in written submissions such as **R-108**, *Observaciones remitidas por Kallpa Generación S.A* and **R-133**, *Observaciones remitidas por Inland Energy, Registro No. 2874802*, 23 November 2018.

C. ALLEGED INDIRECT EXPROPRIATION UNDER TPA ARTICLE 10.7

1229. Claimants allege that Respondent indirectly expropriated First Claimant's rights in the Mamacocha Project, contrary to TPA Article 10.7.[1406] Specifically, Claimants submit that the Mamacocha Project was indirectly expropriated through three principal and interrelated measures, being: (i) the RGA Lawsuit; (ii) the denial of the Third Extension Request; and (iii) the Lima Arbitration.[1407]

1230. Alternatively, Claimants contend that Respondent's measures constituted an indirect expropriation of their investments in the form of a "creeping" expropriation, comprised of a series of seven measures which cumulatively impaired the value of the Project.[1408] These were: (i) the commencement of the RGA Lawsuit; (ii) the AEP's Criminal Investigation; (iii) the AAA's initial denial of Second Claimant's CWA; (iv) the AAA's issuance of a materially defective CWA; (v) the AEP's decision to formalise and continue the Criminal Proceedings, including naming Second Claimant's External Counsel as a suspect; (vi) MINEM's commencement of the Lima Arbitration; and (vii) MINEM's rejection of the Third Extension Request.[1409]

1231. Respondent denies that an expropriation of Claimants' investment took place. In its view, the alleged measures do not meet the required criteria of the TPA, there was no interconnection between the measures or a pattern that would constitute a composite act, and Claimants have failed to prove that each of the measures had an adverse impact on their investment.[1410]

1232. In order to decide upon the expropriation claim, the Tribunal will consider the applicable standard in Section (1) below. Section (2) contains the summary of the United States' NDP Submission on this issue and the Parties' comments thereon. Section (3) addresses the issue of interference with reasonable expectations, while Section (4) covers the character of the

1406 Reply ¶ 579.
1407 Reply ¶ 579.
1408 Reply ¶ 581.
1409 Reply ¶ 614.
1410 R-PHB ¶ 111.

government action. Section (5) concerns other aspects of indirect expropriation, and the Tribunal concludes this issue in Section (6).

(1) Applicable Standard

1233. The standard for expropriation under Article 10.7 of the TPA is set out at ¶ 1008 above. Claimants do not allege a direct expropriation of First Claimant's investments, but an indirect expropriation.[1411] Pursuant to Annex 10-B of the Treaty (see ¶ 1010 above), an indirect expropriation takes place where "an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." As such, whether under Claimants' primary or alternative arguments set out at ¶¶ 1229 and 1230 above, the relevant criteria of an indirect expropriation in Annex 10-B, paragraph 3 of the TPA apply (see ¶ 1010 above).

1234. While they have differing interpretations of the criteria, the Parties are in agreement that a determination of whether an indirect expropriation has taken place under Annex 10-B of the TPA involves analysing, *inter alia*: (i) the economic impact of the government action; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.[1412]

1235. These three criteria are drawn from paragraph 3(a) of TPA Annex 10-B, which specifies that the determination of whether an indirect expropriation has taken place "requires" an "inquiry that considers, among other factors," these three elements (see ¶ 1010 above). The mandatory language of "requires" means that all three factors must be taken into account, without dictating the relative weight to be attributed to each of them. As per paragraph 3(a)(i) of Annex 10-B, however, "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred." Taking into account that paragraph 3 also indicates that the inquiry is to be "case-by-case" and "fact-based", it follows that it is for the Tribunal to make its determination in all the circumstances, as long as these three

1411 Memorial ¶ 361.

1412 Memorial ¶ 361; Counter-Memorial ¶ 767; Reply ¶ 588; Rejoinder ¶ 788.

factors are included in its assessment, and that the specification with respect to adverse economic effect is respected.

1236. In the following Section, the Tribunal will summarise the NDP Submission and comments thereon. Having reviewed the Parties' respective submissions on whether First Claimant's investments were indirectly expropriated,[1413] the Tribunal will thereafter consider the criteria (ii) and (iii) in ¶ 1234 above, before turning to determine other matters as appropriate.

(2) NDP Submission

a. The U.S. NDP Submission

1237. In its NDP Submission, the United States provided its interpretation regarding the relevant test for determining indirect expropriations (TPA Article 10.7).

1238. The United States refers to the relevant factors that an arbitral tribunal adjudicating a claim of indirect expropriation must consider, in its view, pursuant to Annex 10-B, paragraph 3(a) of the TPA: (i) the economic impact of the government action (*i.e.*, whether the measure in question "destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent"); (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations, which is linked to the regulatory situation at the time of the investment; and (iii) the character of the government actions.[1414]

1239. Moreover, the United States contends that the wording in Annex 10-B, paragraph 3(b) of the TPA that "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives" do not constitute indirect expropriations, should not be construed as an exception, but as additional guidance for tribunals to assess whether an indirect expropriation has occurred.[1415]

1413 *See* Memorial ¶¶ 359-382; Counter-Memorial ¶¶ 756-829; Reply ¶¶ 579-624; Rejoinder ¶¶ 787-862.

1414 NDP Submission ¶¶ 33-37.

1415 NDP Submission ¶ 37.

b. Claimants' Comments on the U.S. NDP Submission

1240. Claimants mention that the United States' observations regarding the expropriation provision of the TPA merely summarize its text and neither add nor detract from either Party's prior submissions.[1416]

c. Respondent's Comments on the U.S. NDP Submission

1241. Respondent contends that the United States agrees with it on the correct test that the Tribunal shall apply when assessing the existence of an expropriation under TPA Article 10.7. Respondent argues that, contrary to the "substantial deprivation" test invoked by Claimants, the NDP Submission confirms that, to prove an expropriation under the TPA, Claimants must establish that the government measures in question "destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such an extent and so restrictively as to support a conclusion that the property has been taken."[1417]

(3) Interference with Reasonable Expectations

1242. Paragraph 3(a)(ii) of Annex 10-B to the TPA provides that the determination of whether an action or series of actions constitutes an indirect expropriation requires a fact-based inquiry that considers "the extent to which the government action interferes with distinct, reasonable investment-backed expectations" (see ¶ 1010 above).

1243. According to Claimants, the assessment of reasonable expectations for the purposes of an expropriation claim under the TPA is "akin to legitimate expectations under FET."[1418] In Respondent's view, the applicable standard for reasonable expectations in the context of expropriation under the TPA is more demanding than the legitimate expectations under FET.[1419]

1244. The Tribunal does not consider it necessary to decide on whether the standard of reasonable expectations for the purpose of an expropriation claim under the TPA is more demanding

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1416 Claimants' NDP Observations ¶ 95.

1417 Respondent's NDP Observations ¶¶ 41-43.

1418 Memorial ¶ 362.

1419 Counter-Memorial ¶ 803; *citing* **RL-046**, *Carlos Ríos y Francisco Ríos c. República de Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, ¶ 258.

than the FET standard. Even taking the standard proposed by Claimants as a reference, the Tribunal has rejected First Claimant's claim that Respondent breached its legitimate expectations under the FET claim with respect to: (i) the RGA Lawsuit (see ¶¶ 1065-1066 above); (ii) the Criminal Investigation and Criminal Proceedings (see ¶ 1133 above); (iii) the CWA, including its initial denial and subsequent defective issuance (see ¶¶ 1171, 1173 above); (iv) the commencement of the Lima Arbitration (see ¶ 1206 above); and (v) the denial of the Third Extension Request (see ¶ 1220 above).

1245. These determinations of the Tribunal cover the circumstances invoked by First Claimant in both its primary and alternative arguments on indirect expropriation (see ¶¶ 1229 and 1230 above). As such, the Tribunal finds that the actions alleged by Claimants to constitute an indirect expropriation did not interfere with distinct, reasonable investment-backed expectations as provided by the TPA.

(4) Character of the Government Action

1246. Paragraph 3(a)(iii) of Annex 10-B to the TPA further provides that the determination of whether an action or series of actions constitutes an indirect expropriation requires a fact-based inquiry that considers "the character of the government action" (see ¶ 1010 above).

1247. In Claimants' view, this element is "akin to the discriminatory and good-faith components under the FET standard."[1420] For Respondent, on the other hand, this criterion refers to the requirement that a State may only be held responsible for the violation of an investment treaty if the State acted in exercise of its sovereign prerogatives and not as a contracting party.[1421] Claimants do not specifically dispute Respondent's assertion, rather arguing that the measures were plainly carried out in Respondent's capacity as a sovereign authority.[1422]

1248. First Claimant's claim for indirect expropriation fails under both perspectives of the character of the measures in question.

1420 Memorial ¶ 362.

1421 Counter-Memorial ¶ 783; Rejoinder ¶ 805; R-PHB ¶ 110.

1422 Reply ¶¶ 605-606.

1249. With respect to the commencement of the Lima Arbitration and the denial of the Third Extension Request, the Tribunal has determined at ¶¶ 1200-1203 and 1215-1218 above that the measures in question were undertaken by Respondent as contracting party to the RER Contract and not under the sovereign prerogative of Respondent. For that reason, these measures cannot be expropriatory.

1250. It should be noted that while Claimants contend that Respondent's argument "implicitly concedes that Peru executed the RER Contract in its sovereign capacity,"[1423] the Tribunal does not understand that to be the case. Respondent's argument is precisely the opposite, i.e., that the initiation of the Lima Arbitration and the rejection of the Third Extension Request were acts by Respondent, through MINEM, as contractual party and not an exercise of sovereign powers.[1424]

1251. In addition, the Tribunal has separately rejected First Claimant's claim that Respondent's conduct was arbitrary, discriminatory or lacking in good faith contrary to the FET standard of the TPA in respect of: (i) the RGA Lawsuit (see ¶¶ 1085, 1100 above); (ii) the Criminal Investigation and Criminal Proceedings (see ¶ 1143 above); and (iii) the CWA, including its initial denial and subsequent defective issuance (see ¶¶ 1178, 1184, 1185 above).

1252. For the same reasons, the Tribunal rejects Claimants' argument that those same measures were not *bona fide* government measures because they arbitrarily and discriminatorily targeted the Mamacocha Project.[1425] The same applies to the initiation of the Lima Arbitration and the denial of the Third Extension Request. These were contractual and not sovereign measures by nature, and the Tribunal has found that they did not breach the RER Contract, and did not breach the Peruvian Civil Code with respect to the obligation to act in good faith or otherwise. Accordingly, this conduct was also not arbitrary, discriminatory or lacking in good faith.

1423 Reply ¶ 604.

1424 *See* Rejoinder ¶ 807.

1425 *See* Reply ¶ 603.

(5) Other Aspects of Indirect Expropriation

1253. In light of the Tribunal's findings with respect to reasonable expectations under Annex 10-B of the TPA and the character of the government actions, the Tribunal does not consider any of the actions invoked by Claimants, whether taken individually or together, to constitute an indirect expropriation within the meaning of TPA Article 10.7 and Annex 10-B, whether understood as a single action or a "creeping expropriation" by a series of actions. As mentioned at ¶ 1235 above, under paragraph 3(a)(i) of Annex 10-B, "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred." It follows from the Tribunal's conclusions in relation to reasonable expectations and the character of the government actions that these factors do not support a determination of the existence of an indirect expropriation. In the circumstances, an adverse economic impact alone does not constitute an indirect expropriation.

1254. It is therefore unnecessary to give further consideration to the other aspects of indirect expropriation, such as the economic impact of the contested measures. The Tribunal will not enter into a detailed analysis of the Parties' other arguments in respect of those matters, which are also disputed. Specifically, the Tribunal makes no finding regarding whether the contested measures had sufficient adverse economic impact to meet the standard of indirect expropriation.

1255. In light of the Tribunal's conclusions, it is not necessary to consider whether any expropriation of First Claimant's investments complied with the requirements in TPA Article 10.7 regarding compensation, due process, etc., there being no expropriation in the present case.

(6) Conclusion on Expropriation

1256. In light of the above findings, the Tribunal rejects First Claimant's claim for indirect expropriation under the TPA. In doing so, the Tribunal wishes to emphasise that its findings are also a rejection of Claimants' narrative that each of the seven measures are interconnected events forming part of a "linked, cumulative effort to stop, stall and

eventually destroy the Project."[1426] While the Tribunal has expressed its concerns with respect to certain aspects of Respondent's conduct in the course of this Award, among other things by entering into and subsequently disavowing Addenda 1 and 2, as held at ¶ 1223 above, Claimants' attempt to link the various obstacles suffered by the Mamacocha Project as a concerted or deliberate plan by Respondent to destroy the Project is not borne out by the evidence on record.

