

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

Claimants

v.

THE REPUBLIC OF PERU

Respondent

REQUEST FOR ARBITRATION

Date: August 30, 2019

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**On Behalf of Claimants Latam Hydro
LLC and CH Mamacocho S.R.L.**

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1. Latam Hydro LLC (“Latam Hydro”) and CH Mamacocha S.R.L. (“CHM”) submit this Request for Arbitration against Respondent, the Republic of Peru (“Peru”), for claims arising from Peru’s pervasive interferences with, and ultimate destruction of, a hydroelectric plant and transmission line project near the Mamacocha Lagoon in the Arequipa region of Peru (the “Mamacocha Project” or “Project”).¹

2. This Request for Arbitration is submitted pursuant Article 10.16 of the United States-Peru Trade Promotion Agreement, signed on April 12, 2006 and entered into force on February 1, 2009 (the “Treaty”);² the Concession Agreement for the Supply of Renewable Energy to the National Interconnected Electric System, dated February 18, 2014 (the “RER Contract”);³ and the International Centre for Settlement of Investment Disputes (“ICSID”) Convention and Rules of Arbitration.

3. Claimants have taken all necessary internal actions to authorize submission of this Request for Arbitration to ICSID and have duly authorized the undersigned counsel, Baker & Hostetler LLP, to institute and pursue arbitration proceedings on their behalf against Peru under the ICSID Convention, the Treaty, and the RER Contract.⁴

I. INTRODUCTION

4. Latam Hydro is a limited liability company of the United States of America, duly organized under the laws of the State of Delaware in May 2014, under registration number

¹ A Glossary describing key terms and abbreviations referenced in this Request for Arbitration may be found at Annex A to this document.

² United States-Peru Trade Promotion Agreement (“Treaty”), February 1, 2009 (C-001). Claimants’ Exhibit List listing all exhibits to this Request for Arbitration may be found at Annex B to this document.

³ Concession Agreement for the Supply of Renewable Energy to the National Interconnected Electrical Grid (“RER Contract”), February 18, 2014 (C-002).

⁴ See Resolution and Waiver of the Board of Directors of Latam Hydro LLC , August 14, 2019 (C-003); Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 (C-004); Power of Attorney granted by Latam Hydro to Baker Hostetler LLP, August 16, 2019 (C-005); Power of Attorney granted by CHM to Baker Hostetler LLP, August 29, 2019 (C-006).

5527780. Latam Hydro has its principal place of business at 1865 Brickell Avenue, A-1603, Miami, Florida 33129-1645, United States.

5. CHM, formerly known as Hidroeléctrica Laguna Azul S.R.L., is a legal entity duly incorporated in Peru in November 2012 and registered under Electronic Certificate No. 12941686 of the Lima Registry Office. CHM has its principal place of business at Juan Dellepiani 354, Urb. Country Club El Golf, San Isidro, Lima 15076, Peru.

6. Peru is the constituted *de jure* government of the people and territory of Peru. Under the Treaty and international law, Peru is responsible for the actions of its departments, agencies, and instrumentalities, including the Ministry of Energy and Mines (“MINEM”), as well as regional and local governmental entities in Peru.

7. The Treaty is a bilateral trade and investment promotion agreement that strives to “[s]trengthen the special bonds of friendship and cooperation between [the U.S. and Peru] and promote regional economic integration[,]” and “[e]nsure a predictable legal and commercial framework for business and investment.”⁵

8. Under Section A of Article 10 of the Treaty, Peru must provide substantive protections to U.S. investors and investments, including:

- a. Peru shall accord covered investments treatment “in accordance with customary international law, including fair and equitable treatment and full protection and security” as provided in Article 10.5;⁶
- b. Peru may not “expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization” except in limited cases where the measures were “for a public purpose,” undertaken “in a

⁵ Treaty, Preamble (C-001).

⁶ *Id.*, Art. 10.5(1) (C-001).

non-discriminatory manner[,]” upon “payment of prompt, adequate, and effective compensation[,]” and “in accordance with due process of law and Article 10.5[,]” as provided in Article 10.7;⁷ and

- c. Peru must treat U.S. investors and investments no less favorably than it treats investors and investments from countries other than the United States “with respect to the establishment, acquisition, expansion, management, conduct, operations, and sale or other disposition of investments” in Peru, as provided in Article 10.4.⁸

9. Section B of Article 10 authorizes an investor, “on its own behalf,” to submit to arbitration “a claim that the respondent has breached an obligation under Section A” of Article 10.⁹ Section B of Article 10 also authorizes an investor, “on behalf of an enterprise of the respondent that is a juridical person that the [investor] owns or controls directly or indirectly” to submit to arbitration “a claim that the respondent has breached . . . an investment agreement.”¹⁰

10. The RER Contract is an electricity generation, supply, and guaranteed revenue agreement between Peru, acting through the Ministry of Energy and Mines (“MINEM”), and CHM. Under the RER Contract, Peru, among other things, guaranteed CHM a price of US \$62 per megawatt hour for up to 130,000 megawatt hours per year for a period of up to 20 years (referred to hereinafter as the “Guaranteed Revenue” as defined in Clause 1.4.26 the RER Contract).¹¹

⁷ *Id.*, Art. 10.7(1) (C-001).

⁸ *Id.*, Art. 10.4 (C-001).

⁹ *Id.*, Art. 10.16(1)(a)(i)(A) (C-001).

¹⁰ *Id.*, Art. 10.16(1)(b)(i)(C) (C-001).

¹¹ RER Contract, Clause 1.4.26 (C-002).

11. The RER Contract is an “investment agreement,” as defined in Article 10.28 of the Treaty because it is a “written agreement between a national authority of [Peru] and a covered investment [*i.e.*, CHM] . . . on which the covered . . . investor [*i.e.*, Latam Hydro] relies in establishing or acquiring a covered investment [*i.e.*, the Mamacocha Project and CHM] other than the written agreement itself, that grants rights to the covered investment [*i.e.*, CHM] . . . to supply services to the public on behalf of [Peru], such as power generation or distribution, water treatment or distribution, or telecommunications.”¹²

12. The RER Contract provides that “[d]isputes whose amount is greater than Twenty Million Dollars (US \$20,000,000) or its equivalent in national currency, will be resolved by legal international arbitration through a procedure processed in accordance with the Rules of Conciliation and Arbitration of [ICSID] established in the Agreement on the Settlement of Investment Disputes between the States and Nationals of other States, approved in Peru by Legislative Resolution No. 26210, to which regulations the Parties submit unconditionally.”¹³

13. Latam Hydro brings claims on its own behalf under Article 10.16(1)(a)(i)(A) of the Treaty for Peru’s breaches of the protections under Articles 10.4, 10.5, and 10.7.¹⁴ Latam Hydro “incurred loss or damage by reason of, or arising out of,” those breaches.¹⁵

14. Latam Hydro also brings claims on behalf of CHM under Article 10.16(1)(b)(i)(C) for Peru’s breaches of an investment agreement.¹⁶ These breaches “directly relate” to Latam Hydro’s covered investments in this dispute.¹⁷ CHM “has incurred loss or damage by reason of, or arising out of,” those breaches.¹⁸

¹² Treaty, Art. 10.28 (C-001).

¹³ RER Contract, Clause 11.3(a) (C-002).

¹⁴ Treaty, Art. 10.16(1)(a)(i)(A) (C-001).

¹⁵ *Id.*, Art. 10.16(1)(a)(ii) (C-001).

¹⁶ *Id.*, Art. 10.16(1)(b)(i)(C) (C-001).

¹⁷ *Id.*, Art. 10.16(1)(b)(ii) (C-001).

¹⁸ *Id.* (C-001).

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

16. Peru's aforementioned breaches of the Treaty and the RER Contract have directly caused damages in an amount to be determined at a later stage in these proceedings, but, at a minimum, exceed US \$30 million.

II. EXECUTIVE SUMMARY

17. Claimants seek full compensation for Peru's frustration and ultimate destruction of the Mamacocha Project, a run-of-the-river 20-megawatt hydroelectric project developed in response to Peru's promotion of foreign investment in its renewable energy resources. By accepting CHM's bid during the third public tender under this promotion (the "Third Public Tender") and entering into the RER Contract, Peru made a sovereign guarantee to pay US \$62 per megawatt hour for up to 130,000 megawatt hours of electricity injected into the electricity grid each year for up to twenty (20) years. In reliance on this promise, Claimants made investments in Peru designing, engineering, financing, and obtaining all necessary approvals to construct and operate the power generation project.

18. The Third Public Tender was part of Peru's program to "promote the use of Renewable Energy Resources (RER) in order to improve the quality of life of the population and protect the environment, by promoting investment in electricity production,"¹⁹ including the development of hydroelectric projects with a generation capacity of twenty (20) megawatts or less. As authorized by legislation and implemented in the regulations (supreme decrees) governing the public tenders, Peru offered six key incentives to attract investors, including foreign investors: (1) a stable, consistent and predictable legal framework; (2) Peru's sovereign

¹⁹ See Legislative Decree No. 1002, May 1, 2008 (C-007).

guarantee of payments for up to 20 years at a fixed price determined at the auction, *i.e.*, the Guaranteed Revenue; (3) Peru's sovereign commitment to purchase the full output of the generation facility up to a quantity determined at the auction; (4) Peru's sovereign commitment to assist project developers overcome permitting, licensing, and bureaucratic hurdles whether they were to arise at the local, regional, or central government levels; (5) for U.S. investors, full international law protections, including a right to international arbitration of disputes at ICSID as provided by the Treaty; and (6) for all concessionaires, the right to arbitration at ICSID for any dispute under the renewable energy resources contracts that exceeds US \$20 million.

19. Due to considerable delays caused by concessionaires selected during the first two auctions, Peru adopted new rules for the Third Public Tender that placed time limits on the completion operation date (*i.e.*, the deadline for commencement of operations after the closing of financial obligations, permitting, construction, and commissioning) and the termination date (*i.e.*, the end of payments at the subsidized auction rates). Many concessionaires from the first two public tenders had abused their privileges by investing little or nothing in their projects or merely trying to flip them for a quick profit. The new deadlines imposed under the Third Public Tender were designed to eliminate concessionaire abuses.

20. As it turned out with respect to the Mamacocha Project, it was Peru, not the concessionaire (CHM), that abused these deadlines to justify its own rampant misconduct and negligence, contrary to Peru's obligations to treat U.S. investors and investments fairly, equitably, and reasonably.

21. Claimants' owners are ideal foreign investors for Peru. They are former eBay, Inc. executives who have the proven skills and sufficient resources to implement the Mamacocha Project. They made a long-term commitment to Peru and fully expected that the Mamacocha

Project would be the first of many investments in renewable energy resource projects, including five upstream projects in the same water basin. They had a long-term vision not only for these projects to be profitable, but also to improve living standards in the remote communities in which they were investing.

22. As part of their substantial investments in Peru, the investors commissioned a pre-feasibility study and a multi-phase feasibility study by well-respected global consulting and engineering firms to identify the best location and design for a low-impact, sustainable hydroelectric plant and transmission line. CHM's winning bid at the Third Auction reflected these professional inputs on hydrology, geology, archeology, and environmental and social impacts. The bid was submitted with the reasonable expectation that the Peruvian administrative agencies that oversaw the permitting process would adhere to deadlines and due process procedures.

23. CHM's professional management team comprised experienced engineers and executives from well-respected infrastructure and energy generation companies. Despite their best efforts, the Mamacocha Project was hindered from the start due exclusively to widespread government inefficiencies and mismanagement. In breach of its contractual commitments under the RER Contract and the Treaty and in violation of the administrative regulations governing permitting and approvals, Peru from the outset repeatedly delayed the Project by, among other ways, failing to issue, or attempting to reverse, permitting, licensing, and concession approvals that were on the critical path for the Mamacocha Project. These unexpected and unreasonable delays prevented financial closing and made it impossible for the Project to move forward.

24. Nearly three years into the Project, Peru admitted in January 2017 that its permitting and approval delays put the Project several years behind schedule and were

exclusively the result of inaction, misconduct or malfeasance by its regional and central government agencies and officials. In recognition of this admission, MINEM executed modifications to the RER Contract (Addenda 1 and 2),²⁰ extending the works execution schedule to grant Claimants more time to complete the Mamacocha Project.

25. In reasonable reliance on these extensions, Claimants immediately sought to complete all requirements to implement the Project, including finalizing terms with: (i) an internationally respected financial institution to finance construction and commissioning; (ii) an experienced Peruvian renewable energy contractor to construct the Project; and (iii) a prominent energy investor interested in buying a seventy (70) percent stake in the Project. The Project was on track for completion in accordance with the revised schedule under Addendum 2.

A. The RGA’s Attacks on the Project

26. But then elected officials, administrators, and prosecutors of the Regional Government of Arequipa (“RGA”) revived a campaign to use the Project as a politically convenient rallying cry for anti-foreign and anti-investor sentiment. Those who stood to benefit from the Mamacocha Project, *e.g.*, the neighboring communities, overwhelmingly supported the Project. The RGA’s opposition originally had begun in 2015, with political rallies and street protests in Arequipa spreading false accusations that the Project would harm the environment and the nearby community of Ayo, a village of approximately 125 residents living approximately one hour away from the Mamacocha Lagoon (in walking distance). CHM responded by making presentations at roundtable town-hall meetings in an attempt to explain the low impact, environmentally sensitive design and the benefits of having locally generated electricity for the

²⁰ Addendum 1 to the RER Contract, July 22, 2015 (C-008); Addendum 2 to the RER Contract, January 3, 2017 (C-009).

neighboring communities. CHM also demonstrated its commitment to Ayo by helping to repair its drinking water supply system and installing a sewage water treatment system.

27. In March 2017, two months after MINEM had given a second life to the Project by extending the works execution schedule and the commercial operation date, RGA officials and their allies began a new aggressive campaign to stop the Mamacocha Project, including by engaging in the following measures.