1257. The Tribunal further notes that the non-passage of the Draft Supreme Decree was not invoked by Claimants as one of the seven measures forming part of the creeping expropriation. However, it is referred to by Claimants as one of the three measures in December 2018 that were part of a "litigation strategy by MINEM to end the economic viability of the Project." This alleged strategy comprised: (i) the revocation of the Draft Supreme Decree that would have provided a "lifeline" to the Project; (ii) the denial of the Third Extension Request; and (iii) the commencing of the Lima Arbitration.[1427]

1258. As already found by the Tribunal, the denial of the Third Extension Request and the commencement of the Lima Arbitration are both related to the constraints imposed by mandatory provisions of law relevant to the deadlines under the RER Contract. In line with its considerations at ¶ 1227 above, the Tribunal also dismisses Claimants' submission that the Draft Supreme Decree was abandoned for political reasons or reflected an intention to destroy the Project.

1259. Accordingly, the Tribunal rejects Claimants' request for a declaration that Respondent has breached TPA Article 10.7 with respect to First Claimant and its investments (see ¶ 235(a) above).

D. ALLEGED BREACH OF MFN CLAUSE UNDER TPA ARTICLE 10.4

1260. TPA Article 10.4 ("**MFN Clause**") sets out the TPA obligation to provide Most-Favoured Nation ("**MFN**") treatment to investors of another Party and covered investments (see ¶

[1426] Reply ¶ 623.
[1427] Reply ¶ 622.

1006 above). Claimants assert that Respondent breached this provision with respect to First Claimant and its investments.

1261. Section (1) below summarises the United States' NDP Submission and the Parties' comments thereon. Section (2) contains the Parties' positions on this issue. Section (3) sets out the Tribunal's analysis.

(1) NDP Submission

a. The U.S. NDP Submission

1262. In its NDP Submission, the United States provided its interpretation regarding the conditions for establishing a breach of the MFN Clause (TPA Article 10.4).

1263. In the United States' view, the claimant must prove that it or its investment: (i) were accorded "treatment"; (ii) were in "like circumstances" with other identified investors or investments; and (iii) the treatment received was "less favorable" than the one granted to those identified investors or investments − and that the measure at issue is not subject to the exceptions contained in Annex II of the TPA.[1428] Moreover, the treatment identified by a claimant must correspond to treatment actually being accorded with respect to an investor or investment of a non-TPA Party or another TPA Party in like circumstances, and not a mere speculation on how a hypothetical measure would be applied.[1429]

b. Claimants' Comments on the U.S. NDP Submission

1264. Claimants submit that the NDP Submission does not address Claimants' prior allegations that they are entitled to rely on the more favourable substantive protections accorded by Respondent in other investment treaties. Instead, Claimants argue that the United States has merely put forward a restrictive interpretation of the MFN Clause that is contrary to the ordinary meaning of TPA Article 10.4 and established practice.[1430]

1428 NDP Submission ¶¶ 38-41.

1429 NDP Submission ¶ 42.

1430 Claimants' NDP Observations ¶¶ 78-94.

1265. In particular, Claimants argue that: (i) based on the "ordinary meaning" criterion of Article 31 of the VCLT, the language of TPA Article 10.4 does not limit the application of the MFN Clause to measures that have been "adopted or, maintained" nor does it preclude the possibility to import more favourable provisions in treaties with other States, which Claimants describe as an "established practice";[1431] (ii) by merely reserving the right to adopt or maintain nonconforming measures in the future, Respondent has not properly exercised its right under Annex II and Article 10.13 of the TPA to deny Claimants the protection of the MFN Clause;[1432] and (iii) in any event, Claimants have demonstrated that Respondent's violations meet the "like circumstances" test under Article 3(2) of the Paraguay-Peru BIT, on which Claimants rely on by virtue of the TPA's MFN Clause.[1433]

c. Respondent's Comments on the U.S. NDP Submission

1266. Respondent submits that the NDP Submission contains three fundamental observations for interpreting the MFN Clause, all of which allegedly support Respondent's position.[1434]

1267. In that regard, Respondent argues that the United States agrees with Respondent by concluding that: (i) any non-conforming measure listed in Annex II of the TPA is excluded from the scope of application of the MFN Clause, and the burden to prove that such exclusion does not apply relies on Claimants; (ii) the MFN Clause applies only regarding investors or investments that are in "like circumstances" with Claimants or their investment; and (iii) to conclude that the MFN Clause has been breached, Claimants must identify actual treatment that Respondent accorded to a third-party investor or investment, and not the mere existence of clauses in other treaties signed by Respondent.

(2) Parties' Positions

1268. Claimants submit that Respondent has breached the TPA by treating First Claimant and its investments less favourably than it treats investments from other States.[1435] According to

1431 Claimants' NDP Observations ¶¶ 81-83.
1432 Claimants' NDP Observations ¶¶ 84-90.
1433 Claimants' NDP Observations ¶¶ 91-93.
1434 Respondent's NDP Observations ¶¶ 44-52.
1435 Memorial ¶ 383.

Claimants, pursuant to the MFN Clause, they may rely on other bilateral investment treaty provisions in which Respondent confers more favourable treatment to third party investors.[1436] In Claimants' view, this includes: (i) Article 3(2) of the Paraguay-Peru BIT; and; (ii) the umbrella clauses contained in the Thailand-Peru BIT, the Netherlands-Peru BIT and the United Kingdom-Peru BIT.[1437]

1269. Respondent denies that the MFN Clause permits the importation of the legal protection of the treaties cited by Claimants, which in its view would modify its consent to the TPA by way of interpretation.[1438] Respondent further submits that Claimants' claims on this ground are inadmissible pursuant to TPA Article 10.13.[1439] According to Respondent, the MFN Clause in the TPA requires identification of an investor in like circumstances, and to show that the treatment of the investor has been unjustifiably less favourable.[1440] Respondent further denies that it has breached the provisions in question.[1441]

(3) Tribunal's Analysis

1270. The Tribunal does not consider it necessary to decide whether Claimants may rely on the MFN Clause to import substantive legal protections from other treaties, or whether their claims are inadmissible pursuant to TPA Article 10.13 and Annex II. In light of the Tribunal's determinations already made under the RER Contract and the TPA, Claimants' claims under this ground cannot be sustained, even if the importation of the provisions relied on by Claimants were accepted.

1436 Memorial ¶ 388; Reply ¶ 625.

1437 Memorial ¶¶ 389, 396; Reply ¶¶ 633, 637.

1438 Counter-Memorial ¶¶ 834-842; Rejoinder ¶¶ 869-872; R-PHB ¶ 114.

1439 Rejoinder ¶ 868; R-PHB ¶ 112. *See also* Rejoinder ¶ 865 regarding non-conforming measures in Annex II of the TPA. TPA Article 10.13(2) provides, *inter alia*, that Article 10.4 does not apply to "…any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II."

1440 Counter-Memorial ¶ 841; Rejoinder ¶ 864.

1441 Counter-Memorial ¶ 835.

1271. With respect to Article 3(2) of the Paraguay-Peru BIT, this provides:[1442]

> 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…

1272. Claimants submit that the following measures negatively affected the Project's permits and approvals in violation of the TPA: (i) the commencement of the RGA Lawsuit, which sought to annul the Project's environmental permits; (ii) the commencement of the Criminal Investigation and Criminal Proceedings that attempted to cast doubt on the validity of the Project's environmental permits; (iii) the arbitrary denial of the Project's CWA; and (iv) the issuance of a materially defective CWA and failing to fix it for over six months, losing precious time and compounding the effects of the RGA Lawsuit.[1443]

1273. Respondent opposes each of the alleged bases of this claim.[1444]

1274. The Tribunal has already found that none of the alleged measures cited by Claimants constitute a breach of the FET standard of the TPA or an indirect expropriation under the TPA (see ¶¶ 1228, 1256, 1259 above). In reaching those conclusions, the Tribunal has given detailed consideration to each of the circumstances. Those findings are inconsistent with the arguments Claimants seek to make regarding adverse impacts upon the Project's permits. The Tribunal refers to those findings and does not consider it necessary to repeat them here.

1275. In accordance with an interpretation of Article 3(2) of the Paraguay-Peru BIT under the VCLT, the ordinary meaning of the words "shall grant the permits necessary in relation to such investment" are an imperative. However, the Tribunal agrees with Respondent[1445] that

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1442 **CL-068**, *Convenio entre la República del Perú y la República del Paraguay Sobre la Promoción y Protección Recíproca de Inversiones*, 31 January 1994, Art. 3(2). Translation by Claimants at Memorial ¶ 389. The Spanish original provides:

"*La Parte Contratante que haya admitido una inversión en su territorio, otorgará los permisos necesarios en relación a dicha inversión, incluyendo la ejecución de contratos de licencia y contratos de asistencia técnica, comercial o administrativa…*"

1443 Reply ¶ 634.

1444 Counter-Memorial ¶¶ 846-856; Rejoinder ¶¶ 878-890.

1445 Counter-Memorial ¶ 845.

the provision neither expressly nor implicitly exempts an investor from the requirements of national law with respect to the granting of such permits. Nor does it insulate an investor from legal proceedings challenging a given permit, much less legal proceedings which indirectly "cast doubt" on a permit (see item (ii) at ¶ 1272 above). Only one of Claimants' allegations concern a failure to grant a permit, being the CWA (see item (iii) at ¶ 1272 above). However, that ground has no basis as the CWA was ultimately granted.

1276. In summary, none of First Claimant's claims under Article 3(2) of the Paraguay-Peru BIT withstand scrutiny, based on a plain reading of that provision and in light of the Tribunal's considerations in respect of each of the alleged bases for the claim which have already been analysed in this Award.

1277. Likewise, the Tribunal has found that Respondent did not breach the RER Contract (see ¶¶ 993-997, 998 above). Claimants' submission that any such breaches "likewise constitute internationally wrongful acts"[1446] therefore falls away. If there is no underlying breach of contract, there is no breach to be "elevated" to a breach of a treaty. There can therefore be no recourse to the umbrella clauses contained in the Thailand-Peru BIT, the Netherlands-Peru BIT and the United Kingdom-Peru BIT. The Tribunal therefore does not consider it necessary to further address the arguments made in relation to that claim.[1447]

1278. On this basis, the Tribunal rejects First Claimant's claims under the MFN Clause of the TPA.

E. CONCLUSION ON LIABILITY FOR BREACHES OF THE TPA

1279. In light of the above considerations, the Tribunal rejects First Claimant's claims under the TPA, including those brought on behalf of Second Claimant. Specifically, the Tribunal finds that Respondent did not breach TPA Article 10.5 (see ¶ 1228 above), TPA Article 10.7 (see ¶¶ 1256-1259 above) or TPA Article 10.4 (see ¶ 1278 above) in respect of its

1446 Memorial ¶ 395.

1447 *See*, *inter alia*, Memorial ¶¶ 395-398; Counter-Memorial ¶¶ 858-863; Reply ¶¶ 637-640; Rejoinder ¶¶ 892-897.

treatment of Claimants or their investments. The Tribunal accordingly rejects Claimants' request for a declaration in respect of such breaches (see ¶ 235(a) and ¶ 236(a) above).

1280. There being no breach of the TPA, the Tribunal also rejects Claimants' claim for damages and other relief resulting from any such breach, including: (i) compensation for losses (see ¶ 235(e) and ¶ 236(e) above); (ii) the request for a declaration in relation to the USD 71,500 bond put up by Second Claimant to obtain the final concession for the transmission line bond (see ¶ 235(j) and ¶ 236(i) above); and (iii) the request for an order that Respondent "cease and desist" its harassment of Second Claimant and Second Claimant's External Counsel by terminating the Criminal Proceedings (see ¶ 235(g) and ¶ 236(g) above).

1281. In light of the rejection of Claimants' damages claims, the Tribunal does not need to further address the Parties' arguments and the NDP Submission with respect to the quantum of such damages, or any order for pre-Award interest.

1282. The Tribunal further notes that it is not necessary to receive an update from Claimants in relation to the calculation of their damages claim. Claimants had requested the opportunity to provide such an update in the event that they would prevail on any of their claims (see ¶ 67 above). The Tribunal considers this request to be moot.

X. ALLEGED TERMINATION OF THE CONFIDENTIALITY AGREEMENT

1283. The Confidentiality Agreement was entered into between the Special Commission, First Claimant and Second Claimant on 5 December 2017 (see ¶ 167 above).

1284. On four occasions when extending the period of negotiations between the Parties in relation to the dispute (*trato directo*), the Parties affirmed that the Confidentiality Agreement covered the ongoing negotiations.[1448]

[1448] **R-129**, *Primer Acuerdo de Extensión de Plazo entre la Comisión Especial*, *Latam Hydro LLC y CH Mamacocha SRL*, 26 December 2017, Clause 3; **C-195**, *Acuerdo de Extensión de Plazo entre la Comisión Especial*, *Latam Hydro LLC y CH Mamacocha SRL*, 27 February 2018, Clause 4; **R-130/C-196**, *Acuerdo de Extensión de Plazo entre la Comisión Especial, Latam Hydro LLC y CH Mamacocha SRL*, 28 June 2018, Clause 4; **C-062**, Direct Negotiations Term Extension Agreement between R. Ampuero (Special

1285. By way of background to this ground of Claimants' claim, PO 1, the Tribunal decided upon Respondent's application to expunge certain information and exhibits from Claimants' Notice of Intent and Request for Arbitration (see ¶ 26 above). Respondent had argued that certain information in those submissions was covered by the Confidentiality Agreement dated 5 December 2017 between Claimants and the Special Commission.

1286. In PO 1 the Tribunal rejected Respondent's application, finding, *inter alia*, that: (i) while it takes the confidentiality of settlement negotiations seriously, the information sought to be excluded does not constitute confidential settlement information; and (ii) the Confidentiality Agreement does not restrict the use of information which has entered the public domain.[1449] In relation to the disagreement over whether certain actions by Respondent were admissions of responsibility or good faith efforts to resolve the dispute amicably, the Tribunal indicated that this would be a matter for the Tribunal to weigh when reaching its determinations on the merits.[1450]

1287. Claimants seek a declaration from the Tribunal that "the Confidentiality Agreement is terminated and, with it, all of CHM's obligations and duties owed thereunder."[1451] Respondent opposes Claimants' request.[1452]

1288. Below, the Tribunal sets out the relevant provisions of the Confidentiality Agreement in Section A. Section B contains the Parties' positions on this issue. Section C contains the Tribunal's analysis.

A. RELEVANT PROVISIONS

1289. Clause 2 of the Confidentiality Agreement provides, in part:[1453]

> The Parties acknowledge that this Agreement shall be solely binding on the Special Commission, Latam Hydro and [CH] Mamacocha, which shall be

Commision), S. Sillen (Latam Hydro LLC) and C. Diez Canseco (CH Mamacocha SRL), 21 September 2018, Clause 4.

1449 PO 1, ¶ 33(a) and (b).

1450 PO 1, ¶ 33(c).

1451 Reply ¶ 1045(d).

1452 Rejoinder ¶ 1389.

1453 **C-028**, Confidentiality Agreement, 5 December 2017, Clause 2.

> collectively referred to as "the Parties." In this regard, the Special Commission's powers to represent the Peruvian State shall, for all relevant purposes, be limited to the provisions of Law No. 28933, and its Regulations.
>
> As a result, the effects of this Confidentiality Agreement and/or the scope of the Peruvian State's representation hereunder shall exclusively apply to the negotiations over the Dispute, and shall not extend to any other agency or entity of the Peruvian State, or have any bearing on their powers and/or duties as set forth in the relevant statutory and constitutional provisions applicable in the Republic of Peru.

1290. Clause 3 of the Confidentiality Agreement is as follows:[1454]

> In the spirit of full cooperation, the Parties undertake to keep all matters related to the discussions, talks, documents and information held and/or exchanged between each other within the scope of the Consultation and Negotiation strictly confidential. The only instrument evidencing the conduct of the Consultation and Negotiation procedure shall be the minutes or the final settlement agreement, or any other kind of agreement reached by the Parties, which, at the end of such procedure, shall be executed and duly signed by both Parties in two original copies, one for each of them.

1291. Clause 4 of the Confidentiality Agreement provides:[1455]

> The negotiations between the Parties during the Consultation and Negotiation period shall be without prejudice to either Party's case in a potential international arbitration commenced before the ICSID, or before any other forum to which the dispute may be submitted, in the event that the Parties fail to reach a mutually satisfactory agreement. In addition, the Parties' proposals during the Consultation and Negotiation procedure shall be confidential, and may not be used as evidence in future international arbitration proceedings. The Parties agree that the existence of the Consultation and Negotiation procedure and of this Confidentiality Agreement shall not be confidential in nature.

1292. Clause 7 of the Confidentiality Agreement is set out below:[1456]

> The Parties declare, acknowledge and accept that talks within the scope of the Consultation and Negotiation procedure shall be held in good faith and shall not be binding upon the Parties, unless a written agreement is reached so that neither Party's legal or contractual rights, causes of action and privileges are harmed, negatively affected, terminated, restricted or cancelled. The Parties hereby reserve their right to raise any jurisdictional defense or defense on the merits,

1454 **C-028**, Confidentiality Agreement, 5 December 2017, Clause 3.

1455 **C-028**, Confidentiality Agreement, Clause 4.

1456 **C-028**, Confidentiality Agreement, Clause 7.

> and to assert any claims that they may deem appropriate or convenient. Therefore, the conduct of the Consultation and Negotiation procedure shall under no circumstances be deemed as an acceptance or acknowledgement of the other Party's case.

1293. Clause 8 of the Confidentiality Agreement provides:[1457]

> The Parties agree that under no circumstances, and in no way, may any statement or communication, whether oral or written, from one Party to the other or to a third-party, or any action taken over the course of the Consultation and Negotiation procedure, including this Confidentiality Agreement, be used now or in the future by either Party in any other context, including any international or domestic arbitration proceedings, or any other legal or contentious proceedings before any domestic or foreign courts, whether pending or threatened to be commenced by the Parties. In this regard, the Parties agree to handle all information, representations and materials and/or documents created or disclosed during the course of the Consultation and Negotiation procedure in strict confidentiality, except for any information which is generally available to the public or which has come into the public domain for reasons other than a breach of this Confidentiality Agreement by either Party. The Parties accept that the provisions of this clause shall apply to all exchanges between them since the Consultation and Negotiation procedure commenced.

1294. Under Clause 14 of the Confidentiality Agreement, "…the Parties' duty of confidentiality shall survive the termination of this Agreement."[1458]

B. PARTIES' POSITIONS

(1) Claimants' Position

1295. Claimants assert that with the Counter-Memorial, Respondent submitted testimony of Mr. Ricardo Ampuero Llerena, former President of the Special Commission which is "replete with allegations that contain non-public information exchanged between the Parties, or between the Special Commission and third-parties, arising from the Parties' settlement discussions."[1459] Claimants take issue, in particular, with paragraphs 18-36 and 43-45 of Mr. Ampuero's first witness statement.[1460]

1457 **C-028**, Confidentiality Agreement, Clause 8.

1458 **C-028**, Confidentiality Agreement, Clause 14.

1459 Reply ¶ 926.

1460 Reply ¶ 926.

1296. Contrary to Mr. Ampuero's statement that he believed the Confidentiality Agreement was only in effect until 1 April 2019, Claimants argue that its restrictions survive termination of the Agreement as provided by Clause 14 of the Confidentiality Agreement.[1461]

1297. Claimants contend that as a result of its unauthorised disclosures, Respondent has waived its protections or rights under the Confidentiality Agreement.[1462] It follows, in their view, that Claimants are relieved of their obligations under the Confidentiality Agreement.[1463]

1298. In any event, Claimants argue that Respondent's breaches of the Confidentiality Agreement give Claimants the right to be relieved of their contractual obligations and terminate the Confidentiality Agreement as a matter of law, pursuant to Articles 1428 and 1429 of the Peruvian Civil Code.[1464]

(2) Respondent's Position

1299. Respondent submits that Claimants continue to be bound by the Confidentiality Agreement.[1465] In its view, it is Claimants who are in breach of the Confidentiality Agreement for misrepresenting facts and statements attributed to Peru during the *trato directo* stage.[1466] According to Respondent, the statements made by Mr. Ampuero in his first witness statement were a response to those misrepresentations.[1467] Moreover, Respondent argues that Mr. Ampuero did not reveal confidential information.[1468]

1300. Respondent denies that Claimants are at liberty to breach the Confidentiality Agreement while Respondent is unable to respond without waiving its protections.[1469]

1461 Reply ¶ 930.
1462 Reply ¶ 931.
1463 Reply ¶ 935.
1464 Reply ¶ 936.
1465 Rejoinder ¶ 394.
1466 Rejoinder ¶ 391.
1467 Rejoinder ¶ 392.
1468 Rejoinder ¶¶ 396-401.
1469 Rejoinder ¶ 402.

1301. By making an allegation of breach of the Confidentiality Agreement covertly in the course of the document production only, Respondent accuses Claimants of procedural manoeuvring, bad faith and intentional lack of clarity.[1470]

1302. Respondent contends that even if Respondent had breached any obligation under the Confidentiality Agreement, the requirements of Article 1428 and 1429 of the Peruvian Civil Code for termination of the agreement are not met.[1471]

C. TRIBUNAL'S ANALYSIS

1303. At the outset, the Tribunal notes that Respondent has not contested the Tribunal's jurisdiction over Claimants' claim on the basis of the Confidentiality Agreement. The Tribunal understands the Parties to confer upon the Tribunal jurisdiction to resolve the dispute under the Confidentiality Agreement in the interest of complete resolution of their dispute.

1304. Claimants take issue with paragraphs 18-36 and 43-45 of Mr. Ampuero's first witness statement. In particular, Claimants highlight the following examples:[1472]

> 24 …I also recall that, on the occasion of several meetings with Claimants, I expressly corrected such assertions by Claimants, made orally or in writing, which mistakenly suggested that the Special Commission had authority to force or order State entities to adopt a specific action.
>
> …
>
> 34 …I recall expressly mentioning at the various meetings with the Claimants that the [Confidentiality] Agreement was essential to us, as it had to be absolutely clear that the State's good-faith actions in the context of the direct negotiations, and the communications exchanged in connection with the dispute between the parties, were, quite obviously, without prejudice to the parties' positions and rights.
>
> 35. I even recall myself repeating, at a fair number of meetings with Claimants' representatives, that the purpose was to maintain the status quo (in order not to exacerbate the dispute from the perspective of any of the parties), and that neither party should use any acts done in the context of the direct negotiations stage

1470 Rejoinder § II.I.2, ¶¶ 405, 409.

1471 Rejoinder ¶¶ 405-408.

1472 Reply ¶ 926; *quoting* Ampuero First Statement ¶¶ 24, 34, 35, 43.

> against the counter-party. At the meetings, Claimants expressly represented that they understood and agreed with this. I was emphatic on this point[.]
>
> …
>
> 43. I want to be absolutely clear about this as well: I noted, on multiple occasions at meetings with Claimants, that not only was the Draft Supreme Decree covered by the Confidentiality Agreement…but also it was neither a promise nor a guarantee. I explained that this was an alternative under examination…I recall this clearly because I wanted to remove any false expectations about a Draft Supreme Decree…I expressly recall saying, on more than one occasion, that…Claimants led us to believe, at the various meetings we held, that they understood and accepted that this was so[.]

1305. Respondent argues that the paragraphs cited by Claimants do not reveal confidential information since Mr. Ampuero did not refer to any of Claimants' settlement proposals or actions to resolve the dispute.[1473] In its view, the statements by Mr. Ampuero were necessary to respond to assertions made by Claimants in their Memorial, such as that:[1474] (i) the Special Commission ordered MINEM to retroactively suspend the RER Contract effective as of 21 April 2017 upon commencement of the *trato directo* process;[1475] (ii) the Special Commission evaluated the merits of the RGA Lawsuit;[1476] and (iii) the Draft Supreme Decree was "necessary to give back to the RER projects time lost due to unjustified interferences by the government."[1477] Mr. Ampuero further sought to clarify, according to Respondent, that Respondent acted at all times in good faith, and on the basis that actions taken in the context of the *trato directo* were without prejudice to the positions of the Parties in the arbitration.[1478]

1306. The Tribunal finds the testimony of Mr. Ampuero to be inconsistent with the requirement in Clause 3 of the Confidentiality Agreement to "…keep all matters related to the discussions, talks, documents and information held and/or exchanged between each other within the scope of the Consultation and Negotiation strictly confidential." (see ¶ 1290

1473 Rejoinder ¶¶ 396-397.

1474 Rejoinder ¶ 396; *citing* Ampuero First Statement ¶ 23.

1475 Memorial ¶ 112.

1476 Memorial ¶ 119.

1477 Memorial ¶ 153.

1478 Rejoinder ¶ 400.

above). In particular, Mr. Ampuero mentions statements that he made to Claimants or that Claimants made to him in the course of the consultation and negotiation procedure. As recorded in Clause 3 of the Confidentiality Agreement, the "only instrument evidencing the conduct of the consultation and negotiation procedure shall be the minutes or the final settlement agreement…"

1307. The Tribunal is not persuaded that these disclosures were justified by a breach of the Confidentiality Agreement by Claimants. In this regard, Clause 8 of the Confidentiality Agreement prevents the Parties from using any statements made by one party to the other party, or to a third party, or any action taken over the course of the consultation and negotiation procedure, in a future arbitration (see ¶ 1293 above). However, there is an express carve-out in Clause 8 for information which is "generally available to the public or which has come into the public domain for reasons other than a breach of this Confidentiality Agreement" (see ¶ 1293 above). Respondent has not established that Claimants revealed non-public information in making their assertions. Nor is the Tribunal satisfied that by making these assertions, Claimants effectively "opened up" the content of the Parties' settlement discussions.