28. **First**, the RGA tried to block the Mamacocha Project by filing a frivolous lawsuit in local courts on March 14, 2017, seeking to revoke two environmental permits its own officials had approved more than two years earlier. These environmental permits were among the first of a handful of key permits required to secure approval of the Project's power-generation and transmission line concessions. If successful, this lawsuit would have required CHM to re-start the entire permitting process. The RGA's assault on these environmental permits froze work on the Mamacocha Project for nearly a year and made it impossible for CHM to attain financial closing or begin construction.

29. The Governor of Arequipa eventually was forced to dismiss the RGA's baseless lawsuit by executive order, but only after a reputable outside law firm advised the central government that the RGA lawsuit "would have little chance of success."²¹ The Governor's executive order expressly acknowledged that Peru's Ministry of Economy and Finance's inter-agency commission responsible for overseeing international investment disputes (the "Special Commission") had "inform[ed]" the Governor that the RGA could be held liable for "all the costs and payments necessary to comply with the corresponding arbitration award, conciliation settlements or direct negotiation agreements"²² arising from any international arbitration filed by

²¹ Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 (C-010).

²² *Id.* (C-010).

Latam Hydro against Peru. The Governor also explained in a public interview that she withdrew the RGA's lawsuit, in part, because it could have exposed the RGA to criminal liability for causing economic damages to Peru if Latam Hydro were to prevail in an arbitration seeking compensation for damages resulting from the RGA's lawsuit.²³

30. **Second**, on March 24, 2017, in apparent concert with the RGA, Arequipa's environmental prosecutor (the "Arequipa Environmental Prosecutor") opened a criminal investigation against CHM and the Autoridad Regional del Medio Ambiente ("ARMA") officials who had reviewed and approved the environmental permits that were the targets of the frivolous RGA lawsuit. This groundless, ongoing criminal investigation appears to be nothing more than an attempt to intimidate CHM and public officials who had lawfully supported the Mamacocha Project. The accusations are stale and ill-defined but appear to be based on the strained theory that the ARMA officials, who had approved over a hundred environmental permits for similar projects, were somehow not properly authorized to approve the environmental permits for the Mamacocha Project, even though their competency had never before been challenged and the permits had been granted years earlier without any complaint.

31. In February 2018, just weeks after Arequipa's Governor withdrew the groundless RGA lawsuit, the Arequipa Environmental Prosecutor took another step toward obstructing the Project by expanding its criminal investigation to include CHM's lead Peruvian lawyer. He stands accused as an accomplice to environmental crimes supposedly committed by the ARMA officials, merely because he had signed the environmental applications filed on behalf of CHM. This patently retaliatory investigation remains open and, in breach of Peru's Treaty obligations,

²³ Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, Dec. 30, 2017, available at <https://diariocorreo.pe/edicion/arequipa/gobernadora-de-arequipa-no-queremos-dejar-bombas-de-tiempo-la-proxima-gestion-794552/> (C-011).

continues to threaten CHM and its lead Peruvian attorney who had been an effective advocate in challenging the RGA's interferences and successfully forcing dismissal of its frivolous lawsuit.

32. **Third**, from May 2017 through January 2018, Arequipa's regional water authority, Autoridad Administrativa del Agua Caplina - Ocoña ("AAA"), in apparent concert with the RGA, enacted a series of arbitrary measures that excessively delayed approval of CHM's "civil works authorization." This authorization was the final step along the Mamacocha Project's critical path before CHM could secure financing and begin construction. What should have been a 30-day review process under Peruvian administrative regulations turned into a fifteen-month ordeal, with AAA initially denying CHM's application for arbitrary reasons, then reversing itself after a lengthy appeal process, then entering an incorrect and invalid form of authorization that it inexplicably did not correct for several months. The AAA's unlawful actions and inactions substantially interfered with the Project's development.

33. The attacks by the RGA and its allies on the Project were more than sufficient political obstruction to scare away investors, financiers, and contractors. But Claimants diligently overcame these unforeseen hurdles to move the Project forward, including by exercising their rights under the Treaty to threaten commencement of an international arbitration in response to the RGA's frivolous lawsuit. Claimants' efforts successfully obtained a suspension of the RER Contract's works execution schedule while the Special Commission attempted to broker intra-governmental negotiations to address the RGA's political opposition to the Project.

B. MINEM's Multi-Pronged Assault on the Project

34. The suspension and intra-government negotiations appeared to bear fruit when the Governor of Arequipa issued an executive order in late December 2017 dismissing the RGA's lawsuit against the Mamacocha Project. As the Governor of Arequipa made expressly clear in

her executive order and in a subsequent newspaper interview, she withdrew this lawsuit because it lacked merit and could have subjected Peru to liability under international law and RGA officials to civil and criminal liability under Peruvian law.

35. Following this great victory for the Project, CHM in February 2018 asked MINEM for a corresponding extension of the Project's works execution schedule to account for the substantial time lost due to the regional government's unlawful obstructions. But MINEM, without just cause or reasoned basis, unlawfully denied this critical extension. MINEM then enacted a multi-prong series of measures over a five-day period in late December 2018 to destroy the Project.

36. **First**, on December 31, 2018, MINEM rejected CHM's nine-month-old request for extensions of the RER Contract's commercial operation date and termination dates to mitigate the government's improper delays caused by the RGA lawsuit. In denying this extension request, MINEM for the first time abandoned its long-held position that Peru had a duty under Peruvian and international law to remediate delays to renewable energy resources projects for which Peru was responsible. MINEM had reaffirmed its obligation to remediate several times, including: (i) when MINEM modified the RER Contract's works execution schedule deadlines twice via Addenda 1 and 2; and (ii) when MINEM suspended the works execution schedule deadlines four times via Addenda 3-6 to permit negotiations to proceed under the guidance of the Special Commission.

37. Nonetheless, in its December 31, 2018 decision, MINEM reversed course, spuriously arguing that: (i) CHM had assumed the risk that Peru might, *for any reason*, unilaterally interfere with the Mamacocha Project; and (ii) CHM should not have relied on MINEM's written assurances that CHM's duties and obligations under the RER Contract

(including those under the works execution schedule) were fully “suspended” from April 2017 through September 2018. MINEM’s December 2018 denial of CHM’s extension request constituted a breach of the Treaty and RER Contract and made the Project economically infeasible to complete.

38. **Second**, on December 27, 2018, MINEM aggressively sought to terminate the Project by starting an unauthorized and groundless domestic arbitration before the Lima Chamber of Commerce seeking to overturn its prior extensions of the works execution schedule, revert to the nearly expired original deadline of December 31, 2018, and thus, bring the Mamacocha Project to a swift end (the “Lima Arbitration”). In the Lima Arbitration, MINEM seeks retroactive nullification of previously approved contract extensions set forth in Addenda 1 and 2, both of which had been approved by MINEM, itself, to compensate for delays that admittedly were caused exclusively by government delays, negligence, and misconduct. Addenda 2, issued in January 2017, had extended the initial commercial operations date to March 14, 2020, in compensation for Peru’s own admitted interferences with the permitting process. Relying upon this approved Addenda 2, Claimants had lined up an equity investor, financing, and a contractor and fully expected, without further government interferences, to complete the Project by the extended deadline.

39. If MINEM is granted its requested relief, the commercial operation deadline of March 14, 2020 (after Addenda 1 and 2) would revert to the original commercial operation deadline of December 31, 2018 (which has already passed). Under the RER Contract, MINEM could then declare the RER Contract terminated and collect the performance bond. When MINEM filed the Lima Arbitration, MINEM fully knew and expected that the Project could not possibly be built in four days. This “first strike” local arbitration was a tactical ploy designed to

terminate the RER Contract, kill the Mamacocha Project, and collect on CHM's approximately US \$5 million bond. The Lima Arbitration was also an attempt to undermine CHM's right under the RER Contract to have large disputes (in excess of US \$20 million) with the government be resolved at ICSID, not before a local arbitration center where the government's outsized influence could skew the fairness of the proceeding.

40. The interferences of the RGA and its allies in 2017 (and ongoing) combined with MINEM's multi-prong assault in December 2018 destroyed the Project, directly destroyed the entire value of Claimants' investments in the Mamacocha Project and Upstream Projects, and proximately caused significant damages to Claimants.

41. As described below, Peru is responsible under the Treaty, customary international law, the RER Contract, and Peruvian law for all of the actions or omissions of its ministries and regional authorities. Their cumulative and separate actions and omissions unreasonably, unfairly, and discriminatorily targeted the Mamacocha Project and destroyed Claimants' investments. Latam Hydro's losses directly resulting from the government delicts have been enormous, including expenditures of millions of dollars spent fighting governmental delays and interferences, direct impairment of its expected investment returns exceeding US \$30 million, as well as other direct, consequential and lost profit damages.

42. In addition to seeking full compensation, Claimants, if necessary, may also apply for interim measures requesting the ICSID tribunal to stay the unauthorized Lima Chamber of Commerce arbitration, prevent MINEM from collecting the approximately US \$5 million performance bond and otherwise, to preserve the status quo pending resolution of this ICSID arbitration.

III. FACTS RELEVANT TO THE DISPUTE

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

43. In 2008, Peru enacted Legislative Decree No. 1002 to further the foreign investment objectives of the Treaty, and to “promote the use of Renewable Energy Resources (RER) in order to improve the quality of life of the population and protect the environment, by promoting investment in electricity production,”²⁴ including the development of hydroelectric projects with a generation capacity of twenty (20) megawatts or less. Legislative Decree No. 1002 also set Peru’s goal to have five (5) percent of electricity consumption be met by renewable energy resources as part of its international commitments to increase its production of sustainable, clean energy.

44. As authorized by Legislative Decree No. 1002, MINEM held four public auctions inviting project developers to submit bids for renewable energy projects, such as hydro, wind, solar, and biomass. The auctions were implemented by Peru’s regulator of the electricity sector, Organismo Supervisor de la Inversión en Energía y Minería (“OSINERGMIN”), at MINEM’s direction. OSINERGMIN selected the lowest electrical prices offered that, in the aggregate, would produce an annual supply of electricity publicized by MINEM before the auction. Successful bidders would then enter into a standard-form, non-negotiable, long-term electricity generation, supply, and revenue agreement with Peru (represented by MINEM).²⁵

45. Peru offered six key incentives to attract investors to make substantial investments to build renewable energy generation facilities.

46. **First**, Peru offered what was represented to be a stable, consistent, and predictable legal framework.

²⁴ Legislative Decree No. 1002, May 1, 2008 (C-007).

²⁵ *Id.*, Arts. 5 and 7 (C-007).

47. **Second**, Peru guaranteed payments to the winning bidders at the bid price for quantities of electricity produced up to and including the maximum output identified in the bid, *i.e.*, the Guaranteed Revenue.

48. **Third**, Peru committed to pay the Guaranteed Revenue for up to twenty (20) years.

49. **Fourth**, Peru extended a sovereign commitment to use its best efforts to help project developers secure all necessary regional and central government permits, concessions, and authorizations to achieve commercial operation.

50. **Fifth**, Peru, through the Treaty, offered U.S. investors full international law protections, including a right to international arbitration of disputes at ICSID.

51. **Sixth**, Peru, through the RER contract, offered all concessionaires the right to arbitration at ICSID for any dispute under the RER contracts that exceeds US \$20 million.

52. The price, volume, revenue, and duration guarantees were bankable commitments incentivizing developers to make substantial investments in developing, building, and operating renewable energy power projects. Peru expected the winning bidders to rely upon the Guaranteed Revenue to attract equity capital and debt financing for the project's construction and operation.²⁶ Peru's sovereign guarantee to pay the Guaranteed Revenue over a 20-year period allowed project developers to amortize their loan payments over a sufficiently long period of time for the project to be economically viable.

53. The first public tender under this legislative program took place in 2010, leading to 29 winning bids for renewable energy projects. The second tender took place in 2011 and resulted in 10 winning bids for renewable energy projects.

²⁶ See RER Contract, Clause 6.4.1 (C-002).

54. CHM was created in November 2012 to prepare a bid for the Third Public Tender for renewable energy projects, which took place in October 2013. Claimants relied upon Peru's price, volume, duration and best efforts promises when they decided to invest in the Mamacocha Project. These promises were critical in setting the financial terms of CHM's bid in the Third Public Tender.

B. Peru Modified the Rules for Projects in the Third Public Tender

55. Renewable energy projects established under the first two public tenders were plagued with significant pre-operational delays primarily arising from abuses of alleged "force majeure" conditions and outright negligence by the winning concessionaires. Some winning bidders during these two tenders had limited experience with renewable energy projects and some were speculators who merely intended to flip the generation, supply and Guaranteed Revenue contracts to third parties to turn a quick profit.

56. To mitigate against similar concessionaire delays in the Third Public Tender, Peru narrowed the conditions under which a winning concessionaire could seek modifications to its approved works execution schedule for causes involving the concessionaire's own delays or alleged force majeure events. On July 6, 2013, Peru issued Supreme Decree No. 024-2013-EM,²⁷ which provided that the commercial operation date could not be delayed for more than two years, even if *force majeure* events occurred, or else the contract would terminate, and the performance bond would be forfeited. This decree further provided that the contract termination date was not modifiable for any reason.

57. Based upon the provenance of Supreme Decree No. 024-2013-EM, MINEM's restrictions on time extensions were designed to protect the government from concessionaire

²⁷ The President of Peru is responsible for issuing supreme decrees, including those at issue in this dispute.

delays, not delays caused by the government's own negligence, inaction, or misconduct. The Supreme Decree did not expressly state, nor could it reasonably be implied, that these restrictions immunized the government from accountability for delays caused by the government itself. Such an interpretation would be contrary to the terms of the RER Contract, Third Public Tender, Peruvian law, and Peru's international commitments in the Treaty. The contracts awarded in these public tenders were governed by "all legal rules and binding precedents which form Peru's Domestic Laws, and which from time to time may be amended or added to by the Government Authorities."²⁸ One such rule, embodied in Articles 1338, 1339, and 1340 of the Peruvian Código Civil ("Civil Code"), provides that a contractual party is not responsible for its inability to perform due to its counterparty's actions or inactions. In such instances, the counterparty bears the risk and shall indemnify the party whose ability to perform has been affected. Another rule, embodied in Article 1314 of the Civil Code, provides that "whoever acts with the ordinary diligence required" cannot be said to have breached its obligations under a contract. And a further rule, embodied in Article 1362 of the Civil Code, provides that the RER Contract must be interpreted by the parties in good faith which, under Peruvian law, means that the parties to a contract shall act in a collaborative manner to contribute to the fulfillment and completion of the purpose of the contract.