1308. The Tribunal is further not persuaded that Mr. Ampuero's statements were necessary to rebut Claimants' allegations. Respondent could, and did, rebut Claimants' submission by reference to other evidence.[1479]

1309. It should be noted that while Mr. Ampuero's statements are not in line with the Confidentiality Agreement, the Tribunal does not consider them to constitute a "material breach" of that agreement, as Claimants argue.[1480] As stated in PO 1, the Tribunal takes the confidentiality of settlement negotiations seriously, and settlement negotiations are understood to be conducted on a without prejudice basis.[1481] However, none of Mr. Ampuero's statements reveal a confidential proposal made during the consultation and negotiation procedure.

1479 *See*, *e.g.*, Counter-Memorial ¶¶ 246-247.

1480 *See* Reply § VI.A.

1481 PO 1, ¶ 33(a).

1310. While not specifically argued by Respondent, since Mr. Ampuero refers to the potential expiration of the Confidentiality Agreement,[1482] the Tribunal confirms that even if the agreement had terminated, which has not been established, the Parties' duty of confidentiality survives termination (see ¶ 1294 above).

1311. Claimants argue that as a result of Respondent's affirmative use of this evidence, Respondent has waived any rights or protections that may still exist with respect to the settlement discussions and may not raise any privilege-related defence with respect to allegations, documents, or testimony concerning those discussions.[1483] The Tribunal is open to considering the application of the affirmative use provision in the IBA Rules on the Taking of Evidence in any specific circumstance, and indeed has done so in the course of these proceedings.[1484] However, the Tribunal does not consider it necessary or appropriate to issue open-ended directions on this matter without a specific situation before it. Claimants have not sought to introduce any specific evidence in response to Respondent's statements, but primarily seek to preclude Respondent from raising additional privilege-related defences. In the circumstances, the Tribunal declines to order that Claimants are generally relieved of their obligations under the Confidentiality Agreement.

1312. Claimants also argue that the Confidentiality Agreement has terminated as a matter of law under Articles 1428 and 1429 of the Peruvian Civil Code.[1485] The Tribunal notes that the Confidentiality Agreement does not contain provisions on termination aside from Clause 14 (see ¶ 1294 above). Respondent has not contested the potential application of Articles 1428 and 1429 of the Peruvian Civil Code to the Confidentiality Agreement, although it denies that their requirements are met in the present case.[1486]

1482 Ampuero First Statement ¶ 22.

1483 Reply ¶¶ 931-934.

1484 *See* PO 4, ¶ 53(i).

1485 Reply ¶ 936.

1486 Rejoinder ¶¶ 408-409.

1313. Articles 1428 and 1429 state:[1487]

> Article 1428.- Termination for Breach
>
> In contracts with reciprocal benefits, when one of the parties fails to comply with its provision, the other party may request the fulfilment or termination of the contract and, in either case, compensation for damages.
>
> Article 1429.- Termination as of Right
>
> In the case of article 1428, the party that is harmed by the breach of the other may request it by means of a notarial letter to satisfy its provision, within a period of no less than fifteen days, under the warning that, otherwise, the contract is terminated.
>
> If the provision is not fulfilled within the specified period, the contract is fully terminated, with the debtor being responsible for compensation for damages.

1314. According to Claimants, they provided written notice to Respondent of its breach on three occasions: (i) in their 2 March 2021 request for production of documents; (ii) in their 23 March 2021 response to Respondent's objections to those requests; and (iii) in their 21 April 2021 objections to Respondent's privilege log.[1488]

1315. However, the documents relied on by Claimants as notice are not notarised letters, do not contain language referring to a notice of breach, do not refer to a cure period of 15 days, and do not contain a warning about termination of the agreement. They rather refer to Respondent's alleged waiver of the protection of the Confidentiality Agreement pursuant to IBA Rule 9(3)(d),[1489] or to Respondent's alleged failure to invoke privileges under the Confidentiality Agreement.[1490] The Tribunal rejects the contention that these can be considered notices issued pursuant to Article 1429 of the Peruvian Civil Code, and accordingly rejects the argument that the Confidentiality Agreement has terminated as a result.

1487 **RL-048/CL-149**, *Decreto Legislativo No. 295, Código Civil*, 24 July 1984, Arts. 1428 and 1429, Translation by Claimants at Reply ¶ 936.

1488 Reply ¶ 938; *citing* Claimants' Request for Production of Documents, 2 March 2021; Claimants' Response to Respondent's Objections, 23 March 2021; Claimants' Objections to Respondent's Privilege Log, 21 April 2021.

1489 *See* Introduction to Claimants' Replies to Respondent's Objections of 23 March 2021, ¶ 9.

1490 Claimants' Objections to Respondent's Privilege Log dated 21 April 2021, ¶ 51.

1316. The Tribunal notes that Claimants have not asserted that they have requested the "fulfilment" of the Confidentiality Agreement under Article 1428 of the Peruvian Civil Code (see ¶ 1313 above), and therefore does not need to address that aspect of the provision.

1317. In light of the foregoing, the Tribunal finds that Respondent breached the Confidentiality Agreement, however rejects Claimants' claims with respect to the consequences of that breach. In this respect, the only request for relief by Claimants in relation to the Confidentiality Agreement is a request for a declaration that it is terminated and with it, Second Claimant's obligations and duties thereunder (see ¶ 236(d) above). The Tribunal rejects that request. Accordingly, the finding of breach is inconsequential and the Confidentiality Agreement remains in force between the Parties.

XI. COSTS

1318. In light of the foregoing decisions, the Tribunal shall decide on the allocation and quantification of costs in these proceedings. The Tribunal first sets out the relevant TPA, RER Contract, and ICSID Arbitration Rules provisions (A), before summarising the Parties' positions (B), and then turning to its considerations on costs (C).

A. RELEVANT PROVISIONS

1319. Article 61(2) of the ICSID Convention provides as follows:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

1320. ICSID Arbitration Rule 28 is entitled "Cost of Proceeding," and provides:

> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and

> expenses of the Tribunal and the charges for the use of the facilities of the Centre;
>
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
>
> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

1321. In addition, ICSID Arbitration Rule 47(1) states, in relevant part, that:

> (1) The award shall be in writing and shall contain:
>
> …
>
> (j) any decision of the Tribunal regarding the cost of the proceeding.

1322. TPA Article 10.26(1) provides:[1491]

> Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:
>
> (a) monetary damages and any applicable interest; and
>
> (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.
>
> A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

1323. TPA Article 10.26(3) provides:[1492]

> A tribunal may not award punitive damages.

[1491] **C-001/RL-051**, TPA, Art. 10.26(1).

[1492] **C-001/RL-051**, TPA, Art. 10.26(3).

1324. Clause 11.7 of the RER Contract provides as follows:[1493]

> All the expenses incurred as a result of the settlement of the Technical or Non-Technical Dispute, including fees to be paid to the Expert or the Arbitrators taking part in the settlement of the Dispute, shall be borne by the losing Party, unless the Expert or the Arbitrators decide otherwise.

1325. Furthermore, Clause 11.8 of the RER Contract provides as follows:[1494]

> Costs and expenses such as advisors' fees, internal costs, or others that are attributable to a Party individually, are excluded from the provisions of this Clause.

B. THE PARTIES' POSITIONS

(1) Claimants' Position

a. Amount of Costs

1326. Claimants contend they are entitled to costs, ranging from USD 17,522,014.25 to USD 23,318,729.25, in light of the discounted fee arrangement entered into with their counsel, with a success fee uplift.[1495] The amount of Claimants' claimed costs within that range varies under four scenarios, depending on the amount awarded to Claimants as damages in a successful award.[1496] Without any success fee uplift, the breakdown of the amount of USD 17,522,014.25 is as follows:[1497]

1493 **C-002**, RER Contract, Clause 11.7.

1494 **C-002**, RER Contract, Clause 11.8.

1495 C-CS ¶ 1.

1496 C-CS ¶ 1; C-CS Annex A, Table B(1)(b).

1497 C-CS ¶ 1; C-CS Annex A, p. 1. With regard to the item "Procedural Costs," the Tribunal notes that this amount does not reflect the fourth advance payment of USD 150,000 requested from each of the Parties on 22 September 2023, and paid by Claimants on 20 October 2023, after the Parties' Submissions on Costs dated 1 August 2022 were filed. *See* ICSID's communication of 24 October 2023. Accordingly, ICSID's financial records reflect that adding the fourth advance payment, Claimants made advance payments totaling USD 799,970.00.

Type of Cost	Amount (USD)
Procedural Costs	650,000.00
BakerHostetler Legal Fees and Expenses	12,804,811.99
Local Peruvian Counsel Legal Fees and Expenses	260,907.53
Expert Fees and Expenses	2,083,968.02
Additional Expenses	1,722,326.71
TOTAL	**17,522,014.25**

1327. Claimants submit that any cost award in their favour should carry the pre-award interest of 7.06%, as applicable to Claimants' damages.[1498]

b. Allocation of Costs

1328. Claimants submit that the Tribunal has discretion regarding cost-apportionment for the TPA claims, but that tribunals routinely follow the "costs follow the event" principle, which has emerged as the preferred methodology.[1499]

1329. Claimants argue that regardless of the methodology the Tribunal adopts to determine Claimants' relative success, either by comparing the damages awarded to the damages originally sought or based on the percentage of major disputed issues won by the successful party, Respondent should bear Claimants' full costs, for the following reasons:[1500]

(i) The same harm is sought to be redressed and accordingly the same quantum of damages should be received if Claimants prevail on any or all their claims.[1501]

(ii) The claims arise from the same operative facts and many of the legal issues arising from the TPA and RER Contract claims are intricately intertwined. If Claimants

1498 C-CS ¶ 27; *see* Reply ¶ 1037.

1499 C-CS ¶ 4; *citing* **CL-011**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 533.

1500 C-CS ¶¶ 14-15; *citing* **CL-286**, *Veteran Petroleum v. Russian Federation*, PCA Case Nos. AA 226, AA 227 and AA 228, Final Award, 18 July 2014, ¶ 1876; **CL-283**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 584; **CL-016***, Bear Creek Mining Corporation v. Republic of Peru,* ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 730.

1501 C-CS ¶ 16.

succeed on any of their claims, in their view they will have likely prevailed on all or substantially all of the major disputed issues.[1502]

(iii) Respondent's jurisdictional objections would not have a significant impact on the quantum of the award, as they apply only to certain measures related to the TPA claims and have no effect on the RER Contract claim.[1503] Claimants argue that Respondent's objections concern only discrete legal issues for which neither party expended significant resources.[1504]

1330. Claimants submit that if a party unnecessarily increases costs and time, costs are allocated against that party.[1505]

1331. For Claimants, they acted reasonably throughout the proceedings, while Respondent acted unreasonably by adopting the following positions which compelled them, as defunct companies, to expend sums to enforce their legal rights:[1506]

(i) Respondent ended the Parties' settlement negotiations without notice.[1507]

(ii) Respondent pursued the Lima Arbitration and Criminal Proceeding in parallel with this proceeding, forcing Claimants to incur significant costs as they had to coordinate with their Peruvian counsel to ensure the legal arguments, facts and issues were consistent between the three proceedings.[1508]

(iii) Respondent filed motions asking the Tribunal to expunge nearly 40 percent of Claimants' initial pleadings and exhibits, on the basis that they contain confidential information, which was denied by the Tribunal.[1509] Claimants argue that Respondent's motion compelled it to incur significant legal costs and delayed the

1502 C-CS ¶ 17.

1503 C-CS ¶ 18.

1504 C-CS ¶ 18.

1505 C-CS ¶ 19; *citing* **CL-287**, *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020, ¶ 2022.

1506 C-CS ¶ 20.

1507 C-CS ¶ 21.

1508 C-CS ¶ 22.

1509 C-CS ¶ 23; *citing* PO 1, ¶ 34.

proceedings by at least two months.[1510] Further, Claimants contend that despite being rejected by the Tribunal, Respondent kept raising this issue in pleadings and communication, which compelled Claimants to incur costs in responding to these arguments.[1511]

(iv) Respondent missed the deadline for disclosure, and even after it produced the documents, the disclosure was incomplete, thereby compelling Claimants to incur significant costs to obtain the relevant documents through Peru's transparency laws.[1512]

(v) Respondent increased Claimants' costs by raising what Claimants consider to be frivolous defences, some of which it partially or completely abandoned.[1513]

(vi) Respondent failed to advise Claimants of its objections to their proposal for a damages update.[1514]

1332. Claimants request that if they are unsuccessful on any of their claims, the Tribunal decline to order Claimants to pay Respondent's costs given that this arbitration was commenced in good faith and Claimants had no other viable means of obtaining reparations.[1515]

1333. With regard to the RER Contract, Claimants refer to the parties' agreement under Clauses 11.7 and 11.8 of the RER Contract, pursuant to which administrative costs shall be borne by the losing party and each party will bear its own internal costs.[1516]

1510 C-CS ¶ 23.

1511 C-CS ¶ 23.

1512 C-CS ¶ 24.

1513 C-CS ¶ 25.

1514 C-CS ¶ 26; *see* Claimants' Letter to the Tribunal (29 July 2022).

1515 C-CS ¶ 15, fn 22; *see* **RL-137**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 135.

1516 C-CS ¶ 4 fn 1; *citing* **C-002**, RER Contract, Clauses 11.7-11.8.

c. Reasonableness

1334. Claimants submit that the bar for reasonableness of costs is met if their costs are not manifestly excessive.[1517]

1335. Claimants argue that their legal expenses are reasonable as:

(i) They are consistent with the sums paid by other claimants in investment arbitrations and their counsel's discounted billing rates charged fall below industry standards.[1518]

(ii) Their legal fees were heightened due to the complexities of this arbitration given that: (i) there were three separate cases, raising complex issues under international and Peruvian law; and (ii) Respondent pursued two additional parallel proceedings, namely the Lima Arbitration and the Criminal Proceeding.[1519]

(iii) There were novel issues.[1520] Specifically, no prior case had been brought under the TPA that resulted in a final award on the merits, thereby many of the TPA provisions and disputed issues were yet to be interpreted by other tribunals.[1521] Furthermore, this was the first investment arbitration arising from Peru's RER Promotion, which established a bespoke legal framework in Peru for projects like Claimants'.[1522]

1336. Claimants argue that even if their legal expenses are greater than Respondent's, the legal expenses are reasonable as: (i) Claimants' counsel represented two parties; (ii) they bore the burden of proof on all merits-related and quantum-related issues; (iii) they drafted two

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1517 C-CS ¶ 6; *citing* **CL-282**, Micha Bühler, "Awarding Costs in International Commercial Arbitration: An Overview", ASA Bulletin 22, (2/2004), p. 273.

1518 C-CS ¶¶ 6-7; *citing* **CL-031**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 861; **RL-146**, *Philip Morris Brand Sàrl et al. v. Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 583; *see* C-CS Annex 1, Table B(1).

1519 C-CS ¶ 8.

1520 C-CS ¶¶ 6, 9; *citing* **CL-031**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 861; **RL-146**, *Philip Morris Brand Sàrl et al. v. Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 583.

1521 C-CS ¶ 9.

1522 C-CS ¶ 9.

more pleadings than Respondent, i.e., the Notice of Intent and Request for Arbitration; and (iv) Respondent's conduct increased costs.[1523]

1337. Claimants contend that their success fee arrangement with their counsel is also reasonable as the arrangement of paying "deferred fees" and a success uplift, depending upon the amount awarded, is routine in investment arbitrations and has been regularly awarded by investment tribunals in cost awards.[1524]

1338. Claimants argue that their expert fees are reasonable due to the novel legal issues involved and the fact that these fees are commensurate with the fees typically paid to experts in investment arbitrations.[1525]

1339. Claimants submit that their additional expenses, which include fees for witness preparation and travel, are also reasonable as their representatives, experts and counsel are from different jurisdictions.[1526] Claimants argue that these expenses include payments to their current and former employees for their assistance in the case; a cost, Claimants assert, that is regularly deemed reasonable by arbitral tribunals.[1527]

1523 C-CS ¶ 10; *see* C-CS Annex A, Table B(1)(b); *citing* **CL-280**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶ 910; **CL-283**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 588; **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 734.

1524 C-CS ¶¶ 6, 11; *citing* **CL-031**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 861; **RL-146**, *Philip Morris Brand Sàrl et al. v. Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 583; **CL-284**, *Khan Resources Inc. v. The Government of Mongolia*, PCA Case No. 2011-09, Award, 2 March 2015, ¶¶ 427(i), 445-447; **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶¶ 721, 735; **CL-283**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 588; **CL-285**, *Sunlodges Ltd. and Sundlodges (T) Limited v. Republic of Tanzania*, PCA Case No. 2018-09, Award, 20 December 2019, ¶¶ 531, 552; **CL-221**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 604, 611, 621-625.

1525 C-CS ¶ 12; *see* C-CS Annex A, Table C.

1526 C-CS ¶ 13.

1527 C-CS ¶ 13; *citing* **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 721; **CL-286**, *Veteran Petroleum v. Russian Federation*, PCA Case Nos. AA 226, AA 227 and AA 228, Final Award, 18 July 2014, ¶¶ 1847, 1876.

(2) Respondent's Position

a. Amount of Costs

1340. Respondent seeks the following amounts as costs in this proceeding, in addition to pre- and post-award compound interest on the total amount claimed, until payment date, calculated at 3%:[1528]

Description	Amount (USD)
Procedural Costs	650,000.00
Legal Fees and Expenses	3,618,694.00
Expert Fees and Expenses	522,457.80
Additional Expenses	13,682.00
Total	**4,804,833.80**

1341. Respondent also claims any additional costs, fees or expenses that it might reasonably incur before the Tribunal issues the final award, plus compound interest of 3%.[1529]

b. Allocation of Costs

1342. For Respondent, the Tribunal has broad discretion to make its order for costs and may start from the "cost follows the event" principle, or balance that with other relevant factors, including the Parties' conduct during the proceedings.[1530]

1343. In the event that the Tribunal finds that one or more claims were to fall outside the Tribunal's jurisdiction or are found to be meritless, Respondent argues that Claimants should pay all of Respondent's costs.[1531]

1528 R-CS ¶¶ 29- 30(a); *see* R-CS, Annex A. With regard to the item "Procedural Costs," the Tribunal notes that this amount does not reflect the fourth advance payment of USD 150,000 requested from each of the Parties on 22 September 2023, and paid by Respondent on 30 October 2023, after the Parties' Submissions on Costs dated 1 August 2022 were filed. *See* ICSID's communication of 31 October 2023. Accordingly, ICSID's financial records reflect that adding the fourth advance payment, Respondent made advance payments totaling USD 800,000.00.

1529 R-CS ¶ 30(b).

1530 R-CS ¶¶ 4-5; *citing* **C-001/RL-051**, TPA, Art. 10.26(1); *also citing, inter alia,* **CL-011**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 533.

1531 R-CS ¶ 8. *See* R-CS ¶¶ 9-10 elaborating on the alleged jurisdictional defects and lack of merit in Claimants' claims.

1344. Respondent further submits that Claimants' procedural behaviour warrants an allocation of costs against them, which includes:

(i) Advancement of meritless claims that Respondent has had to expend significant State resources to defend against.[1532]

(ii) Mischaracterisation of evidence: Respondent argues that Claimants mischaracterised its statements made in the course of friendly consultations as admissions of liability, despite those consultations being conducted on a "without prejudice" basis.[1533] Further, Respondent contends that Claimants failed to disclose the Amparo Judgment to the Tribunal, and when they did address it during the Hearing, they presented a truncated quotation in an attempt to mislead the Tribunal as to the significance of that ruling.[1534] In another example, Respondent asserts that Claimants characterised the Morón Report as a categorical condemnation of the RGA Lawsuit, however, that report details various grounds on which the Project permits could be challenged successfully, and ultimately were the grounds on which the Amparo Judgment later invalidated the permits.[1535]

(iii) Mischaracterisation of Respondent's position: According to Respondent, Claimants have mischaracterised Respondent's position on various points and procedural communications which thereby increased Respondent's costs.[1536]

(iv) Baseless requests for adverse inferences: Further, Respondent contends that Claimants' unsuccessful application for further documents and search descriptions as well as their unjustified demands for adverse inferences to be drawn against Respondent's response to Claimants' document production requests required

1532 R-CS ¶ 7.

1533 R-CS ¶ 14; *citing* Counter-Memorial ¶¶ 246-249; Rejoinder ¶¶ 170-181, 398, 1068; R-PHB ¶¶ 59-62.

1534 R-CS ¶ 15; *citing* **CD-01**, Claimants' Opening Presentation, slide 173; *see* Respondent's Closing Statement, Transcript (Day 9), 18 March 2022, 2080:1-2083:6; *see also* Rejoinder § I.F.

1535 R-CS ¶ 16; *citing* Claimants' Opening Statement, Transcript (Day 1), 7 March 2022, 31:2-6, 12-14; Respondent's Opening Statement, Transcript (Day 1), 7 March 2022, 236:13-21; **R-140/C-229**, Legal Report by J.C. Morón and D. Lizárraga (Echecopar Law Firm), 5 December 2017, pp. 1-3; *see* Reply ¶ 124; *see* Rejoinder ¶¶ 170–181. *See also* Transcript (Day 1), 7 March 2022, 236:5–21 (Peru's Counsel).

1536 R-CS ¶¶ 17-19; *citing* Email from Claimants' Counsel to Tribunal (16 February 2022), p. l; Email from Respondent's Counsel to Tribunal (17 February 2022).

Respondent to devote a portion of its Rejoinder to address Claimants' submissions.[1537]

(v) Joint hearing bundle: Respondent also argues that Claimants' approach to the joint hearing bundle, contrary to Tribunal's orders in PO 6, caused it to incur additional costs as it had to (i) contest Claimants' introduction of new documents and translations; and (ii) review with extra care all documents and translations to ensure that the materials in the joint bundle were in fact part of the existing record.[1538]

(vi) Making unfounded assertions that Respondent engaged in bad faith when, on the contrary, Respondent acted in good faith.[1539]

1345. Respondent contends that even if Claimants were to prevail in one or more of their claims, it should not be ordered to pay Claimants' costs, as Respondent: (i) raised serious defenses, which were well-founded in public international law and Peruvian law, and participated in these proceedings in good faith; (ii) assisted the Tribunal by providing relevant evidence and a fair representation of the applicable legal standards; and (iii) endeavoured to consult Claimants on procedural issues and accommodated Claimants' multiple extension requests.[1540]

c. Reasonableness

1346. Respondent submits that its costs are reasonable given the volume and complexity of issues presented.[1541]

C. THE TRIBUNAL'S DECISION ON COSTS

1347. The Tribunal is deciding on the issue of costs relevant to all claims and all jurisdictional objections put forward in this arbitration proceeding. This includes claims and objections

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1537 R-CS ¶¶ 20-23; *citing* Letter from Claimants to the Tribunal (9 May 2021), p. 18; *see* PO 5, ¶¶ 37-39, 44-47; *see also* Respondent's Letter to the Tribunal (14 May 2021), p. 11; *see* Reply ¶¶ 306-313. *See also* Rejoinder § II.H, ¶¶ 366-386.

1538 R-CS ¶¶ 24-25; *see* PO 6, ¶ 34.

1539 R-CS ¶ 7.

1540 R-CS ¶¶ 26-28; *citing* Email exchange between the Tribunal and Parties' respective Counsel (18-21 October 2021).

1541 R-CS ¶ 29.

related to: (i) First Claimant's claims under the TPA and the ICSID Convention, on its own behalf and on behalf of Second Claimant; and (ii) Second Claimant's claims under the RER Contract. The fact that these claims are brought under different legal instruments and by different parties means that the Tribunal must have regard to the legal instruments applicable to each for the determination of costs. The Tribunal will therefore first make a determination on the allocation of costs under the RER Contract, before proceeding to determine the allocation of costs under the TPA and the ICSID Convention. The Tribunal will then proceed to the quantification of costs. Noting that the Parties' respective costs submissions are provided globally for the arbitration proceedings, without breaking costs down between the two types of claims, the Tribunal will consider the implications of any divergence between its decisions at ¶ 1384 below.

(1) Costs Under the RER Contract

a. The Legal Standard

1348. In their costs submission, Claimants mention the Parties' agreement on costs under the RER Contract. [1542] Respondent, on the other hand does not make reference to it, and therefore does not distinguish between costs in relation to the RER Contract and in relation to the TPA.

1349. Pursuant to Clauses 11.7 and 11.8 of the RER Contract, Second Claimant and Respondent agreed to distinguish between two types of costs. Clause 11.7 of the RER Contract concerns "[a]ll the expenses incurred as a result of the settlement of the … Non-Technical Dispute, including fees to be paid to the … Arbitrators" (see ¶¶ 1324-1325 above). The Tribunal will refer to these costs as "**Arbitration Costs**," which the Tribunal understands include ICSID's administrative fees, and the fees and expenses of the Members of the Tribunal. Under Clause 11.7, Arbitration Costs are to be borne by "the losing Party, unless the … Arbitrators decide otherwise."[1543]

1350. Clause 11.8 of the RER Contract refers to "[c]osts and expenses such as advisors' fees, internal costs, or others that are attributable to a Party individually" (see ¶ 1325 above).