58. Furthermore, as per Article 1398 of the Civil Code, in case of contracts with rigid non-negotiable terms, drafted by one of the parties (as is the case with the RER Contract, which had non-negotiable terms drafted by Peru), any provision that exonerates or limits the responsibility and liability of the drafting party is invalid. Hence, no provision of the RER Contract that implements the restrictions imposed by Supreme Decree No. 024-2013-EM can

²⁸ RER Contract, Clause 1.4.30 (C-002).

lawfully and validly immunize the government from accountability for delays or interferences attributable to Peru.

59. Accordingly, under Peruvian law, a concessionaire from the public tenders could not be expected to be held responsible for the consequences of Peru's own interferences in breach of its contractual and Treaty obligations. Similarly, Peru could not attempt to limit, narrow, or simply ignore its obligations to provide the concessionaire with Guaranteed Revenue over a period of up to twenty (20) years by obstructing completion of the Project.

60. The RER Contract at issue does not expressly provide that CHM must assume the unknowable and unpredictable risk that Peru, itself, might interfere with performance of the contract. Nothing was disclosed during the Third Public Tender that would have alerted the bidders to accept this significant, uncontrollable, and unilateral risk. To the contrary, Peru designed these contracts to be bankable investment agreements to encourage investment under a purportedly stable and consistent regulatory framework.

61. Under the Treaty and bid documents, Peru assured potential investors that they would not assume the political risk of government interferences, inaction, or misconduct. Peru's express reference and adherence to the Treaty in the bid documents reaffirmed to foreign investors that the government would not take unpredictable, non-transparent, inconsistent, unfair, or unreasonable actions affecting a U.S. investor's investment in renewable energy projects under the RER program.

62. For these reasons, Claimants reasonably understood that the new restrictions placed on time extensions in Supreme Decree No. 024-2013-EM were not designed to whitewash government misconduct, inaction, or malfeasance, but rather would apply only if the concessionaire, and not the government, was at fault for any delays.

C. Peru Offered Bidders a Non-Negotiable RER Contract

63. In September 2013, OSINERGMIN published the terms and conditions for the Third Public Tender, which provided that winning bidders were “guaranteed” up to twenty (20) years of revenue at the awarded bid price up to a predetermined amount of energy injected into the National Interconnected Electric System (“SEIN”). OSINERGMIN also published a non-negotiable contract – within the meaning of Articles 1390 and 1398 of the Civil Code – that would be offered to bidders.

64. Under the RER Contract, MINEM promised to pay the concessionaire (CHM) Guaranteed Revenue,²⁹ which is the annual revenue that the concessionaire would receive for its net injections of power up to the limit of the “Awarded Energy”³⁰ (130,000 megawatt hours per year), remunerated at the “Awarded Price”³¹ (US \$62 per megawatt hour) during the up-to-20-year “Term of Validity,”³² which spans from the reference date for commencement of commercial operations (projected to be December 31, 2016)³³ through the “Agreement Termination Date”³⁴ (projected to be December 31, 2036). Importantly, in the applicable RER Contract, the projected commencement date of commercial operations of December 31, 2016 gave CHM approximately three years from the execution of the RER Contract to achieve commercial operation, which was critical given that the construction and commissioning of the hydroelectric plant and transmission line were projected at various times to take between twenty-seven (27) and thirty-three (33) months to complete.

²⁹ RER Contract, Clause 1.4.26 (C-002).

³⁰ *Id.*, Clause 1.4.17 (C-002).

³¹ *Id.*, Clause 1.4.45 (C-002).

³² *Id.*, Clause 1.4.37 (C-002).

³³ *Id.*, Clause 1.4.24 (C-002).

³⁴ *Id.*, Clause 1.4.22 (C-002).

65. In addition to the Guaranteed Revenue, CHM was permitted to sell any surplus electricity produced beyond the Awarded Energy during the RER Contract term at a spot price or at a price negotiated with a third party. CHM, upon approval, also was to receive unlimited concessions to generate and transmit electricity after the RER Contract term for the effective life of the generation facility (projected to be at least forty (40) years for the Mamacocha Project hydroelectric plant).

66. MINEM further agreed to “employ its best efforts”³⁵ to help CHM navigate the regional and central government processes necessary to obtain permits and electricity generation and distribution concessions. CHM could not advance the Project without these authorizations and concessions. No reputable financial institution would lend CHM, or any concessionaire, tens of millions of dollars without all critical permits being in place. And without project financing, CHM, like any typical concessionaire, would be unable to meet the financial closing milestone under the works execution schedule in the contract, much less begin construction.

67. Peru’s promise of “best efforts” support was particularly essential for projects offered during the Third Public Tender because, unlike for projects qualified under the first two public tenders, Peru, for the first time, delegated to regional government agencies the approval process for environmental and water permits for RER projects. This permitting and approval process previously had been implemented by Peru’s central government agencies. As Claimants later learned, these regional authorities were ill-equipped to handle these new responsibilities.

68. The RER Contract also provided a procedure through which the parties could amend their terms and conditions in writing, including changes to the milestone dates in the works execution schedule and any contract terms.³⁶

³⁵ *Id.*, Clause 4.3 (C-002).

³⁶ *Id.*, Clause 12.3 (C-002).

D. Peru Accepted the Mamacocha Project Bid and Executed the RER Contract

69. In October 2013, CHM submitted its bid for a run-of-the-river project to inject into the grid up to 130,000 megawatt hours per year at the set price of US \$62 per megawatt hour for up to twenty (20) years. In December 2013, OSINERGMIN³⁷ notified CHM that it was one of sixteen winning bidders in the Third Public Tender.

70. Importantly, CHM priced its bid on the reasonable assumption that Peru would not be able to unilaterally restrict the Guaranteed Revenue period for arbitrary or bad-faith reasons. Had CHM known that Peru years later would take the position that it had the ability to restrict the Guaranteed Revenue period unilaterally and without good faith, CHM would have either never submitted this bid or submitted a different bid with a significantly higher asking price to account for such an unfairly one-sided and incalculable risk.

71. On February 18, 2014, CHM executed the RER Contract with MINEM, which signed on behalf of the Republic of Peru. In the contract, CHM agreed to develop, finance, construct, commission, and operate a hydroelectric plant and a transmission line to inject electricity into the SEIN.

72. The RER Contract required CHM to post a performance bond equal to “US\$ 250,000 per MW to be installed” that was to last for “at least one hundred eighty (180) calendar days and will be renewed for the same period of time, and so on successively, at the latest by its expiration date.”³⁸ CHM at all relevant times complied with this term. Beginning in 2014, CHM posted a US \$5 million performance bond for the hydroelectric plant pursuant to an agreement with Banco de Crédito del Perú, a Peruvian private bank. CHM has consistently renewed this

³⁷ OSINERGMIN is the government entity responsible for regulating Peru’s energy and mining industries.

³⁸ RER Contract, Clause 8.1 (C-002).

bond every six months, as required. CHM also extended and has consistently renewed a separate performance bond for construction of the transmission line.

73. In May 2014, Latam Hydro was established to own and control CHM and assist with financing, developing, and advancing the Mamacocha Project. Latam Hydro also was committed to develop and operate additional hydroelectric plants in Peru, including five “Upstream Projects,” a series of run-of-the-river and dam projects in the same river valley as the Mamacocha Lagoon. These projects were to be developed immediately upon completion of construction of the Mamacocha Project.

74. Since its creation, Latam Hydro has directly or indirectly owned and controlled CHM.

E. The Mamacocha Project Was Designed to Have a Minimum Environmental and Visual Impact and Provide Sustainable Energy for the Benefit of Peru and the Neighboring Local Communities

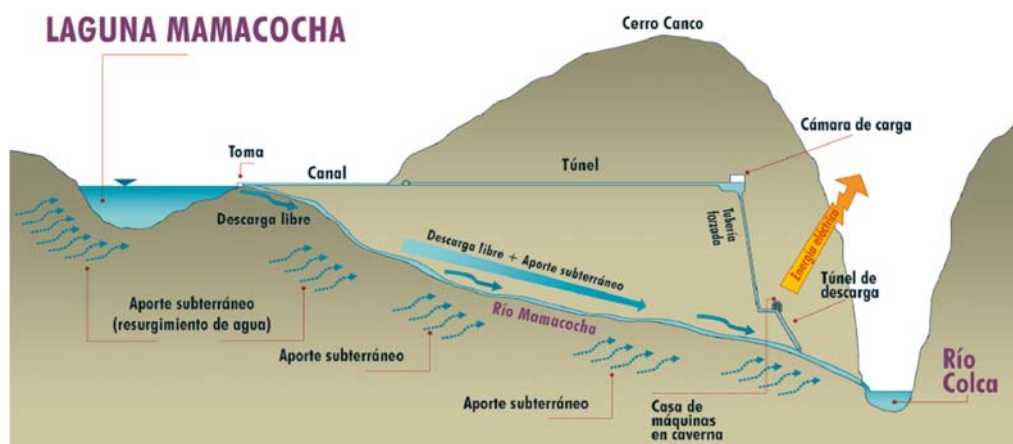
75. The founders and co-owners of Latam Hydro are former eBay, Inc. executives. They and the world-class team of professionals they hired combined energy sector, design, engineering, and construction experience with local Peruvian savvy and an ability to secure project financing for large-scale energy and infrastructure projects. Their experts saw the untapped potential for a 20-megawatt run-of-the-river hydroelectric project adjacent to the Mamacocha Lagoon, located near the town of Ayo in Arequipa’s mountains. The clean energy project would have minimal environmental impact yet would produce electricity from renewable resources for at least forty (40) years. This project also promised to kickstart the neighboring local economies by creating hundreds of construction jobs, increasing the supply of energy, and donating hundreds of thousands of dollars to local business, civil works, and cultural initiatives.

76. The Mamacocha Project began on February 22, 2012, with commissioning of a nine-month pre-feasibility study conducted by CESEL Ingenieros, a world-renowned

engineering firm based in Peru. This lengthy study focused on the hydrological, geological, archaeological, topographical, environmental, and social conditions of the areas surrounding the Mamacocha Lagoon, as well as possibilities for electrical grid connection and other relevant technical issues. The study also suggested several possible locations where a 20-megawatt hydroelectric plant could operate for decades by using the runoff from the overflow of the Mamacocha Lagoon.

77. In late 2012, CHM hired a well-respected global consulting and engineering firm with expertise in hydroelectric engineering, Pöyry, to conduct a multi-phase feasibility study that detailed the economics and risks of the Mamacocha Project. Among other things, this study identified the two most feasible designs for the Mamacocha Project based on the alternatives proposed by CESEL in the pre-feasibility stage.

78. Below is a depiction of the design that Pöyry recommended and CHM adopted. The overspill from the Lagoon would have been funneled through a 1.4 km covered surface canal and a 2.24 km tunnel inside an adjacent mountain. The water would have been conveyed through two 10-megawatt turbines, which would also have been located inside the mountain. Then, the water would have been discharged into the Mamacocha River, near its confluence with the Colca River.



79. The Mamacocha Project was specifically designed to minimize its environmental and visual footprint, including by locating the intake away from the Lagoon. Most of the Project was designed to be installed inside the mountain and would not have been visible at eye level. And the remote, mountainous, and arid conditions of the site ensured there would be little-to-no environmental impact on flora and fauna, or on the approximately 125 residents of Ayo, all of whom lived approximately one hour away (in walking distance).

80. As further measures to minimize any environmental impact, and as required by environmental laws, the Mamacocha Project's water usage was designed to allow sufficient flow to sustain the flora and fauna of the nearby Mamacocha river. The design team conducted extensive tests to ensure that the anticipated construction and operation of the hydroelectric plant would not adversely affect neighboring crayfish or an otter species that inhabits nearby waterways.

81. Unlike typical hydroelectric projects west of the Andes mountains that experience significant seasonal fluctuations in hydrology, the anticipated energy production from the Mamacocha Project was expected to have fewer fluctuations year-round because the water flow into the Lagoon derived not from melting glaciers or rainfall in the immediate vicinity but, rather, from underground springs that fed into the Mamacocha Lagoon at a fairly consistent annual rate.

82. The design that CHM selected promised to be the most profitable based on the feasibility study's assumptions, which was important to ensure the Project would attract investors and financing. This design could reliably and consistently generate up to 142,000 megawatt hours of energy per year at minimal maintenance for at least forty (40) years.

83. The electricity generated by this plant would then have been sent through a transmission line to a substation located approximately 65 km away. Norconsult, a well-respected consultancy firm based in Norway, conducted the feasibility study for this component of the Mamacocha Project. CHM relied on the findings of this study in its efforts to obtain the necessary easements and rights of way for the Mamacocha Project and in its negotiations with the owner of the substation that would have been used for the Project.

84. Pöyry's feasibility study also identified the potential for five additional Upstream Projects. These Upstream Projects were projected to have a combined installed capacity of 45 to 100 megawatts. CHM moved forward with a conceptual design of the Upstream Projects, which it marketed to potential equity investors and financial institutions that were interested in a long-term project finance commitment for renewable energy projects in Peru. Claimants' plan was to develop the Upstream Projects once the Mamacocha Project entered the commercial operation phase.

85. To develop the Mamacocha and Upstream Projects, Latam Hydro hired world-class engineers and project managers who cumulatively had decades of experience developing, engineering, constructing, and operating energy projects in South America and around the world at well-known companies, such as Iberdrola, Vattenfall and GDF Suez. During the development phase alone, the Mamacocha Project had more than a dozen contractors and consultants in offices in Lima, Ayo, Arequipa, and Andagua. The Project expected to employ an additional 250 contractors during construction and a dozen long-term contractors during operation.