1542 C-CS ¶ 4 fn 1.

1543 **C-002**, RER Contract, Clause 11.7.

The Tribunal will refer to these costs as "**Legal and Other Costs**," which the Tribunal understands include legal fees and expenses, expert and witness fees and expenses, travel expenses, bank fees, delivery fees, photocopying, support services, translation, research and other internal expenses. Under Clause 11.8 of the RER Contract, Legal and Other Costs are excluded from the provisions of Clause 11. The Tribunal concurs with Claimants' interpretation[1544] that the meaning of this provision is that each party will bear its own Legal and Other Costs with respect to an arbitration under the RER Contract.

1351. The Tribunal considers it appropriate to follow the parties' agreement reached in respect of the allocation of costs under the RER Contract and will apply the above provisions to the dispute between Second Claimant and Respondent under the RER Contract. While Respondent did not rely on these provisions in making its costs submissions, the Tribunal does not consider this approach to be inconsistent with Respondent's views, which emphasise the broad discretion of the Tribunal with respect to costs.[1545]

b. Allocation of Costs

1352. In accordance with Clause 11.8 of the RER Contract, the Tribunal finds that the Legal and Other Costs incurred in relation to this arbitration for Second Claimant's claims against Respondent under the RER Contract are to be borne by Second Claimant and Respondent respectively with respect to each of their individual internal costs.

1353. Under Clause 11.7 of the RER Contract, the losing party is to bear the Arbitration Costs, unless the Tribunal decides otherwise. In order to determine whether Second Claimant or Respondent is the losing party, the Tribunal will summarise the outcome of the various objections and claims put forward:

(i) Respondent's jurisdictional objections (to the extent relevant to the RER Contract): Second Claimant is the successful Party (see ¶ 568 above).

1544 C-CS ¶ 4 fn 1.

1545 R-CS ¶ 4.

(ii) Second Claimant's claim for breach of Clauses 1.4.26, 1.4.37, 2.2.1, 4.3, 6.3, 11.3 and Addenda 3-6 of the RER Contract: Respondent is the successful Party (see ¶ 993 above).

(iii) Second Claimant's claim for breach of the Peruvian law doctrines of good faith, *actos propios* and *confianza legítima*: Respondent is the successful Party (see ¶ 993 above).

(iv) Second Claimant's claim for breach of the review periods under the GLAP and TUPA: Respondent is the successful Party (see ¶ 993 above).

(v) Second Claimant's claim for compensation in respect of any of the alleged breaches of the RER Contract: Respondent is the successful Party (see ¶ 999 above).

(vi) Second Claimant's requests for orders that Respondent must return the Performance Bond under the RER Contract, and may not call or collect it: Second Claimant is the successful Party (see ¶ 996 above).

1354. Since both Second Claimant and Respondent argued that the RER Contract has been terminated, for different reasons, the Tribunal does not consider either Party to be a losing Party on that point.

1355. With respect to the Confidentiality Agreement, to the extent relevant to the RER Contract, the Tribunal found that Respondent has breached the Agreement, but rejected Claimants' claims with respect to the consequences of that breach. The Tribunal does not consider either Party to be the losing Party with respect to that point.

1356. In light of the above, the Tribunal considers Second Claimant to be the losing Party with respect to the dispute under the RER Contract. While it succeeded in establishing the Tribunal's jurisdiction under the RER Contract, Second Claimant was not successful with respect to any of its claims, save for its request for an order that Respondent may not call or collect the Performance Bond. The value of that Performance Bond is USD 5 million, being less than 10% of the compensation sought by Second Claimant combined with the two bonds for which relief was sought. Moreover, the bulk of the Parties' submissions,

evidence, and time at the Hearing in relation to Second Claimant's claims under the RER Contract was dedicated to Second Claimant's other claims under the RER Contract.

1357. Having determined that Second Claimant is the losing Party under the RER Contract, the default provided under Clause 11.7 of the RER Contract is that Second Claimant will bear the Arbitration Costs. It remains to be considered whether there is any basis for the Tribunal to "decide otherwise", as provided in that Clause.

1358. Neither Party has made submissions as to the basis, if any, upon which the Tribunal should deviate from the default provided by Clause 11.7 of the RER Contract. However, both sides have made reference in their respective submissions to the procedural conduct of the opposing Party in the course of the arbitration, as a basis for adjusting the "costs follow the event" principle (see ¶¶ 1330-1331, 1344 above). The Tribunal considers that the Parties' procedural conduct could potentially be relevant to its award on costs under the RER Contract, in particular with respect to any bad faith or abusive procedural conduct.

1359. The Tribunal has reviewed and takes note of the Parties' respective accounts of the proceedings. Many of the instances of procedural conduct invoked by one side against the other fall within the reasonable exercise of a party's right to pursue its legal claims and defences in the arbitration. In this respect, not every unsuccessful procedural application justifies an adverse award of costs. The Tribunal considers that each side conducted itself with due professionalism, and without bad faith or abusive procedural tactics.

1360. The Tribunal further notes that it does not consider Second Claimant's claims under the RER Contract to be frivolous.

1361. The Tribunal does not find that any of the circumstances cited by the Parties justify an adjustment to the approach laid down in Clause 11.7 of the RER Contract, i.e., that the losing Party shall pay the Arbitration Costs.

c. Conclusion on Costs Under the RER Contract

1362. The Tribunal finds that as the losing Party with respect to the claims made under the RER Contract, Second Claimant is responsible for the Arbitration Costs in relation to that

dispute. Second Claimant and Respondent are to bear their respective individual Legal and Other Costs incurred.

(2) Costs Under the TPA and the ICSID Convention

a. The Legal Standard

1363. TPA Article 10.26(1) provides that the Tribunal may award costs and legal fees in accordance with Section A of Chapter 10 of the TPA and the applicable arbitration rules, which in this case are the ICSID Arbitration Rules (see ¶ 1322 above).

1364. The Parties agree that the Tribunal has wide discretion in the exercise of its power to order costs under Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 28 (see ¶¶ 1319-1321 above).[1546] Neither provision contains a rule to be followed according to which a party should bear or be awarded costs. The "loser pays" or "costs follow the event" principle is routinely applied as the starting point for the allocation of costs in investment arbitration proceedings.

1365. In relation to the dispute under the TPA, the Parties agree that it is appropriate to apply the principle of "costs follow the event" in this case,[1547] although they disagree on its application.

1366. The Tribunal agrees, in general, that the successful party in an investment arbitration may be awarded costs, subject to the specific circumstances of the case. The Parties have each referred to adjustments that may be made to the "costs follow the event" standard to account for relevant factors such as: (i) the reasonableness of costs claimed by the successful party; (ii) the relative success of the parties; and (iii) the reasonableness of the parties' conduct and positions (including any frivolous claims, any abuse of the system, and any particularly serious allegations made without substantiation).[1548] The Tribunal

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1546 C-CS ¶ 4; R-CS ¶ 4.

1547 C-CS ¶¶ 4-5; R-CS ¶ 8.

1548 C-CS ¶¶ 4-5; *citing* **CL-011**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 533; **CL-278**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, ¶ 207; **CL-279**, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Peru's Submission on

endorses these factors as potentially relevant considerations to take into account when awarding costs.

1367. ICSID Arbitration Rule 28(2) also requires that costs are "reasonably incurred."

1368. In deciding on costs under the TPA and the ICSID Convention, the Tribunal will therefore consider: (i) whether First Claimant or Respondent has prevailed with respect to the claims and objections put forward, and the relative success and failure of each Party; (ii) the Parties' procedural conduct and any other relevant considerations; and (iii) the reasonableness of costs in turn below.

b. Relative Success and Failure

1369. The Tribunal sets out the successful Party for each of the jurisdictional objections and claims made below:

(i) Respondent's jurisdictional objections under the TPA and the ICSID Convention: First Claimant is the successful Party, aside from the issue of the Tribunal's jurisdiction in respect of the Upstream Projects, for which Respondent was successful (see ¶ 568 above).

(ii) First Claimant's claims on behalf of Second Claimant under TPA Article 10.16(1)(b)(i)(C), in relation to alleged breach of the RER Contract as an

Costs, 15 August 2016, ¶ 4; **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 734; **CL-280***, Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶ 909; **CL-281**, *EBO Invest AS and others v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, ¶ 530; R-CS ¶ 5; *citing* **RL-207**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 620; **RL-009***, Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. No. ARB/00/9, Award, 24 July 2008, ¶¶ 24.2-24.6; **RL-212**, *PNG Sustainable Development Program Ltd. v. Papua Nueva Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015, ¶ 406; **RL-253**, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, ¶ 584; **RL-254**, *CEAC Holdings Ltd. v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, 1 May 2018, ¶ 155; **RL-255**, *Tidewater Investment SRL et al. v. Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, ¶¶ 213-215; **CL-048**, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 624; **CL-125**, *Cortec Mining Kenya Ltd. et. al. v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018, ¶ 399.

"investment agreement" thereunder: Respondent is the successful Party (see ¶ 998 above).

(iii) First Claimant's claims on its own behalf (under TPA Article 10.16(1)(a)) and on behalf of Second Claimant (under TPA Article 10.16(1)(b)(i)(A)) for breach of TPA Articles 10.4, 10.5 and 10.7: Respondent is the successful Party (see ¶ 1279 above).

1370. The Tribunal makes the same observations as it recorded at ¶¶ 1354-1355 -above, i.e., that it does not consider either Party to be the losing Party with respect to: (i) the argument that the RER Contract had terminated; and (ii) the breach of the Confidentiality Agreement.

1371. In light of the above determinations made under the TPA and the ICSID Convention, the Tribunal considers Respondent to be the successful Party in relation to the claims under the TPA and the ICSID Convention, since First Claimant failed to successfully make out any of its claims. The Tribunal acknowledges, however, that it rejected all except one of Respondent's jurisdictional objections under the TPA and the ICSID Convention. These objections were multiple and required significant time and costs to address.

1372. Similarly to the conclusion reached at ¶ 1360 with respect to the Second Claimant's claims under the RER Contract, while the Tribunal has rejected First Claimant's claims under the TPA, including those filed on behalf of Second Claimant, the Tribunal does not consider those claims under the TPA to be frivolous. The Tribunal takes due account of this factor in reaching its decision on costs.

c. Procedural Conduct

1373. The Tribunal refers to its findings at ¶ 1359 above in relation to the Parties' procedural conduct for the purposes of the claims under the RER Contract. Those observations apply equally to the claims made under the TPA and the ICSID Convention. The Tribunal considers that each side has conducted itself with due professionalism, and without bad faith or abusive procedural tactics. The Tribunal does not find that any of the circumstances of procedural conduct cited by the Parties justify an adjustment to the "costs follow the event" principle.

d. Reasonableness

1374. The Tribunal considers that the reasonableness of costs under ICSID Arbitration Rule 28(2) may take into account the amount in dispute, the complexity of proceedings, and their length, among other relevant factors. This assessment may be nuanced, and the Tribunal does not necessarily equate reasonableness with "not manifestly excessive" as Claimants have proposed.[1549]

1375. Where there are disparities in legal costs between the Parties, the Tribunal notes that Parties are free to choose their legal representatives. This may lead to differences in costs, and such a difference alone does not deem those costs unreasonable. It may still be necessary to consider whether the amount of costs and any fee arrangement is justified in all the circumstances of a case.

1376. In the present case, Claimants' claimed costs range from USD 17,522,014.25 to USD 23,318,729.25, depending on a success fee uplift agreed with its counsel. Respondent's claimed costs amount to USD 4,804,833.80, representing some 27% of Claimants' lower claim. The disparity is increased in respect of Claimants' "uplifted" costs claim.

1377. The Tribunal acknowledges the complex nature of this proceeding which has involved multiple claims under different legal instruments, also requiring coordination with other legal proceedings. Also taking into account the amount in dispute and the duration of the proceedings, the Tribunal understands that significant costs were incurred by the Parties. The Tribunal is not persuaded, on the other hand, that the disparity in costs between the Parties can be attributed to the points raised by Claimants, i.e., that (i) Claimants' counsel represented two parties; (ii) they bore the burden of proof on all merits-related and quantum-related issues; (iii) they drafted two more pleadings than Respondent, i.e., the Notice of Intent and Request for Arbitration; and (iv) Respondent's conduct increased costs.[1550] The Tribunal attributes the disparity to the Parties' respective choices in legal

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1549 C-CS ¶ 6; *citing* **CL-282**, Micha Bühler, "Awarding Costs in International Commercial Arbitration: An Overview", ASA Bulletin 22, (2/2004), p. 273.

1550 C-CS ¶ 10; *see* C-CS Annex A, Table B(1)(b); *citing* **CL-280**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶ 910; **CL-283**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 588; **CL-016**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 734.

counsel and case management. Even so, the Tribunal considers First Claimant's costs to exceed what is reasonable in this case.

1378. In all the circumstances, the Tribunal confirms the reasonability of Respondent's costs, while being unable to confirm the reasonability of the totality of First Claimant's costs.

e. Conclusion on Allocation of Costs

1379. Taking into account the Tribunal's conclusions above regarding (i) the relative success and failure of First Claimant and Respondent in respect of the claims and objections under the TPA and the ICSID Convention; (ii) their procedural conduct; and (iii) the reasonableness of costs claimed, the Tribunal finds it appropriate to distinguish between the Arbitration Costs and the Legal and Other Costs.

1380. In respect of the Arbitration Costs for the TPA and ICSID Convention claims and objections, the Tribunal decides that these shall be borne by First Claimant, on the basis that it was unsuccessful in establishing any of its claims, reflecting the principle of "costs follow the event."

1381. In respect of the Legal and Other Costs, the Tribunal decides that each side shall bear its own respective costs. This determination adjusts the principle of "costs follow the event" in respect of these costs, in recognition of the conclusions above that (i) while First Claimant was unsuccessful in its claims, it succeeded in defending all but one of Respondent's jurisdictional objections; (ii) while First Claimant was unsuccessful in its claims, those claims were not frivolous. Since there is no order for Respondent to pay any part of First Claimant's Legal and Other Costs, there is no cost implication of the Tribunal's conclusion that it was unable to confirm the reasonability of First Claimant's costs.

(3) Overall Conclusion on the Allocation of Costs

1382. The Tribunal notes that it has reached the same conclusion with respect to the allocation of costs under both the RER Contract and the TPA and ICSID Convention claims. First Claimant shall be responsible for the Arbitration Costs under the TPA and the ICSID Convention, and Second Claimant shall be responsible for the Arbitration Costs under the

RER Contract. Each Party will bear its own individual Legal and Other Costs with respect to both claims.

1383. Since Claimants made joint submissions and joint payments towards the Arbitration Costs and, as requested by Claimants, ICSID has jointly administered both claims, the Tribunal considers it appropriate for Claimants to be jointly responsible for the Arbitration Costs.

1384. There being no discrepancy between the Tribunal's determinations between the two types of claims, the Tribunal does not need to give further consideration to any implications that would have arisen from such a difference.

(4) Quantification of Costs

1385. Taking into account the Tribunal's decision at ¶¶ 1382-1384 above, the Tribunal quantifies the amount of the Arbitration Costs to be borne by Claimants.

1386. Since each side will pay its own Legal and Other Costs in relation to both the TPA claims and the RER Contract claims, the Tribunal does not need to determine the amount of such costs.

1387. The Arbitration Costs, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' Fees and Expenses	
Prof. Dr. Albert Jan van den Berg	USD 602,662.97
Prof. Dr. Guido Tawil	USD 239,353.60
Prof. Raúl E. Vinuesa	USD 227,148.51
ICSID's Administrative Fees	USD 220,000.00
Direct Expenses	USD 219,139.33
Total	**USD 1,508,304.41**

1388. The above costs have been paid out of the advances made by the Parties in equal parts.[1551] As a result, each Party's share of the costs of arbitration amounts to USD 754,152.21.

1389. Accordingly, the Tribunal orders Claimants to pay Respondent USD 754,152.21 for the expended portion of Respondent's advances to ICSID.

1390. The Tribunal further considers it appropriate for post-award interest to accrue on the amount awarded to Respondent as sought by Respondent, calculated at 3% per annum, compounded annually, until the date of full payment.

XII. CONCLUSIONS

1391. In this Section, the Tribunal summarises its decisions with respect to each of the Parties' relief sought in this arbitration. The Tribunal considers the most recent requests for relief to be the Parties' respective current relief sought, and therefore bases its conclusions on the requests made in Claimants' Reply and Respondent's Rejoinder. To the extent these mirror requests made in their earlier submissions, cross-references are provided.

A. CLAIMANTS

1392. The Tribunal reached the following conclusions with respect to the requests for relief set out in Claimants' Reply (see ¶ 236 above). Where these requests also substantially mirror requests made in the Memorial, the Memorial reference is also provided.

1393. Request (a) for a declaration "that Peru has breached Articles 10.4, 10.5 and 10.7 of the TPA" (see Reply ¶ 1045(a)) (see also Memorial ¶ 547(a)). This request is rejected (see ¶ 1279 above).

1394. Request (b) for a declaration as follows (see Reply ¶ 1045(b)) (see also Memorial ¶ 547(b)):

> that Peru has breached its obligations under the RER Contract, including Peru's obligations: (i) under Clauses 1.4.26, 1.4.37, 2.2.1, 4.3, 6.3, 11.3, and Addenda 3-6 of the RER Contract; (ii) to execute the RER Contract in accordance with the Peruvian law doctrines of good faith, *actos propios*, and *confianza legítima*;

[1551] The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case fund. The remaining balance shall be reimbursed to the Parties based on the payments that they advanced to ICSID.

> and (iii) to adhere to the review periods under the GLAP and TUPA, which form part of the governing law under the RER Contract[.]

This request is rejected (see ¶¶ 993-994 above).

1395. Request (c) for a declaration "that the RER Contract is terminated and, with it, all of CHM's obligations and duties owed thereunder" (see Reply ¶ 1045(c)) (see also Memorial ¶ 547(c)): This request is partially granted, in respect of the declaration that the RER Contract is terminated, and the remaining language is rejected (see ¶ 995 above).

1396. Request (d) for a declaration "that the Confidentiality Agreement is terminated and, with it, all of CHM's obligations and duties owed thereunder" (see Reply ¶ 1045(d)): This request is rejected (see ¶ 1317 above).

1397. Request (e) for an order for Respondent (see Reply ¶ 1045(e)) (see also Memorial ¶ 547(e)):

> …to compensate Claimants for their losses resulting from Peru's breaches under the TPA, the RER Contract, Peruvian law, and international law, which, as of the date of this Memorial, amount to at least **US $45,620,000** but continue to increase due to the ongoing nature of Peru's unlawful breaches[.]

This request is rejected (see ¶¶ 999, 1280 above).

1398. Request (f) for an order for Respondent (see Reply ¶ 1045(f)) (see also Memorial ¶ 547(f)):

> …to pay all costs and expenses of this arbitration, including Claimants' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs[.]

This request is rejected (see ¶ 1389 above).

1399. Request (g) for a recommendation that Respondent (see Reply ¶ 1045 (g)) (see also Memorial ¶ 547(g)):

> …cease and desist its harassment of CHM and its lawyer, [Second Claimant's External Counsel], by terminating the AEP's criminal proceeding concerning CHM's environmental permit for the Mamacocha Project[.]

This request is rejected (see ¶¶ 1143 and 1280 above).

1400. Request (h) to order the Parties "to protect the *status quo* and not aggravate the dispute pending resolution of the ICSID arbitration" (see Reply ¶ 1045(h) (see also Memorial ¶ 547(h)): The Tribunal did not consider such an order to be necessary in the course of these proceedings, and finds no basis to issue such an order in this Award. This request is rejected.

1401. Request (i) for an order that Respondent (see Reply ¶ 1045(i)) (see also Memorial ¶ 547(j)):

> …may not call or collect any bond put up by either Claimant in relation to the Mamacocha and Upstream Projects, including the US $5 million bond under the RER Contract and the US $71,500 bond that CHM put up to obtain the final concession for the transmission line[.]

This request is partially granted insofar as Respondent may not call or collect the USD 5 million Performance Bond put up under the RER Contract, and rejected in respect of the remaining requests (see ¶ 996 above).

1402. Request (j) for an order for "further relief as counsel may advise or the Tribunal may deem just and appropriate" and request (k) for an award of "such other relief as the Tribunal considers appropriate" (see Reply ¶ 1045(j) and (k)) (see also Memorial ¶ 547(k)-(l)): No argument or particularised request has been made in relation to these requests. The Tribunal considers that it would violate its mandate if it were to grant relief outside the pleaded cases of the Parties. In the absence of further substantiation, these requests for relief are in the Tribunal's view meaningless legal recitations and are rejected.

1403. In addition, the Tribunal partially grants the request at Memorial ¶ 547(d) for a declaration that "all bonds put up by either Claimants as part of the Mamacocha and Upstream Projects be returned to CHM, including the US $5 million performance bond under the RER Contract" (see also Reply ¶ 25). This request is granted with respect to the USD 5 million Performance Bond under the RER Contract to be returned to Second Claimant, and rejected in respect of the remaining requests (see ¶ 996 above).

1404. With respect to the request at Memorial ¶ 547(i) for an order for "Peru to cease its pursuit of the Lima Arbitration pending resolution of the ICSID arbitration," the Tribunal

considers this request to be moot, noting that the Lima Arbitration has terminated with an award in which the tribunal declined jurisdiction (see ¶ 216 above).

1405. Taking into account the Tribunal's conclusions reached in this Award and summarised above regarding Claimants' claims, Claimants' request to present updates to their damages figures at the end of the case, should they prevail on any of their claims, does not arise.

B. RESPONDENT

1406. The Tribunal reached the following conclusions with respect to the requests for relief set out in Respondent's Rejoinder (see ¶ 238 above). These mirror Respondent's requests for relief set out in its Counter-Memorial, which are expressed in slightly different terms but are not different in substance and are enumerated in the same subparagraph numbers (see ¶ 237 above).

1407. Request (a) for the Tribunal to "*declare con lugar las objeciones jurisdiccionales presentadas por el Perú*" (see Rejoinder ¶ 1390(a)): This request is granted with respect to the objection that the Tribunal has no jurisdiction *ratione materiae* over First Claimant's claims with respect to the Upstream Projects under the TPA, and denied in all other respects (see ¶ 568 above).

1408. Request (b) for the Tribunal to "*rechace las reclamaciones de las Demandantes por falta de mérito*," to the extent that it finds that it has jurisdiction with respect to one or more of those claims (see Rejoinder ¶ 1390(b)): This request is granted consistent with the conclusions set out at ¶¶ 1393, 1394, 1396, 1397 and 1399 above, subject to the conclusions reached in relation to the declarations at ¶¶ 1395 and 1401 above.

1409. Request (c) for the Tribunal to: "*rechace todas las demás peticiones accesorias de las Demandantes, incluyendo aquella relativa a la ejecución de la Garantía de Fiel Cumplimiento*" (see Rejoinder ¶ 1390(c)): This request is rejected in respect of the declaration on the Performance Bond as set out at ¶ 1401 above. In respect of Claimants' other requests see ¶¶ 1395, 1396, 1399, 1400 and 1402 above.

1410. Request (d) that "*en caso de que el Tribunal considere total o parcialmente improcedentes los petitorios (a), (b) y (c) arriba, rechace la solicitud de compensación de las Demandantes*" (see Rejoinder ¶ 1390 (d)): Claimants' claims for compensation are rejected, as set out at ¶ 1397 above.

1411. Request (e) to (see Rejoinder ¶ 1390(e)):

> *condene a las Demandantes al pago de la totalidad de las costas procesales, así como de la totalidad de los honorarios profesionales y gastos de abogados del Perú, y cualquier otro gasto incurrido por el Perú en el presente arbitraje, más un interés compuesto sobre esos montos antes y después de emitido el laudo, hasta la fecha de pago, calculado con base en una tasa de interés razonable.*

This request is partially granted (see ¶¶ 1389-1390 above).

XIII. AWARD

1412. FOR THE FOREGOING REASONS, the Tribunal renders the following decisions:

(A) DECLARES that it has jurisdiction over First Claimant's claims under the TPA on its own behalf and on behalf of Second Claimant, with the exception that it has no jurisdiction *ratione materiae* over First Claimant's claims with respect to the Upstream Projects;

(B) DECLARES that it has jurisdiction over Second Claimant's claims under the RER Contract;

(C) DECLARES that the RER Contract is terminated;

(D) ORDERS that the USD 5 million Performance Bond under the RER Contract is to be returned to Second Claimant;

(E) ORDERS that Respondent may not call or collect the USD 5 million Performance Bond under the RER Contract;

(F) REJECTS, by majority, Second Claimant's claims under the RER Contract, subject to the declarations in Recitals (C), (D) and (E) above;

(G) REJECTS, by majority, First Claimant's claims under the TPA on its own behalf and on behalf of Second Claimant;

(H) ORDERS, by majority, that Claimants shall jointly bear the Arbitration Costs in an amount of USD 1,508,304.41, and accordingly shall reimburse Respondent USD 754,152.21 in respect of such costs;

(I) ORDERS, by majority, that post-award interest shall accrue on the amount awarded to Respondent, calculated at 3% per annum, compounded annually, until the date of full payment;

(J) DECLARES that each side shall bear its Legal and Other Costs;

(K) REJECTS all other claims and requests.