86. The Mamacocha Project involved a substantial investment of capital and resources by Claimants. The original plans envisioned investment of approximately US \$80 million in equity and loans to complete the development and construction phases of the

Mamacocha Project. Of this amount, approximately US \$46 million was estimated for construction of the hydroelectric plant (including, *inter alia*, an intake, canal, tunnel, pressure shaft, underground powerhouse, turbines, generators, transformer, and discharge) and transmission line. Claimants invested millions of dollars into the Mamacocha Project and planned to finance the balance by recruiting equity partners and obtaining a non-recourse project finance loan from Deutsche Investitions-und Entwicklungsgesellschaft (“DEG”), a prominent German development bank with significant experience in financing hydroelectric projects in Peru.

87. The hydroelectric plant was estimated to generate on average approximately 142,000 megawatt hours per year. Peru committed to pay US \$62 per megawatt hour for all power produced up to a maximum of up to 130,000 megawatt hours each year over a twenty (20) year period.³⁹ CHM could then sell the balance of electricity at the then-existing spot price.⁴⁰ Accordingly, it was estimated that CHM would receive a revenue stream of approximately US \$8 million per year or approximately US \$160 million during the up-to-20-year Guaranteed Revenue period plus additional revenues from the sale of the surplus electricity at spot prices.

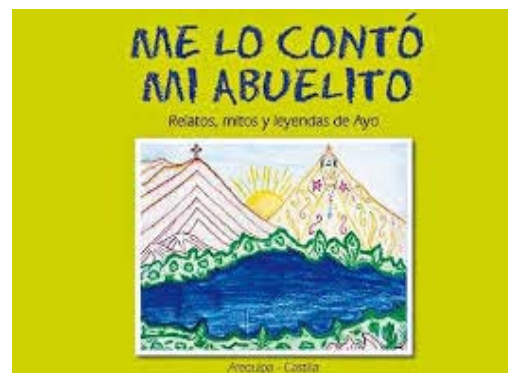
88. Before it could achieve commercial operation, CHM first had to complete several phases, including: (i) permitting; (ii) financing; (iii) construction; and (iv) commissioning. CHM estimated the construction and commissioning phases of the Mamacocha Project, alone, would take approximately twenty-seven (27) months to complete, of which approximately twenty (20) months were necessary to excavate and build the 2.24 kilometer mountain tunnel called for in the Project’s designs.

³⁹ RER Contract, Clause 1.4.26 and Annex 7 (C-002).

⁴⁰ *Id.*, Clause 6.2.3 (C-002).

89. Claimants assembled a world-class team of environmental scientists and consultants to review and help design the Mamacocha Project. These experts ensured that the Project exceeded Peru's environmental standards as well as the more stringent standards established by the World Bank and International Finance Corporation for international development projects. DEG also concluded that the Mamacocha Project satisfied the highest international environmental and compliance standards based upon its on-site, pre-financial closing due diligence.

90. In addition, the Mamacocha Project had a significant social investment component. The Mamacocha Project included a technical design that would have provided the Ayo village, which had long suffered from days-long power blackouts, with a consistent supply of electricity. Moreover, during its development phase alone, the Mamacocha Project donated approximately US \$360,000 to civil works projects, local businesses, and helped publish two books (pictured below) extolling the culture of Ayo. Among other things, CHM: (i) helped repair Ayo's drinking water supply system; (ii) installed a sewage water treatment system; (iii) gave support to the local health center and primary school; and (iv) helped organize and donated to various businesses in the local avocado, cattle, cheese, milk, and weaving communities. Had Peru not unlawfully destroyed the Mamacocha Project, the Project would have donated an additional US \$500,000 to Ayo as part of its planned loan package with DEG.



IV. PERU'S INTERFERENCES WITH THE MAMACOCHA PROJECT

91. The Mamacocha Project ended in December 2018 due entirely to insurmountable roadblocks imposed by regional and central Peruvian government ministries that stripped the project of its economic viability and made it impossible for Claimants to move the project forward.

A. Regional Administrative Bodies Initially Delayed the Permitting and Approval Processes

92. Peru promised that the permitting process for the Mamacocha Project would be transparent, predictable, timely, and consistent. The Texto Único de Procedimientos Administrativos (“TUPA”) sets out regulations governing each administrative entity within the Peruvian government and establishes fixed time periods in which administrative authorities must review, respond to, and approve applications. If an authority exceeds these review periods, MINEM, upon request, was obligated under Clause 4.3 of the RER Contract to use its best efforts to help CHM secure these permits.

93. During the early stages of the Project from 2013 through 2015, regional administrative bodies delayed their review of the Project's permit applications well beyond the fixed review periods. The regional agencies entrusted with permitting authority for projects from the Third Public Tender were ill-equipped, unprepared, and untrained to approve environmental and water permits for renewable energy projects, particularly hydroelectric power projects. CHM repeatedly and consistently requested MINEM's assistance to secure these permits as required under Clause 4.3 of the RER Contract. Each time, MINEM failed to respond or expend any efforts to mitigate the effect of these administrative delays.

94. To take one example, when CHM applied for its environmental permits from ARMA, the regional authority initially applied a level of review reserved for the most

environmentally destructive of proposals that may displace residents, deforest standing groves, or exhaust toxic materials into the air and waterways (*e.g.*, chemical plants and massive dams). ARMA's reasoning was that because it had authority to classify hydroelectric projects up to twenty (20) megawatts, it presumed that the Mamacocha Project's 20-megawatt capacity should receive the highest possible classification, notwithstanding that it was a clean, renewable energy project to be built in a remote area far from habitation and with little or no impact on flora or fauna. On information and belief, the Mamacocha Project is the only project from Peru's renewable energy resources promotion to receive this classification. CHM appealed this decision. After intervention by more experienced regulators in Lima, ARMA acknowledged its mistake and re-classified the project as having a low environmental impact.

95. These permitting delays were significant and beyond what could be reasonably expected. Many of the delays affected permits that were on the critical path for development of the project because they were prerequisites for obtaining the concessions and final authorizations under the RER Contract. If CHM did not receive the concessions and final authorizations on time, the Mamacocha Project could not receive financing or commence construction, putting the viability of the Project at risk.

B. Peru Assumed Full and Exclusive Responsibility for the Permitting Delays and Extended the Works Execution Schedule in Addendum 1

96. The pervasive permitting delays, coupled with MINEM's failure or refusal to assist CHM in this process, made it impossible for CHM to secure necessary financing or begin construction. During this time, CHM solicited several financial institutions for investment capital or loans to obtain the necessary financing (approximately US \$50-60 million) needed to bring the Mamacocha Project to commercial operation. Each time, these potential lenders and investors expressed significant interest in the Mamacocha Project but communicated to CHM

that they would not close on any investment or debt financing agreements until CHM acquired all necessary permits and concessions.

97. In December 2014, CHM asked MINEM for an extension to the milestones in the works execution schedule (including the financial closing milestone) and requested that the commercial operation date be moved from approximately December 31, 2016 to December 8, 2018 to account for these delays and interferences that were exclusively attributable to government actions or inactions.

98. CHM explained to MINEM that the RER Contract was subject to Civil Code principles that (a) one party to a contract cannot render performance impossible for the counterparty; and (b) contracts must be interpreted in good faith. MINEM accepted this reasoning and granted the extension request, finding that the “delays in the approval of the administrative procedures mentioned by [CHM] were caused by [ARMA]” and these delays “prevented [CHM] from concluding the financial closing of the project, affecting financing.”⁴¹

99. On June 12, 2015, MINEM and CHM entered into their first written modification of the RER Contract (“Addendum 1”), amending the works execution schedule.⁴² This Addendum restored the time period that was necessary for CHM to achieve commercial operation of the Mamacocha Project.

C. Beginning in 2015, the Regional Government of Arequipa Began Its Discriminatory and Politically Motivated Interferences with the Mamacocha Project

100. Starting in 2015, the Mamacocha Project began to encounter stiff political opposition, led by elected RGA officials who did not live in Ayo. These officials organized political rallies and street protests and spread baseless accusations in the press claiming, falsely,

⁴¹ Addendum 1 to the RER Contract, July 22, 2015, Clause 4 (C-008).

⁴² *Id.*, Clause 7 (C-008).

that the Project would despoil the environment and destroy the surrounding communities. These officials demonized the Project – including its foreign ownership – and vociferously exploited anti-investor sentiment during municipal and regional elections.

101. In April 2015, local elected officials of RGA pressured its environmental administrative body (ARMA) to revoke its September 2014 approval of the environmental permits for the Mamacocha Project. ARMA initially buckled to the pressure and suspended the environmental permits nine months after approving them. The suspension was short-lived as ARMA reinstated the permits days later after finding the challenge was baseless.

102. The RGA’s growing disinformation campaign about the Mamacocha Project began affecting local officials, including four provincial mayors from the Arequipa region who vowed on camera that the hydroelectric plant would never be built (see below).



103. The RGA’s opposition also incited protests throughout 2016 by local officials and opposition groups located outside of Ayo (pictured below).



104. RGA officials and local mayors also periodically sent communications to MINEM and made public statements to lobby against the generation and transmission concessions that CHM had requested in March 2015. For example, in early 2016, the Mayors from the neighboring districts of Castilla and Caylloma sent a letter to MINEM arguing that the concessions for the Mamacocha Project should be denied based on unsupported allegations that the Project would have an adverse environmental impact. If these regional and local officials could convince MINEM to deny either of these concessions, the Mamacocha Project could not proceed.

105. The coordinated opposition by regional public officials improperly delayed approval of the concessions by a year, at a minimum. The applicable TUPA regulations expressly provided at the time of CHM's applications that the maximum review period for each of these concessions was thirty (30) business days. MINEM, however, took nearly a year to approve the transmission line concession and nearly fifteen (15) months to approve the concession for electricity generation. MINEM's failure to comply with its own deadlines for administrative reviews was arbitrary and capricious and violated CHM's contractual and due process protections.

106. During MINEM's prolonged deliberations over the Project's concession applications, the RGA invited CHM to attend a series of public roundtable meetings to discuss the Mamacocha Project. CHM agreed to participate in a good-faith effort to clear up any public misconceptions about the Project. But the entire process was a publicity stunt to villainize CHM and create unnecessary controversy and suspicion around the Project. RGA officials refused to follow the pre-approved speaking format, shouted down CHM representatives, and showed no interest in learning about the design and anticipated execution of the Mamacocha Project.

107. Notwithstanding the vociferous regional political opposition, MINEM belatedly granted CHM the transmission line and power generation concessions in March 2016 and June 2016, respectively, which reaffirmed MINEM's view of the value of the Project and the lack of merit of the opposition. These approvals removed one of the last obstacles for the Mamacocha Project to move forward. Days later, the RGA canceled the roundtable discussions and appeared to end its interferences with the Project.

D. Peru Assumed Full and Exclusive Responsibility for MINEM's Delays in Approving the Concessions and, in Addendum 2, Extended the Commercial Operation Date Beyond the Deadline Set Forth in the RER Contract

108. Obtaining approved concession agreements for the generation plant and transmission line were essential pre-conditions to securing financing and commencing construction. MINEM's unexpected and unjustified delays in approving the concession requests, therefore, had prevented the Project from moving forward on its works execution schedule under the RER Contract.

109. In July 2016, CHM requested a further extension of the works execution schedule in light of these delays, including an extension of the commercial operation date from December 8, 2018 to March 14, 2020. If granted, and if no further government interferences took place, this extension would have permitted CHM to achieve its milestones under the RER Contract and still remain commercially viable.

110. This extension would also have extended the commercial operation date beyond the commercial operation deadline (December 31, 2018) identified in Clause 8.4 of the RER Contract, which states:

If, as of December 31, 2018, the Commercial Operation Start-up of the RER Generation Project that is the subject matter of this Agreement has not been completed for any reason whatsoever, the

*Agreement will be terminated as of right, and the Performance Bond will be executed.*⁴³

111. CHM provided MINEM with four reasons as to why this request should be approved:
- a. **First**, the bidders reasonably believed that the December 31, 2018 date could be extended where, as here, the government’s own actions or inactions made it impossible for CHM to advance the project to the commercial operation phase within the time frame set forth in the RER Contract.
 - b. **Second**, the governing Civil Code provides that a party acting diligently cannot be found to default under a contract when the counterparty’s actions made it impossible to perform.
 - c. **Third**, MINEM was responsible for the failures of ARMA, AAA, and other permitting authorities to follow the TUPA time schedules due to its own failures to use its “best efforts” to help CHM secure the necessary permits and authorizations on schedule.
 - d. **Fourth**, if MINEM refused to grant the extension request, it would be acting in bad faith in violation of Peru’s Civil Code.

112. On October 6, 2016, MINEM issued a report that MINEM’s Director General of Electricity, Ms. Carla Paola Sosa Vela, endorsed on November 22, 2016 (the “Sosa Report”).⁴⁴ The Sosa Report found: (i) the interferences to the Mamacocha Project were “not attributable” to CHM, but rather fully and exclusively the fault of the government; (ii) the RER Contract is subject to the good-faith principle under the Civil Code; and (iii) it would be unfair for CHM to

⁴³ RER Contract, Clause 8.4 (C-002).

⁴⁴ MINEM’s Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (“Sosa Report”) (C-012).

assume the risk of governmental interferences, especially since this assumption of risk was not made expressly clear in the RER Contract and is contrary to the Peruvian legal truism that no one can plead his own fault in his favor. The Sosa Report concluded that the interferences constituted breaches of Peru's obligations to CHM under the RER Contract and governing civil laws. The Sosa Report also concluded that Peru's inconsistent treatment of the Mamacocha Project, through contradictory positions about the project's classification and permitting review periods, could subject Peru to liability under the Treaty and customary international law.

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

*The foreign investor also expects that the receiving State will act in a non-contradictory manner; that is, among other things, without arbitrarily reversing previous or pre-existing decisions or approvals issued by the State on which the investor relied and based the assumption of his commitments and the planning and implementation of its economic and commercial activities. The investor also trusts that the State will use the legal instruments that govern the performance of the investor or the investment in accordance with the typically foreseeable function of such instruments, and in any case never to deprive the investor of his investment without compensation.*⁴⁵

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

In this context, the delay (outside of what is foreseeable and expected) in obtaining the operating permit for the provision of the generation service, can be understood as unreasonable treatment

⁴⁵ Sosa Report, p. 12 (C-012).