Prof. Dr. Guido Santiago Tawil
Arbitrator

Date:

Prof. Raúl E. Vinuesa
Arbitrator

Date:

Dissenting in part as per attached individual opinion

[Signed]

Prof. Dr. Albert Jan van den Berg
President of the Tribunal

Date: [December 20, 2023]

[Signed]

Prof. Dr. Guido Santiago Tawil
Arbitrator

Date:

Prof. Raúl E. Vinuesa
Arbitrator

Date: [December 20, 2023]

Dissenting in part as per attached individual opinion

Prof. Dr. Albert Jan van den Berg
President of the Tribunal

Date:

[Signed]

Prof. Dr. Guido Santiago Tawil
Arbitrator

Date: [December 20, 2023]

Prof. Raúl E. Vinuesa
Arbitrator

Date:

Dissenting in part as per attached individual opinion

Prof. Dr. Albert Jan van den Berg
President of the Tribunal

Date:

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LATAM HYDRO LLC AND CH MAMACOCHA S.R.L.

Claimants

and

THE REPUBLIC OF PERU

Respondent

(ICSID Case No. ARB/19/28)

DISSENTING OPINION OF PROFESSOR GUIDO SANTIAGO TAWIL

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20 December 2023

1. I concur, in general, with the reasoning and decisions on jurisdiction and admissibility as reflected in the Award.[1]

2. On the contrary, I respectfully dissent from the decisions proposed by my colleagues as to the merits of the claim. In this case, my discrepancy is eminently conceptual.

3. The Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System ("the RER-Contract or the Contract") is a collaborative administrative contract whereby - through the assumption of relevant commitments by both parties - the private contracting party (in this case, Hidroeléctrica Laguna Azul S.R.L.; now, CH Mamacocha S.R.L. or CHM) undertook significant investment obligations in order to supply the awarded energy in exchange for certain commitments, basic but crucial, for the Contract to succeed. Just as the Contract could not succeed absent CHM's investments and fulfillment of its obligations, such result would not be possible absent the State contracting party's due compliance with the obligations undertaken by it.

4. Due compliance with such obligations gives rise to the so-called *financial-economic balance or equation of the contract* under administrative contract law, and failure to discharge such obligations may (depending on the magnitude of the non-compliance) lead to the impossibility to perform and the virtual death of the contract.

5. As reflected by the practice adopted in various countries, the construction of many infrastructure projects requires, for them to be feasible, the introduction of mechanisms guaranteeing a minimum flow of revenue during a long period, to allow an internal rate of return (IRR) sufficient to repay the investment undertaken and adequately compensate for the risk assumed in the context of the project. This occurs in both large infrastructure projects and others, even smaller, where the remuneration generated through ordinary market mechanisms would not suffice to repay the investment and yield the return necessary to encourage private actors to undertake such projects.

6. That is particularly the case of certain "*clean energy*" generation projects (such as those of a hydroelectric nature, like the one at issue here) under which, while machines are mainly called to dispatch in view of their low operating costs, ordinary remuneration systems (generally, based on marginal cost) are not enough to repay the high investment commitments assumed. Thus, many hydroelectric plants are built by States - which, through them, meet, in turn, other objectives (*e.g.*, regulating water flows for consumption or crops downstream, developing marginal or uninhabited areas, or, even, fostering geopolitical interests) - or by means of a robust

[1] Award, ¶¶ 341-568.

subsidy scheme, through either direct (transfer of funds) or indirect (tax relief, guaranteed energy prices, etc.) contributions. When the investment is made by private parties, most of such projects are funded through project finance mechanisms in which resources are obtained from third parties (in general, financial institutions which, in turn, source funds from the markets), who get involved in such funding on the basis of long-term flows of revenue expected and using the income and assets of the project itself as collateral. Hence, such projects are especially sensitive to unexpected changes, regulatory opportunism, etc.

7. In my view, the majority opinion fails to properly assess the relevance of certain key elements of the RER-Contract in such financial-economic balance.

8. By concluding, for instance, that the RER-Contract did not impose on Respondent the obligation to assure the Guaranteed Revenue,[2] to grant the third extension requested (which was crucial in order to reach precisely the 20-year period of guaranteed revenue contractually provided and necessary to repay the project) in the face of delays not attributable to the concessionaire,[3] or to actively assist it before regional authorities in the obtention of permits, the majority decision, in practice, endorses the destruction of the financial-economic balance of the Contract mentioned *supra*.

9. In such context, I cannot agree, *inter alia*, with (i) the decision to validate the rejection of the third request for extension[4] based on the alleged invalidity of Addenda 1 and 2,[5] which - expressly

[2] Term defined in Clause 1.4.26 of the RER-Contract as "the annual revenue that the Concessionaire Company shall receive for the net injections of energy up to the limit of the Awarded Energy paid at the Award Tariff. It will only apply during the Term of Validity" (**Exhibit C-2**, RER-Contract, 18 February 2014). The majority rules on this matter in Award, ¶¶ 711-726. Concerning the operation of the Guaranteed Revenue and the Term of Validity in the RER-Contract, see Benavides Report I, ¶¶ 171-178.

[3] Award, ¶¶ 727-843.

[4] **Exhibit C-30/MQ-26/CLC-38**, Official Letter No. 2312-2018-MEM/DGE issued by the MINEM, 31 December 2018, attaching Report No. 511-2018-MEM/DGE, 31 December 2018. The third request for extension was submitted on 5 February 2018 and denied on 31 December 2018, almost eleven months after it had been filed and exactly on the same date as -were the extension not to be granted- the Contract would terminate. In such regard, see Quiñones Report I, ¶ 6; and Quiñones Report II, ¶ 95, where it is observed that, in accordance with Articles 106 and 142 of the Peruvian Law of Administrative Procedures, the Conceding Authority should have answered the request within the general term of thirty business days.

[5] **Exhibit C-8**, Addendum No. 1 to the Concession Contract, 22 July 2015, and **Exhibit C-9**, Addendum No. 2 to the Concession Agreement, 3 January 2017, which agreed to modify the Works Execution Schedule of the Concession Contract and extend the term for the POC by 705 and 462 calendar days, respectively. Addendum 1 provided in its Clause Sixth: "Inasmuch as the aforementioned delays in the administrative procedures made it impossible to achieve Financial Closing for the project, entailing the failure to comply with the terms of the Milestones of the Works Execution Schedule of the Concession Agreement—having failed to conclude with the process of financing the project—the conclusion must be reached that said events of non-compliance do not fall within the scope of the Concessionaire's liability, applying article 1314 of the Civil Code which establishes that a party acting in ordinary due diligence cannot be held responsible for failure to execute its obligations or for the partial, late, or defective compliance with said obligations. In this sense, via Official Document No. 504-2015-MEM/DGE, the General Directorate of Electricity approved the extension of the term requested due to delays that could be attributed to the State, pursuant to the provisions of Legal Report No. 005-2015-EM-DGE."

recognizing the existence of the events of non-compliance of the Peruvian State, modified work execution schedules and the date of Commercial Operation Start-up (POC, for its Spanish acronym)[6] - *were never declared null and void and remain valid as of the date of this decision*;[7] (ii) the decision to validate Respondent's failure to consider the Sosa Report of 22 November 2016[8] or the reports prepared by Estudio Echecopar of 5 April and 17 April 2018,[9] which - despite having been requested by the MINEM itself - were neither assessed nor mentioned when the third request for extension was rejected; (iii) the failure to duly consider Respondent's change of attitude as from late December 2018, who - deviating from the position adopted from the commencement of the Contract and until November 2018 whereby CHM was not to bear the consequences of State interference[10] - abruptly modified the criterion adopted, denied the third extension only a month later,[11] and - unsuccessfully - attempted to seek the declaration of nullity

[6] In such context, Ministry Resolution No. 559-2016-MEM/DM of 29 December 2016 attached to Addendum No. 2 pointed out in its ninth consideration: "That, by extending the CCO term four hundred and sixty-two (462) calendar days, the new date for this milestone would be March 14, 2020, exceeding the deadline of December 31, 2018 contained in number 8.4 of Clause Eight of the RER Agreement, the same which stipulates that said date cannot be exceeded *'for any reason', which must be understood, excluding the scope of responsibility of the Concessionaire, non-performance or late or defective performance, directly caused by acts of the contracting Public Administration*…" (emphasis added).

[7] The majority rules in connection with this matter in Award, ¶¶ 819, 823 and 826.

[8] **Exhibit C-12**, Report No. 166-2016-EM-DGE, 6 October 2016, adopted by the then-Director General of Electricity (Carla Sosa Vela), which, under paragraph 2.2.5., stated that the expression for "*any reason*" in Article 8.4 of the RER-Contract authorizing automatic termination of the Contract and enforcement of the Performance Bond does not allow inferring the Concessionaire's contractual liability for acts of God, force majeure or acts of prince (including action attributable to the Public Administration).

[9] **Exhibit C-235**, Legal Report of Estudio Echecopar, 5 April 2018; and **Exhibit C-236**, Legal Report of Estudio Echecopar, 17 April 2018. The first report of Estudio Echecopar (dated 5 April 2018) concluded that "1. *The MEM must extend the COS term beyond two (2) years after the Actual Date set forth in the Tender Requirements and change the Termination Date of the RER Concession Contract in order to recognize the Guaranteed Premium for twenty 20 years as initially contemplated* where RER Awardees show that the COS delay is not attributable to them but rather to unavoidable force majeure events, such as the Administration's delay in granting the required permits. *This extension must be agreed upon in an Addendum to the RER Concession Contract signed by both parties*" and "4. In view of the foregoing, we believe that *it is not possible to terminate the RER Concession Contract by way of penalty where the RER Awardee shows that the COS delay was due to a force majeure event, i.e., the administration's delay in the issuance of the authorizations; moreover, in that case, the Performance Bond posted for the State should not be enforced*" (emphasis added). At the hearing, witness Ísmodes Mezzano (former Minister of the MINEM) was questioned about the first report of Estudio Echecopar (Exhibit C-235) and said that he was not aware of it. Tr. (Day 3), 9 March 2022, 575:2-578:17. Particularly noteworthy is the fact that both reports of Estudio Echecopar were not mentioned or discussed in the decision rejecting the third request for extension (**Exhibit C-30**, Official Letter No. 2312-2018-MEM/DGE, 31 December 2018), where the rejection was determined by the Director General of Electricity himself, Eng. Víctor T. Estrella, to whom both reports were addressed. The majority discusses the relevance of these reports in Award, ¶¶ 650, 794-795.

[10] On the basis of which Respondent defended the concessionaire's actions in court within the framework of the *amparo* action, executed Addenda Nos. 1, 2, 3, 4, 5 and 6, and made the regulatory proposal of 11 November 2018 (**Exhibit C-18**, Statement of Reasons of the Ministry of Energy and Mines, 11 November 2018).

[11] To such effect, it ignored the Addenda signed and decided to attribute Claimants the risk of State interference. In such regard, Respondent's change of view evidenced between November and December 2018 is noteworthy. See, in that regard, Benavides Report I, ¶¶ 197-201; and Quiñones Report I, ¶¶ 6, 201-202 and 226; as well as the references made by witness Ísmodes Mezzano in the course of the hearing (Tr. (Day 3), 9 March 2022, 618:8-621:20) to the opposition of one of the main gas producers in Peru. Given the abrupt change of attitude observed, it is difficult to justify the failure to produce more contemporaneous documentary evidence in support of the decisions adopted. In these circumstances, I also disagree with the majority decision to reject the request for

of Addendas 1 and 2 for the first time by instituting the Lima Arbitration on 27 December 2018;[12] or (iv) the decision to declare the RER-Contract *automatically* terminated for not reaching the POC on the specified date, and without any right to compensation whatsoever for CHM, even though CHM had not caused the termination and had made millionaire investments as from the execution of the RER-Contract in February 2014.

10. Respondent's actions in dispute entail, in my view, a clear breach of Clauses 1.4.26, 1.4.37 and 6.3 of the RER-Contract,[13] as well as arbitrary conduct on the part of Respondent in violation of the duty to accord fair and equitable treatment to Claimants' investments assumed by the Republic of Peru under Article 10.5 of the Treaty.

11. Given the terms in which the majority of the Tribunal has ruled, no decision is to be adopted regarding the damages claimed.

negative interference in connection with document production requests Nos. 1, 2 and 22. Award, ¶¶ 252 (i), (ii) and (vii), and 253.

[12] **Exhibit C-96**, Official Letter No. 2300-2018-MEM/DGE, 31 December 2018, attaching the request for arbitration filed before the Lima Chamber of Commerce.

[13] See, likewise, Benavides Report I, ¶¶ 15, 17, 19, 87, 204, 205 and 266; and Quiñones Report II, ¶ 6.

[Signed]

Guido Santiago Tawil
Arbitrator
Date: [December 20, 2023]