*afforded to the investor, subject to challenge, even more so when negative consequences of a financial nature for the Concessionaire can be extracted from an act attributable to the Administration.*⁴⁶

115. In accordance with the Sosa Report’s findings, MINEM, on January 3, 2017, granted CHM’s request to extend the RER Contract’s work schedule to March 14, 2020. The parties thus entered into their second modification to the RER Contract (“Addendum 2”).⁴⁷ By approving this Addendum, MINEM again recognized that Supreme Decree No. 024-2013-EM did not serve as an impediment to an extension, even an extension beyond the original operation completion date (December 31, 2018) identified in the RER Contract. This Addendum also restored the time that was necessary for CHM to achieve commercial operation of the Mamacocha Project, if no other interferences took place.

E. In March 2017, the Mamacocha Project Finally Had All Necessary Government Approvals and Was Ready to Proceed

116. Prior to MINEM’s approval of Addendum 2, the hostile political climate and regulatory uncertainties surrounding the government’s approvals of the Project’s permits and authorizations prevented Latam Hydro from locking in project financing and executing a construction agreement. The situation turned around, however, when Addendum 2 established an achievable operational deadline and included the government’s express acknowledgement that it had been fully and exclusively responsible for the project’s delays.

117. With a newly amended works execution schedule, the Mamacocha Project was finally ready to proceed. Claimants finalized negotiations with Innergex Renewable Energy Inc. (“Innergex”) about becoming a stakeholder in the Mamacocha Project. Innergex, a Canadian independent renewable power producer that develops and operates similar run-of-the-river

⁴⁶ *Id.* (C-012).

⁴⁷ Addendum 2 to the RER Contract, January 3, 2017 (C-009).

hydroelectric plants around the world, had shown significant interest in the Project since early 2016 and even visited the Project's location in Ayo on several occasions. But the myriad interferences and delays during the permitting phase – particularly those pertaining to the concessions – prevented the progression of Innergex's negotiations with Claimants. By early 2017, however, CHM had its concessions in hand and the remaining permits promised to be readily attainable. By February 3, 2017, Innergex and Latam Hydro agreed to terms of a new investment agreement and planned to close the arrangement in early April 2017.

118. As part of this agreement, the parties undertook to continue asking MINEM for extensions of the RER Contract termination date that corresponded to the front-end extensions to the Project's Commercial Operation Date and works execution schedule, given that the originally promised 20-year period of Guaranteed Revenue had been unilaterally and unfairly shortened by Peru's self-admitted interferences and delays.

119. Around the same time, Latam Hydro reengaged DEG to negotiate a nonrecourse finance loan for the Mamacocha Project. Even with Innergex as an additional equity investor, the Mamacocha Project still needed an additional pledge of US \$50 to \$60 million to close its financial obligations and have sufficient money to bring the Mamacocha Project through construction, commissioning, and into operation. DEG, which had previously financed other hydroelectric projects in Peru, was keen on participating in this Project. Similar to Innergex, DEG conducted several on-site technical and social inspections and analyses through their independent consultants, including Hatch, an industry leader in engineering consulting based in Canada.

120. Hatch memorialized its extensive analysis of the Mamacocha Project in a detailed, 100-page technical report dated April 26, 2017.⁴⁸ This report concluded that, *inter alia*: (i) the Project’s design was “technically sound”; (ii) the contemplated hydroelectric plant was capable of operating for at least forty (40) years; (iii) the newly amended commercial operation date and works execution schedule under the RER Contract allowed for a 33-month construction and commissioning period, which was more than sufficient given the updated proposals and timelines from the contractor that CHM contemplated using for the Mamacocha Project, GCZ Ingenieros S.A.C. (“GCZ”); and (iv) the remaining critical path permit – the civil works authorization – and easements should be granted imminently and with sufficient time to begin the 33-month construction and commissioning period in a timely fashion.⁴⁹

121. Latam Hydro and DEG agreed in principle to a lending agreement that was preconditioned on Latam Hydro finalizing its investment agreement with Innergex and CHM finalizing the permitting process. Both of these preconditions were on the brink of being fulfilled. As noted earlier, Innergex and Latam Hydro planned to close in April 2017 and CHM had submitted its application for the civil works authorization from AAA in November 2016 and its approval appeared to be imminent. DEG and Latam Hydro anticipated closing on the lending arrangement in May 2017.

122. In March 2017, CHM also entered into the final phases of negotiations with an experienced contractor, GCZ, a global engineering and construction firm specializing in energy generation facilities in Latin America, including small to mid-size hydroelectric projects in Peru. Shovels were expected to be in the ground by July or August 2017, which would have put the

⁴⁸ Hatch, Independent Engineering Review of the Mamacocha Project, No. H352051, April 26, 2017 (C-013).

⁴⁹ *Id.*, pp. 6-8 (C-013).

Project in excellent position to achieve commercial operations under the amended works execution schedule.

F. The Regional Government Brought the Project to an Abrupt Halt by Commencing a Meritless Lawsuit in Local Peruvian Courts, a Baseless Criminal Investigation, and Denying the Civil Works Authorization

123. Notwithstanding, or perhaps because of, MINEM's approval of Addendum 2, the RGA on March 14, 2017 commenced a lawsuit in Arequipa local court to declare null and void ARMA's environmental approvals for the hydroelectric plant and transmission line.⁵⁰ If successful, the lawsuit would have required CHM to re-start the entire permitting process.

124. This lawsuit was the culmination of a series of efforts by the RGA and its regional allies, including ARMA, to render meaningless the recently granted concessions. Days after these concessions were fully granted, regional mayors from Castilla and Caylloma formally requested MINEM to vacate the concessions for the Mamacocha Project. MINEM refused. The RGA and its allies next took aim at the environmental permits. If these permits could be nullified, MINEM's concessions would be rendered meaningless. In July 2016, the RGA commenced an unnecessary, *post-hoc* investigation into whether these permits, which ARMA had granted more than two years earlier, were sound. CHM was not invited to participate and had only a vague second-hand awareness that an investigation had been commenced. In October 2016, the RGA concluded its investigation and, without CHM's knowledge, self-servingly determined these permits had been improperly granted by ARMA. In December 2016, ARMA issued a resolution that co-opted the RGA's conclusions and declared that its earlier permits should not have been granted. Because the reconsideration and appeal periods for these permits had long passed, however, ARMA expressly noted that it was legally incapable of rescinding

⁵⁰ This lawsuit is styled as: *Gobierno Regional de Arequipa c. Hidroeléctrica Laguna Azul S.R.L.*, No. 01554-2017-0-0401-JR-CI-04, Corte Superior de Arequipa.

them. For this reason, the RGA brought the lawsuit in March 2017 seeking a court order to declare these permits null and void.

125. The RGA's lawsuit was meritless. The RGA argued that the body within ARMA that had approved the Mamacocha Project's environmental permits was not legally competent, even though the governing TUPA regulations unambiguously stated otherwise.⁵¹ Furthermore, the very same ARMA body had previously approved environmental permits for more than one hundred (100) other projects before and after its approval of the Mamacocha Project's permits, without ever facing a competency challenge.

126. In reality, the lawsuit was an attack on Claimants as part of a concerted effort by RGA and its regional allies to harass and thwart the Mamacocha Project. RGA officials spread misinformation about the Project to the press, incited local protests, and met with MINEM officials in an attempt to delay approvals of the Project's concessions. RGA raised its legal competency objection for the first time only after MINEM approved the concessions and extended the commercial operation date.

127. The RGA lawsuit immediately thrust the Project into crisis, at the very moment when it had overcome all previous government obstacles and was leapfrogging ahead to achieve operational readiness.

128. On March 24, 2017 – just ten days after the RGA's lawsuit was filed – the Arequipa Environmental Prosecutor pursued a baseless criminal investigation against CHM and former ARMA officials.⁵² This investigation ran parallel to the RGA lawsuit and appears to be based on the RGA's unfounded speculation that ARMA must have engaged in some type of irregular procedure in approving the Mamacocha Project's environmental permit. The Arequipa

⁵¹ Ironically, the RGA argued that its own officials were not authorized to review and approve the permits.

⁵² Criminal proceeding No. 01-2017-0-FPEMA-MP-AR.

Environmental Prosecutor provided CHM with no specification or details of this investigation at the time of its commencement. Nor did it provide any meaningful opportunity for CHM to contest the undefined allegations.

129. RGA-related political resistance to the Project also arose from AAA, the RGA's regional water authority which was run at that time by Mr. Isaac Martinez, a political ally of the officials behind the RGA lawsuit. The filing of the RGA lawsuit appeared to embolden Mr. Martinez and his staff at AAA as he embarked on a series of politically motivated, arbitrary, and discriminatory actions against the Project involving the civil works authorization, which was the final permit on CHM's critical path and the last remaining hurdle (prior to the RGA's lawsuit) preventing Latam Hydro from finalizing its transactions with Innergex and DEG.

130. CHM submitted its application for the civil works authorization to AAA on November 25, 2016. The governing TUPA regulations required AAA to approve or deny the application within thirty (30) business days. At first, the process experienced typical administrative delays that, unlawfully, had become customary for Arequipa's regional authorities in charge of reviewing permits related to the Mamacocha Project. But, once the RGA filed its lawsuit against the Project, the tenor of these delays drastically changed. From March through most of May 2017, the AAA went inexplicably silent and refused to respond to CHM's diligent inquiries as to when a final decision on the permit approval application would be received. Finally, on May 19, 2017, AAA denied CHM's application for the reason that some technical information was missing. This reason was completely untrue – CHM had made extensive submissions to AAA that contained all relevant technical information. In any event, this response was arbitrary and unreasonable considering that AAA held CHM's application for

nearly seven months and could have requested the additional information during that time, if that were the real reason for its denial.

131. On June 2, 2017, CHM filed an application with AAA asking for reconsideration of its denial of the civil works authorization. CHM also met with the central government's water authority in Lima, Autoridad Nacional del Agua ("ANA"), to request its intervention in this process, particularly given MINEM's unwillingness to honor its "best efforts" obligations under Section 4.3 of the RER Contract to assist CHM in securing permits from the regional authorities. ANA agreed to intervene and by early July 2017, AAA reversed its earlier denial and issued a resolution granting the permit.

132. The ordeal with AAA was not over, however. AAA's written resolution was inexplicably riddled with errors that were material and needed to be fixed. CHM formally requested an amended resolution from AAA and additional assistance from ANA. The RGA's lawsuit, however, had succeeded in poisoning the relationship between CHM and regional government authorities like AAA. Instead of merely correcting and returning the resolution, in September 2017, AAA submitted this "dispute" to an ANA administrative court in Lima. In December 2017, the administrative court issued an order ruling against AAA and demanding that AAA fix the resolution. Finally, on January 25, 2018 – fourteen (14) months after CHM originally had made application for the civil works authorization – AAA finally issued the amended resolution.

133. During the pendency of these patently discriminatory and unforeseen political interferences by the regional government, Innergex refused to finalize the equity participation documentation. DEG also refused to move forward with its loan. And negotiations with the contractor, by necessity, were put on hold. The RGA and regional government's unreasonable

and politically motivated disruptions stymied further development of the Mamacocha Project. Accordingly, the works execution schedule was rendered obsolete and unachievable.

G. Peru Officially Suspended the Mamacocha Project Effective as of April 2017 to Permit the Various Government Agencies to Resolve their Differences

134. Upon learning of the RGA's lawsuit, in April 2017, CHM asked MINEM to suspend further execution of the RER Contract and all rights and obligations deriving from it including the works execution schedule, during the pendency of the RGA lawsuit. CHM explained that, because Peru is a unitary government and acts both through MINEM and the RGA, it would be fundamentally unfair for Peru to require CHM to perform under the RER Contract while it was simultaneously challenging the viability of the Mamacocha Project in court.

135. On June 20, 2017, Latam Hydro filed a notice of intent to submit a claim to arbitration under the Treaty, in which it alleged that the government interference from the RGA violated Latam Hydro's investor protections under the Treaty. Latam Hydro sought consultations and negotiations under Article 10.15 of the Treaty, which provides:

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.⁵³

136. The filing of this notice allowed for Latam Hydro to enter into direct negotiations with the Special Commission, the inter-agency body responsible for overseeing potential investment disputes involving Peru. The Special Commission comprises representatives of various ministries, including MINEM.

⁵³ Treaty, Art. 10.15 (C-001).

137. In September 2017, MINEM and CHM executed Addendum 3,⁵⁴ which formalized the parties' agreement for a "suspension of the [RER Contract], including the obligations, rights and the Works Execution Schedule contained in Annex II of the [RER Contract] previously modified by Addendum No. 1 and Addendum No. 2" retroactive to April 21, 2017, the date on which CHM formally requested the suspension.⁵⁵ Addendum 3 was yet another concession by MINEM that Supreme Decree No. 024-2013-EM did not pose an impediment to negotiating an extension for the Mamacocha Project, even one that extended the operational deadline beyond the original operation completion deadline identified in the RER Contract (December 31, 2018).

H. The RGA Withdrew Its Lawsuit But Not Before the Project Was Destroyed

138. As was later made public by the RGA's Governor,⁵⁶ the Special Commission evaluated the merits of the RGA's lawsuit by hiring a reputable Peruvian law firm to advise the government whether the lawsuit had any legal merit. In or around November 2017, the law firm concluded the lawsuit would not succeed.⁵⁷

139. On December 27, 2017, the Governor of Arequipa issued an executive order withdrawing the RGA's lawsuit. The Governor's order expressly acknowledged that the lawsuit was being withdrawn in large part due to the legal analysis from the Special Commission's outside counsel and the fact that the Special Commission warned the Governor that the RGA could be financially responsible for all costs or damages that Peru had to pay in an international or national arbitration.⁵⁸

⁵⁴ Addendum 3 to the RER Contract, September 8, 2017 (C-014).

⁵⁵ *Id.*, Agreements, p. 15 (C-014).

⁵⁶ *See* Regional Executive Resolution No. 665-2017-GRA/GR, Dec. 27, 2017, p. 3 (C-010).

⁵⁷ *Id.* at 2 ("In the opinion of the expert in Administrative Law, the claim filed by the Regional Government of Arequipa (GORE Arequipa) would have little chance of success") (C-010).

⁵⁸ *Id.* (C-010).

140. That same day, the Governor of Arequipa gave a public interview with a local periodical that further disclosed that if she had not ordered the withdrawal of the RGA lawsuit, the RGA politicians responsible for the lawsuit could face criminal liability for their roles in exposing Peru to reputational and financial harm in a national or international arbitration.⁵⁹

I. The RGA Retaliated by Bringing Unfounded Criminal Charges against CHM’s Lead Peruvian Lawyer

141. The RGA Governor’s executive order withdrawing the RGA’s lawsuit as meritless should have ended the RGA’s efforts to derail the Project. But it did not. In February 2018, the Arequipa Environmental Prosecutor announced it was investigating whether CHM’s lead Peruvian lawyer, Mr. Roberto Santivañez, acted as an accomplice to CHM’s supposedly “irregular” procurement of its environmental permit from ARMA in September 2014. This new allegation against CHM’s attorney came nearly a year after the Arequipa Environmental Prosecutor commenced its criminal investigation into this matter.

142. The Arequipa Environmental Prosecutor did not provide CHM or Mr. Santivañez with any contemporaneous notice as to the factual basis for this charge. The action appears to arise from the same discredited allegations contained in the RGA lawsuit, *i.e.*, that ARMA had no authority to approve the environmental permits for the hydroelectric plant and transmission line and the Mamacocha Project should not have been classified as having a low impact on the surrounding environment. As the outside law firm that advised the Special Commission had already concluded, these allegations are meritless.

143. Over the ensuing months, CHM and Mr. Santivañez attempted on several occasions to have this charge dropped on account of its utter lack of notice as to the factual basis

⁵⁹ Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017, available at <https://diariocorreo.pe/edicion/arequipa/gobernadora-de-arequipa-no-queremos-dejar-bombas-de-tiempo-la-proxima-gestion-794552/> (C-011).

for an alleged crime. At each turn, the Arequipa Environmental Prosecutor refused to provide any specification or drop the charge. Eventually, a Peruvian judge ordered the Arequipa Environmental Prosecutor to provide CHM and Mr. Santivañez with a written explanation as to the basis for the criminal charge.

144. In June 2019 – more than fifteen (15) months after commencing the investigation against Mr. Santivañez – the Arequipa Environmental Prosecutor finally notified Mr. Santivañez and CHM that Mr. Santivañez is being charged as an accomplice to ARMA’s supposedly unlawful approval of the environmental permits for the Mamacocha Project solely because he signed the permit application on behalf of CHM. In a flagrant breach of due process and Peru’s international law obligations, the Arequipa Environmental Prosecutor closed the investigation and levied a charge against Mr. Santivañez without giving him or CHM an opportunity to testify or submit exculpatory evidence.

145. The timing and apparent focus of this investigation, coupled with the Arequipa Environmental Prosecutor’s repeated refusal to substantiate it, demonstrate that the criminal proceeding is part of the RGA’s continued abusive resistance to the Project. Even though this charge is facially bare, its mere existence caused two significant harms to Claimants. First, this baseless investigation scared off potential investors and lenders. DEG hired a Peruvian law firm, CMS Grau, to issue a legal opinion as to the criminal investigation’s validity. Although CMS Grau was unable to find any such validity, it noted that if this proceeding were to result in liability it could single-handedly stop the Mamacocha Project. Second, the mere launching of this investigation has deprived CHM of its right to counsel under customary international law and the Peruvian Constitution, as the Arequipa Environmental Prosecutor’s charge had the intended effect of limiting Mr. Santivañez’s role in the Mamacocha Project. This unfounded

criminal charge constitutes another violation of Peru's responsibility to provide due process, transparent, fair and equitable treatment of investments of foreign investors.

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

146. Although the RGA lawsuit was dismissed at the end of December 2017, its nearly year-long delays to the Mamacocha Project rendered the twice-amended works execution schedule under the RER Contract completely obsolete.

147. In February 2018, CHM formally requested extensions to the commercial operation date and the termination date under the RER Contract to February 28, 2021 and December 31, 2041, respectively. These proposed dates accounted for the myriad government interferences to date, restored the 20-year Guaranteed Revenue commitment under the RER Contract, and afforded CHM sufficient time to complete the pre-operation milestones for the Mamacocha Project.

148. In March 2018, Latam Hydro filed its second notice of intent to submit claims under the Treaty, which focused on the effects of the RGA's interferences with the Mamacocha Project and highlighted how these and the historical interferences to this Project had effectively taken away approximately four to five years off the 20-year Guaranteed Revenue period promised under the RER Contract and rendered the Project economically unviable.

149. On April 17, 2018, Latam Hydro formally withdrew its first notice of intent filed a year earlier on account of the RGA's lawsuit against the Mamacocha Project.

K. Peru Again Promised to Honor Its 20-Year Guaranteed Revenue Commitment

150. Negotiations through the Special Commission continued through most of 2018, resulting in CHM and MINEM executing Addenda 4-6, which formally suspended the RER

Contract, “including the obligations, rights and works execution schedule” as “previously modified by Addenda No. 1 and No. 2,” through September 30, 2018.⁶⁰

151. Prior to the conclusion of the suspension period, MINEM proposed the promulgation of a new supreme decree that would extend the work schedules, commercial operation dates, and contract termination dates for all concessionaires if delays had been caused by government interferences, as admittedly occurred on the Mamacocha Project. In an October 2018 public presentation, MINEM’s Minister, Francisco Ismodes, justified this supreme decree as necessary to move the hydroelectric projects forward and unlock approximately US \$222 million in foreign investments in these projects.

152. In the case of CHM, the proposed supreme decree was legally unnecessary as applied to its own situation. The proposed supreme decree would have allowed MINEM to provide relief to other concessionaires in the Third and Fourth Public Tenders that could establish that government delays, not concessionaire’s deficiencies, delayed their projects. The Civil Code grants MINEM autonomous authority to extend the commercial operation and contract termination dates where, as with the Mamacocha Project, government interference made it impossible for a concessionaire to advance the project. And the governing customary international law principles expressly incorporated under the Treaty obligate Peru to treat U.S. investors and investments fairly, equitably, and consistently, as MINEM had previously admitted in the Sosa Report. For these reasons, MINEM already had granted similar extensions to CHM through Addenda 1 and 2 under the RER Contract. The proposed supreme decree, therefore, appeared to provide little else other than political cover to MINEM with respect to CHM and other concessionaires.

⁶⁰ Addendum 4 to the RER Contract, January 17, 2018 (C-015); Addendum 5 to the RER Contract, March 26, 2018 (C-016); Addendum 6 to the RER Contract, July 23, 2018 (C-017).

153. Nonetheless, Claimants were relieved that MINEM agreed to offer a solution to the unlawful mess primarily created by the RGA and its regional allies in Arequipa. In reliance on MINEM's good faith extension of the commercial operation date and RER Contract termination date, Latam Hydro invested further time and money into the Project. For instance, Latam Hydro: (i) re-engaged with potential equity partners; (ii) re-engaged with DEG concerning their previously negotiated financing deal; (iii) re-engaged with GCZ concerning their previously negotiated contracting agreement; (iv) finished environmental studies; (v) finalized negotiations for the acquisition of easements from local municipalities; and (vi) increased its social action plan through which it invested in the Mamacocha Project's neighboring communities.

154. On November 11, 2018, MINEM published its proposed supreme decree for public comment. MINEM also published a "Statement of Motives" explaining its rationale for the supreme decree.⁶¹ MINEM acknowledged that if Peru failed to honor its 20-year Guaranteed Revenue commitments for the renewable energy projects, the officials who interfered with these projects could face significant personal financial liability under Article 258 of the Law of General Administrative Procedure.⁶² Article 258 provides that government officials are financially responsible before those administered for direct and immediate damages caused by the acts of the public administration or the public services directly provided by them.

155. MINEM's Statement of Motives also explained that the decree would: (i) promote the interests and objectives set forth in Legislative Decree No. 1002; (ii) avoid proceedings under domestic and international law; (iii) create a framework under which the renewable energy resources projects authorized by Legislative Decree No. 1002 could be carried out to completion; (iv) allow the contracts from the Third Public Tender to be carried out under their original terms

⁶¹ Statement of Motives from the Ministry of Energy and Mines, November 11, 2018 (C-018).

⁶² *Id.* at p. 4 (C-018).

(e.g., over a 20-year period); (v) promote stability in renewable energy projects; (vi) result in higher investor confidence in the energy sector; (vii) have a positive impact in local areas where the projects would be built; and (viii) have a positive impact on Peru's environment.⁶³

L. In December 2018, Peru Launched a Multi-Faceted Attack on the RER Contract in a Transparent Attempt to End the Mamacocha Project and Collect the Performance Bond

156. In December 2018, just weeks after Peru, through its Statement of Motives, publicly touted the renewable energy projects and reaffirmed its legal obligations under Peruvian and international law to see them through, MINEM abruptly reversed course and took several orchestrated steps to repudiate the RER Contract and destroy the Project.

157. **First**, on December 27, 2018, MINEM issued a report recommending against issuing its own proposed supreme decree. This report contradicted MINEM's Statement of Motives issued just weeks earlier that Peru had an obligation under Peruvian and international law to restore the time to renewable energy projects lost to interferences and delays attributable to the government and instead provided it would be politically and economically expedient to let these projects (including the Mamacocha Project) default in order to permit Peru to collect the approximately US \$55 million in performance bonds under their corresponding contracts.

158. **Second**, without advance notice, consent or jurisdiction, MINEM affirmatively launched the Lima Arbitration against CHM on December 27, 2018 before the Lima Chamber of Commerce.⁶⁴ The Lima Arbitration seeks to reverse MINEM's previously approved extensions by nullifying Addenda 1 and 2 to the RER Contract. Although these Addenda were executed years before, MINEM argued for the first time in its arbitral complaint that the Addenda had

⁶³ *Id.* at pp. 5-6 (C-018).

⁶⁴ This arbitration is styled as: *Ministerio de Energía y Minas de la República del Perú c. Hidroeléctrica Laguna Azul S.R.L (hoy) CH Mamacocha S.R.L*, Procedimiento Arbitral No. 0669-2018-CCL, Centro Nacional e Internacional de Arbitraje de la Cámara de Comercio de Lima.

been approved on false pretenses and were improper as a matter of law. MINEM's groundless arguments in its arbitration complaint completely contradict MINEM's prior admissions, in which MINEM repeatedly acknowledged that the extensions were valid modifications of the works execution schedule and were necessary to repair, in part, the damages caused by the government's own interferences in the Mamacocha Project.

159. MINEM purportedly brought the arbitration under Clause 11.3(b) of the RER Contract, which provides that: “[d]isputes whose amount is equal to or less than twenty million dollars (US\$ 20,000,000) or its equivalent in national currency, or that cannot be quantified or assessed in money,” must be submitted to the Lima Chamber of Commerce in Peru.⁶⁵ MINEM's arbitration, however, is a transparent attempt to terminate the RER Contract and all benefits to CHM thereunder. The “dispute” raised in the case far exceeds US \$20 million, as will be proven in this ICSID arbitration. And it would be disingenuous to contend that the dispute cannot be quantified.

160. The parties' dispute falls within Clause 11.3(a) of the RER Contract, providing: “[d]isputes whose amount is greater than twenty million dollars (US\$ 20,000,000) or its equivalent in national currency, will be settled through international arbitration of law through a procedure processed in accordance with the Rules of Conciliation and Arbitration of the International Centre for the Settlement of Investment Disputes (ICSID) established in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States” in Washington D.C.⁶⁶

161. MINEM commenced the Lima Arbitration without CHM's notice, authorization or consent. The tribunal lacks competence or jurisdiction *ratione materiae*. Peru is contractually

⁶⁵ RER Contract, Clause 11.3(b) (C-002).

⁶⁶ *Id.*, Clause 13(a) (C-002).

required to bring all significant disputes concerning the Mamacocha Project to an ICSID tribunal, based in Washington, DC. MINEM cannot circumvent this fundamental term of the RER Contract by initiating a local arbitration in Peru.

162. **Third**, on December 31, 2018, MINEM unexpectedly and without input or warning issued two reports formally rejecting CHM's February 1, 2018 request for extensions to the commercial operation and contract termination dates. These reports reversed MINEM's prior admissions, legal commitments, and representations. MINEM contended, contrary to its international law and Peruvian legal obligations, that the 20-year Guaranteed Revenue commitment was not an irrevocable legal commitment, but rather, could be unilaterally disregarded by the government even if the projects' commencement had been delayed solely due to the government's own interferences, as happened in the Mamacocha Project.

163. In essence, MINEM adopted the arbitrary and illogical conclusion that concessionaires assumed the risk that the government had unilateral authority to delay, obstruct, and reverse prior approvals on the RER projects even if, as here, this conduct was wholly unreasonable, arbitrary, non-transparent and unfair. MINEM also rejected its own prior legal position, endorsed by the Sosa Report, that Peru had an obligation under the Treaty and Peruvian law to extend the relevant dates under the RER Contract in instances of government interference. In addition to being illogical and unfounded, Peru's novel position that it could unilaterally restrict the Guaranteed Revenue period under the RER Contract for any reason constitutes an abuse of rights because it attempts to implement contractual provisions for a purpose different from their original intent.

164. MINEM also reversed its prior commitments to CHM, as set forth in Addenda 3 through 6, that the project had been "suspended" for seventeen (17) months from April 21, 2017

through September 30, 2018, and that CHM would not be penalized during the Special Commission's interventions to convince the RGA to act lawfully toward the Mamacocho Project.⁶⁷ MINEM's December 31, 2018 decision adopted the unreasonable, arbitrary, and unfair position that the 17-month suspension period should be counted against CHM, not the government body that had created the unlawful delays on the Project.

165. The patent unfairness of MINEM's coordinated efforts in December 2018 to destroy the Mamacocho Project is best illustrated by the fact that MINEM announced on *December 27, 2018* that it was seeking retroactively to reimpose the original commercial operation deadline of *December 31, 2018*, despite the fact that it had been extended multiple times by formal agreement of the parties and had also been suspended for nearly a year and one-half by mutual agreement. And MINEM informed CHM of its decision *just four days* before the original deadline date was to expire. Plainly, it was impossible for CHM to complete its approximately 30-month construction, testing and commissioning processes in this absurd time period.

166. MINEM's complete *volte-face* in December 2018 was an attempt to retroactively, unilaterally, and unlawfully cancel the Mamacocho Project, by rendering it impossible to complete. MINEM's repudiatory breach directly caused harm both to CHM and Latam Hydro's investments.

M. MINEM's December 2018 Measures Ended the Mamacocho Project

167. MINEM's orchestrated, multi-prong assault on the Project in December 2018 destroyed any prospects for the Project to survive. MINEM's December 2018 decisions

⁶⁷ Addendum 3 to the RER Contract, September 8, 2017 (C-014); Addendum 4 to the RER Contract, January 17, 2018 (C-015); Addendum 5 to the RER Contract, March 26, 2018 (C-016); Addendum 6 to the RER Contract, July 23, 2018 (C-017).

disavowed its own proposed solution to the government's interferences with the RER projects, denied CHM's required extensions to the RER Contract, and commenced an aggressive frontal attack on the Project by seeking nullification of its prior extensions in a local arbitration.

168. These measures put an immediate and permanent end to Latam Hydro's ongoing negotiations with potential investors and lenders. Following announcement of the proposed supreme decree on November 11, 2018, Latam Hydro had reengaged Innergex and DEG and once again finalized terms with both parties regarding transactions that promised to finance the Mamacocha Project through construction, commissioning and operation. But, again, Latam Hydro's efforts to finance the Project were rendered impossible by Peru's unilateral actions.

169. In February 2019, CHM closed its offices in Peru and laid off its employees. In May 2019, Latam Hydro officially ended its presence in Peru. The Mamacocha Project was over.

N. Claimants' Attempts to Resolve this Matter through Consultation

170. Claimants attempted on several occasions to engage Peru in consultations in a good-faith attempt to resolve this dispute. In mid-January 2019, for example, Latam Hydro's senior officials visited with the Special Commission in person to inquire about a potential resolution.

171. On May 28, 2019, Claimants served the Special Commission and MINEM with a detailed Notice of Intent to Submit Claims to Arbitration ("Notice of Intent") that expressly invited Peru to resolve the dispute amicably through consultations and negotiations.⁶⁸

⁶⁸ For avoidance of doubt, the "dispute" detailed in the Notice of Intent and this Request for Arbitration is not a continuation of the prior disputes outlined in the first and second notices of intent from June 2017 and March 2018, respectively. Accordingly, Claimants filed a new Notice of Intent in May 2019.

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

V. PERU BREACHED ITS OBLIGATIONS UNDER THE TREATY

173. The Treaty imposes obligations on all organs (executive, legislative and judicial) and emanations of the Peruvian state, including, without limitation, MINEM, RGA, ARMA, AAA, the Peruvian courts, and all their employees, agents, officials and representatives.

174. The measures taken by Peru outlined above breached Peru’s obligations towards Claimants under Article 10 of the Treaty in many ways, including without limitation, the following illustrations:

A. Peru Violated Protections Accorded to Latam Hydro’s Investment under Article 10.5 of the Treaty

175. Article 10.5 provides that Peru “shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”⁶⁹

1. Peru Failed to Accord Fair and Equitable Treatment to Latam Hydro’s Investments

176. Peru had a duty to accord Latam Hydro’s investments “fair and equitable treatment” under customary international law. Notably, a State can still violate this international

⁶⁹ Treaty, Art. 10.5(1) and Annex 10-A (C-001).

law standard regardless of the State’s motives and without any requirement for showing a State’s bad faith motivation.

177. It is widely accepted that fair and equitable treatment is an internationally “broad requirement,”⁷⁰ and a “flexible” concept.⁷¹ Tribunals often describe the fair and equitable treatment standard as encompassing a basket of investor protections that can be classified in the following subgroupings of standards, including: (i) whether the host State breached the investor’s reasonable and legitimate expectations when the investments were made; (ii) whether the State failed to provide a stable and predictable legal and business framework; (iii) whether the State acted arbitrarily or unreasonably; (iv) whether the disputed measures were disproportionate; (v) whether the State’s conduct was discriminatory; (vi) whether the State’s conduct was transparent; and (vii) whether the State acted in good faith.

a. Peru Deprived Latam Hydro of Its Reasonable Expectations under the RER Contract

178. Protection of an investor’s legitimate expectations is one of the most commonly invoked elements of the fair and equitable treatment standard particularly where, as here, the international investment agreement itself requires a “predictable legal and commercial framework for business and investment.”⁷²

179. On at least seven occasions, Peru contradicted, reversed, or declared null and void promises and commitments it made under the RER Contract on which Latam Hydro had reasonably and legitimately relied. Each of these reversals or inconsistent positions constituted a violation of the fair and equitable treatment standard under the Treaty.

⁷⁰ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID case No. ARB/05/15), Award, June 1, 2009, par. 450. Please note that all case references in this Request for Arbitration are available online at <http://icsid.worldbank.org/> and <http://italaw.com/>

⁷¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, November 6, 2008, par. 185.

⁷² Treaty, Preamble (C-001).

180. **First**, Peru (through MINEM) promised to pay CHM Guaranteed Revenue for a period of up to twenty (20) years. Latam Hydro reasonably and legitimately relied on this representation when it ran its revenue forecasts and offered its bid package at the Third Public Tender. Peru's 20-year Guaranteed Revenue commitment also served as a fundamental attraction for Latam Hydro to obtain equity participation and project financing for the Project. Peru, however, violated this fundamental assurance by interfering with and ultimately blocking development and completion of the Project. Peru then repudiated its 20-year Guaranteed Revenue commitment when MINEM announced for the first time in its December 31, 2018 report denying CHM's extension requests that Peru could unilaterally shorten or eliminate entirely the 20-year Guaranteed Revenue period by its own interferences, actions, or inaction, preventing completion of the Project. Peru's decision not to restore the 20-year Guaranteed Revenue period provided under the RER Contract is a violation of the fair and equitable treatment standard under the Treaty.

181. **Second**, Peru (through MINEM) agreed in July 2015 and January 2017 to extend the commercial operation date under the RER Contract to account for its own admitted governmental interferences and delays. Latam Hydro reasonably relied on these extensions in its assessment of whether to invest further in the Mamacocha Project and whether to complete all requirements for financial close. On December 27, 2018, however, Peru decided to reverse course and commenced the Lima Arbitration seeking nullification of its own decisions made years earlier in Addenda 1 and 2 to the RER Contract and thereby, seeking reversion to the original commercial operation deadline date of December 31, 2018. Peru's decision to seek reversal of MINEM's prior approvals of Addenda 1 and 2 in the Lima arbitration is, itself, a violation of the fair and equitable treatment standard under the Treaty.

182. **Third**, Peru (through MINEM and MEF) agreed to suspend CHM's obligations under the RER Contract for a 17-month period from April 21, 2017 through September 30, 2018 to allow the central government ministries to convince the RGA to withdraw its meritless legal attack on the Project. Latam Hydro deferred to the Special Commission's request and reasonably relied on Peru's repeated contractual guarantee that the works execution schedule had been suspended during this period of intra-government wrangling. On December 31, 2018, however, Peru reversed course and issued two reports that rejected recognition and addition of this suspension period to the works execution schedule. Peru's decision to renege on its contractual commitment to honor the suspension period under the RER Contract is a violation of the fair and equitable treatment standard under the Treaty.

183. **Fourth**, Peru (through ARMA) approved the environmental permits early in the Project (after more than a year of unnecessary government delays). Latam Hydro reasonably relied on these approvals to make its investments in CHM, the RER Contract, and in furthering its significant efforts to obtain all related and subsequent permits, licenses and concessions. On March 14, 2017, however, Peru (through the RGA and ARMA) authorized and commenced a meritless lawsuit seeking to revoke these approvals. This lawsuit fatally interrupted Latam Hydro's development of the Project, by undermining investor, lender, and contractor confidence in the Project's continuation and completion in the face of repeated, unreasonable governmental interferences. Peru's decision to challenge the environmental permits for the Mamacocha Project violated the fair and equitable treatment standard under the Treaty.

184. **Fifth**, ten days later, on March 24, 2017, Peru (through the Arequipa Environmental Prosecutor) commenced a baseless criminal investigation that similarly called into question ARMA's prior approval of the environmental permit for the hydroelectric plant in

the Mamacocha Project. Peru's decision to commence the criminal investigation concerning the process for procuring the environmental permits for the Mamacocha Project violated the fair and equitable treatment standard under the Treaty.

185. **Sixth**, in the RER Contract, Peru (through MINEM) promised CHM to “employ its best efforts”⁷³ to secure the necessary permits, licenses, and approvals from other government agencies. Latam Hydro reasonably and justifiably relied upon this critical pledge of cooperation and assistance when it decided to invest in the Project. Peru, however, refused and failed to expend any efforts to help CHM secure the necessary permits and concessions. To the contrary, Peru obstructed CHM's efforts to obtain a number of its most critical permits, such as the civil works authorization. Peru's decision to disavow or negligently undertake its contractual obligation to use its “best efforts” to assist CHM during the permitting phase violated the fair and equitable treatment standard under the Treaty.

b. Peru Adopted Measures that Threatened the Stability of the Legal Framework Upon Which Latam Hydro Reasonably Relied

186. Central to the relevant jurisprudence is the concept that fair and equitable treatment requires that investors be accorded a stable and predictable legal framework. This is particularly applicable in cases where, as here, a State offers incentives to lure investors and then employs measures that modify or eradicate the regime in ways that unfairly damage the covered investment.

187. Here, Peru expressly induced Latam Hydro to invest by promising the 20-year Guaranteed Revenue commitment. This incentive was included in Legislative Decree No. 1002, the bidding terms for the Third Public Tender, and the RER Contract.

⁷³ RER Contract, Clause 4.3 (C-002).

188. Peru, however, undertook numerous measures that unlawfully reduced the Guaranteed Revenue period for the Mamacocha Project and, instead of restoring the time and value these measures took away from the Project – as it had previously done on multiple occasions and as is required under the governing legal framework, the Treaty, and Peruvian law – Peru announced for the first time in December 2018 that it had the right to unilaterally reduce this period for any reason and that Latam Hydro bore the risk of such an outcome.

c. Peru Destroyed Latam Hydro’s Investments through Arbitrary Measures

189. International tribunals have found that States violate the fair and equitable standard of treatment when they act arbitrarily. A measure is arbitrary when it has no rational relationship with the purported goal of that measure or is otherwise unreasonable, prejudicial or capricious. Here, Peru employed several arbitrary measures that damaged Latam Hydro’s covered investments, including, by illustration, the following:

190. **First**, the RGA’s March 2017 decision to bring a lawsuit to challenge the environmental permits for the Mamacocha Project was arbitrary, meritless, and designed merely to harass and obstruct. The frivolous lawsuit challenged the “competency” of its own administrative body that had approved the Mamacocha Project’s environmental permits. The applicable TUPA regulations unambiguously provided that the regional body was legally competent to approve the environmental permits and had, in fact, approved similar permits for more than one hundred (100) projects in the recent past. As publicly disclosed by the Governor of Arequipa, the Special Commission, after receiving outside legal advice explaining that the lawsuit was baseless, insisted that the Governor withdraw the lawsuit, or the RGA could be found civilly and criminally liable under Peruvian law.

191. **Second**, the Arequipa Environmental Prosecutor’s decision to bring a criminal investigation against CHM and formally charge Mr. Santivañez is similarly arbitrary since this

criminal matter is purportedly based on the same allegations as those contained in the RGA lawsuit, which was later withdrawn for lack of merit. The commencement and pursuit of this meritless investigation of CHM and subsequent criminal charge against CHM's lead Peruvian attorney, Mr. Santivañez, is emblematic of a pattern of arbitrary and capricious actions of government authorities interfering with and ultimately destroying the Project.

192. **Third**, MINEM's decision to challenge Addenda 1 and 2 in the Lima Arbitration is an arbitrary measure not supported by a rational policy choice, but rather designed to repudiate Peru's 20-year Guaranteed Revenue commitment, retroactively impose an inapplicable commercial operation deadline, and collect on the performance bond. Additionally, MINEM's commencement and continuation of the Lima Arbitration without CHM's consent is not authorized by the RER Contract. It is an abusive tactical ploy to circumvent the parties' agreement to bring disputes involving the Project that exceed US \$20 million to ICSID, not a local arbitration center in Lima.

193. **Fourth**, MINEM's decision to reject CHM's extension requests to the works execution schedule was arbitrary. MINEM approved the 17-month suspension period several times in writing, before it reversed its own position and opposed recognizing the suspension period in the time schedules under the RER Contract. Again, the underlying reasons for these reversals were not rational policy, but rather MINEM's unlawful strategy to terminate the RER Contract and collect on the performance bond.

194. **Fifth**, AAA's decision to obstruct CHM's civil works authorization was unreasonable and arbitrary. AAA first denied the civil works authorization for frivolous reasons on May 27, 2017. Then, after ANA succeeded in getting AAA to reverse its denial, AAA

arbitrarily and unreasonably issued a civil works authorization that was riddled with errors. This led to another six months of unnecessary costs and delays to the Mamacocha Project.

d. Peru Did Not Offer Latam Hydro Transparency or Due Process

195. Fair and equitable treatment also requires States to act transparently toward investors, free from ambiguity and uncertainty, and pursuant to due process standards. Here, Peru has undertaken numerous actions and measures that violated due process, and created a climate of uncertainty, lawlessness, and inconsistent treatment of foreign investment in the Project, including, by illustration, the following:

196. **First**, Peru's decision to commence the RGA lawsuit violated the basic principles of due process under international law. This lawsuit was designed to, and did, undermine investor, lender, and contractor confidence in Peru's commitment to the RER regime and the Mamacocha Project. The lawsuit contradicted ARMA's prior determinations and demonstrated that the central government did not have control over regional authorities in matters that were within its exclusive competence.

197. **Second**, the Arequipa Environmental Prosecutor's decision to commence a criminal proceeding against CHM and its legal counsel was similarly designed to harass Claimant and undermine Claimants' due process and ethical right to counsel in this and other legal actions defending against the government's misconduct. The Arequipa Environmental Prosecutor has to date refused to provide either CHM or Mr. Santivañez with any meaningful opportunity to defend or dismiss the charge or to afford them basic due process protections. The prosecutor only recently informed CHM and Mr. Santivañez as to the purported factual basis for the investigation (more than fifteen months after the investigation began and only at the behest of a Peruvian court order).

198. **Third**, MINEM's December 2018 decision to reject the work schedule extensions that CHM requested in February 2018 created fundamental uncertainties as to MINEM's standards and processes for granting such extensions, given that MINEM previously admitted Peru was fully and exclusively responsible for the delays and interferences justifying the extensions.

199. **Fourth**, MINEM's decision to commence the Lima Arbitration in an attempt to nullify Addenda 1 and 2 creates grave uncertainties as to Peru's commitment to the rule of law and consistent, transparent application of its policies, procedures, and prior decisions.

200. **Fifth**, AAA's decision to obstruct the civil works authorization through a series of denials, reversals, and improper authorizations caused unnecessary uncertainties for the Mamacocha Project. The civil works authorization was the last permit on CHM's critical path and served as an unpredictable obstacle to financial close and construction. The uncertainties caused by AAA's conduct turned away potential investors and lenders. It also appears to have been part of the regional government's broader attacks on the Project.

e. Peru Discriminated Against the Mamacocha Project

201. Discriminatory treatment of a covered investment without a permissible justification is a classic fair and equitable treatment violation.

202. The RGA unjustifiably discriminated against Latam Hydro's investment when it decided to bring a baseless lawsuit in local courts to revoke ARMA's environmental permits for the Mamacocha Project. The RGA discriminatorily challenged only the Mamacocha Project, not the more than one hundred (100) similar projects that had received environmental permits from the same ARMA body whose authority RGA challenged in the lawsuit.

203. The Arequipa Environmental Prosecutor discriminated against Latam Hydro's investment by deciding to target CHM and Mr. Santivañez in a criminal proceeding based on the

same allegations that Peru admitted being meritless in its withdrawal of the RGA lawsuit. The discriminatory nature of this proceeding is further evidenced by the fact that the Arequipa Environmental Prosecutor began its investigation of Mr. Santivañez only weeks after CHM succeeded in getting the RGA's lawsuit withdrawn.

204. AAA also unjustifiably discriminated against Latam Hydro's investment when it decided to obstruct CHM's application for a civil works authorization. These measures were unauthorized, as is evident from its supervisory body ANA's actions and orders. They also were carried out by a political ally of the RGA in what appears to have been a coordinated effort to stop the Project.

f. Peru's Measures Were Disproportionate

205. Fair and equitable treatment includes an obligation of proportionality. State measures are disproportionate where there is no reasonable relationship between the burden imposed on the foreign investor and the aim sought to be realized by the measure.

206. MINEM's decisions to reject CHM's February 2018 extension request, and challenge Addenda 1 and 2 were all unreasonable and disproportionate government responses that had the foreseeable consequence of fatally destroying the project and depriving Latam Hydro of its entire investment. Peru had more minimally intrusive alternatives available, as it showed when it granted two prior extension requests set out in Addenda 1 and 2.

g. Peru's Measures Lacked Good Faith

207. Fair and equitable treatment requires a State to act in good faith. A violation of its fair and equitable treatment obligations under the Treaty does not require a showing that the State acted with malicious intent or in bad faith. Rather, a breach of the fair and equitable treatment protections can be proven with a showing that the State did not act reasonably. Alternatively, a State acts without good faith if it exercises a right "for a purpose different from

that for which that right was created,” otherwise known in international law as an “abuse of rights.”⁷⁴ Here, Peru has adopted various measures that were unreasonable and lacked good faith, including, by illustration, the following:

208. **First**, the RGA unreasonably decided to bring a lawsuit to revoke CHM’s permits that it later voluntarily withdrew because it was meritless. RGA’s Governor said in a public interview that the RGA officials involved in this lawsuit could have been held criminally liable if she had not dismissed the lawsuit by executive order.

209. **Second**, as part of its bad faith efforts to block the Mamacocha project, the RGA decided to open a baseless criminal investigation against its regional government officials on specious grounds relating to the officials’ purported lack of authority to grant an environmental permit – a ground that outside counsel to the Special Commission determined was wholly without merit – and against Mr. Santivañez for having signed on behalf of CHM documents requesting this environmental permit.

210. **Third**, after publicly acknowledging that government officials were wholly and exclusively responsible for delays on the Project, MINEM unreasonably decided to reverse its extensions to the works execution schedule, disingenuously arguing that concessionaires assumed the risk that a project might be held up by government delays and interferences. To the contrary, the RER Contract, the Treaty, Peruvian law, and customary international law protects CHM from Peru’s unreasonable interferences with the Mamacocha Project as well as its bad faith reversals of its commitments to the investor.

211. **Fourth**, MINEM acted in bad faith when it decided to disavow the suspension period under the RER Contract. MINEM and CHM formally installed this suspension period

⁷⁴ *Saipem v. SpA v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Final Award, June 30, 2009, par. 160, available at <https://www.italaw.com/sites/default/files/case-documents/ita0734.pdf>.

under the RER Contract for seventeen (17) months but then MINEM unreasonably reversed course, determining that the suspension period should count against CHM's deadlines.

212. **Fifth**, AAA's acted in bad faith when it obstructed the civil works authorization application. Its obstreperous actions were later reversed and rectified upon intervention of its supervisory body (ANA), and an administrative court, but not before these bad faith actions had contributed to the destruction of the Project.

2. Peru Failed to Provide Full Protection and Security to Latam Hydro's Investments

213. Article 10.5 of the Treaty requires a State to take measures to protect an investment from adverse effects. As part of this obligation, a State must maintain a secure investment environment. Peru breached its obligation of full protection and security in several ways, including, by illustration:

214. **First**, Peru failed to protect the Project from vociferous and sustained political interference from RGA officials, even after CHM sought MINEM's intervention and protection.

215. **Second**, Peru failed to protect the transparency, consistency, and predictability of its legal regime.

3. Peru Violated the International Law Principle of Estoppel

216. The customary international law principle of estoppel prohibits a State from taking actions or making representations that are contrary to or inconsistent with actions or representations that it had previously made or issued. In violation of its international obligations, Peru has induced Claimants' reasonable reliance on its actions and representations on numerous occasions, including, by illustration, the following:

217. **First**, Peru induced Latam Hydro to invest in obtaining permits, licenses, and concessions based upon ARMA's approval of the environmental permits for the Mamacocha

Project. Latam Hydro suffered harm when the RGA brought a lawsuit that argued those permits should be revoked.

218. **Second**, Peru induced Latam Hydro invest in the Mamacochoa Project based upon MINEM's guaranteed 20-year Guaranteed Revenue commitment. Latam Hydro suffered harm when MINEM denied CHM's February 2018 extension requests to the work schedule and term date under the RER Contract that would have restored the agreed-upon 20-year Guaranteed Revenue period.

219. **Third**, Peru induced Latam Hydro to make further investments under the RER Contract after extending the works execution schedule under Addenda 1 and 2. Latam Hydro suffered harm when MINEM commenced the Lima Arbitration to nullify these Addenda.

B. Peru Has Indirectly Expropriated Latam Hydro's Investment in Violation of Article 10.7 of the Treaty

220. Article 10.7 of the Treaty provides that Peru may not "expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization," except: (i) for a public purpose; (ii) in a non-discriminatory manner; (iii) on payment of prompt, adequate, and effective compensation; and (iv) in accordance with due process of law and Article 10.5.⁷⁵

221. The Treaty provides that an "indirect expropriation" occurs "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."⁷⁶

222. Peru has indirectly expropriated Latam Hydro's investments in many ways, including, but not limited to the following:

⁷⁵ Treaty, Art. 10.7(1) (C-001).

⁷⁶ *Id.*, Annex 10-B (C-001).

223. **First**, through its December 2016 decision to disavow the environmental permits that it had previously granted for the Mamacocha Project and bring the March 14, 2017 lawsuit, which was completely baseless and ultimately withdrawn but not before rendering the operative works execution schedule under the RER Contract entirely obsolete.

224. **Second**, through its decision to commence the March 24, 2017 criminal investigation, which had the effect of chilling investor, lender, and contractor confidence in the Mamacocha Project and depriving CHM of its right to counsel, which in turn made it impossible for CHM to move this Project forward.

225. **Third**, through its decision to obstruct the civil works authorization application from April 2017 through January 2018. The civil works authorization was the last permit on its critical path and one of the final prerequisites for CHM to obtain the necessary financing to finish this Project.

226. **Fourth**, through its December 2018 decision to commence a local arbitration that challenges to Addenda 1 and 2 and thereby makes it impossible for CHM to perform under a contract that MINEM is simultaneously trying to terminate.

227. **Fifth**, through its December 2018 decision to reject CHM's formal request for extensions to the RER Contract and its underlying deadlines, which effectively made it impossible for CHM to bring the Project into commercial operation.

228. If as a result of the Lima Arbitration, or otherwise, MINEM were to terminate the RER Contract under Clauses 8.3, 8.4, or 10.1, or if MINEM were to call CHM's approximately US \$5 million performance bond, Peru would also be liable under Article 10.7 for a direct

expropriation arising from its outright seizure of Latam Hydro's investments without just compensation.⁷⁷

229. None of the relevant exceptions under Article 10.7(1) would convert Peru's unlawful expropriation into a lawful taking.

230. **First**, Peru's expropriations were not undertaken for a valid public purpose. Peruvian law and international law obligations require State entities and officials to comply with their statutory, regulatory, treaty and contractual obligations, otherwise they can be held personally, financially liable. Peru has not tried and could not try to color its actions in the patina of public policy.

231. **Second**, Peru's measures were discriminatory in nature against Latam Hydro and CHM, particularly through the RGA's, AAA's, ARMA's and the Arequipa Environmental Prosecutor's aggressive political and legal challenges to the Project and its legal counsel.

232. **Third**, Peru has not offered Latam Hydro any compensation for this expropriation. To the contrary, Peru is currently challenging the RER Contract so that the government may try to collect on the bond.

233. **Fourth**, as demonstrated in the preceding section, these expropriatory measures violated Latam Hydro and CHM's due process rights.

C. Peru Has Treated Latam Hydro Less Favorably Than It Treats Investors from Other Countries in Violation of Article 10.4 of the Treaty

234. Article 10.4 of the Treaty requires Peru to accord U.S. investments "treatment no less favorable than that it accords, in like circumstances, to investments in its territory of

⁷⁷ *Id.*, Art. 10.7(1) (C-001).

investors of . . . any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”⁷⁸

235. In at least three bilateral investment treaties with other countries, Peru has agreed to an “umbrella clause” commitment to “observe any obligation . . . into which it has entered concerning investments of nationals” from those countries.⁷⁹ Accordingly, this obligation must be extended to Latam Hydro in accordance with Article 10.4’s obligation for Peru to treat Latam Hydro no less favorably than comparable investors from other countries.

236. Peru’s “umbrella clause” commitment requires Peru to honor and enforce its obligations under the RER Contract, since these obligations affect Latam Hydro’s covered investments under the Treaty.

237. As explained in the next section below, Peru breached the RER Contract by: (i) abandoning its guarantee that CHM would receive a 20-year Guaranteed Revenue commitment and its resulting revenue stream; (ii) making it impossible for CHM to perform; (iii) repudiating the contract through the filing of the Lima Arbitration, thereby effecting a repudiatory breach; (iv) making false representations; (v) failing to use its best efforts to help CHM secure the necessary authorizations for the Mamacocha Project; and (vi) taking measures under the RER Contract without good faith.

⁷⁸ *Id.*, Art. 10.4(2) (C-001).

⁷⁹ Art. 4(2) of the Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Peru for the Promotion of Investments, Nov. 15, 1991, *available at* <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2757/peru---thailand-bit-1991->; Art. 3(4) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Republic of Peru, Dec. 27, 1994, *available at*: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2641/netherlands---peru-bit-1994->; and Art. 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru for the Promotion and Protection of Investments, Oct. 4, 1993, *available at* <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2758/peru---united-kingdom-bit-1993->.

VI. PERU BREACHED ITS OBLIGATIONS UNDER THE RER CONTRACT

238. Latam Hydro submits on behalf of CHM claims for arbitration under Article 10.16(1)(b)(i)(C)⁸⁰ of the Treaty for Peru's breaches of the RER Contract because the RER Contract is an "investment agreement" as defined under the Treaty.⁸¹

239. CHM also submits these claims to arbitration on its own behalf. Clause 11.3(a) of the RER Contract expressly authorizes CHM to bring claims under the ICSID Rules of Arbitration where, as here, the matter in dispute exceeds US \$20 million in value. By executing the RER Contract, Peru has consented to ICSID arbitration of these claims.

240. Peru breached, among others, the following obligations of the RER Contract:

- a. Peru breached the RER Contract by abandoning its 20-year Guaranteed Revenue commitment.⁸² Article 1361 of the Civil Code provides that a contract's terms are binding on contract parties.
- b. Peru breached the RER Contract by repudiating its 20-year Guaranteed Revenue commitment through its December 31, 2018 memoranda that denied CHM's extension requests to the works execution schedule and term date of the RER Contract. Article 1333.3 of the Civil Code provides that a written declaration by a party that it will not perform under a contract constitutes a breach of the same.
- c. Peru breached the RER Contract by rendering CHM's performance impossible. Articles 1155, 1338, 1339, 1340, and 1432 of the Civil Code provide that when a party makes it impossible for the counterparty to perform under a contract, the contract will be terminated, and the responsible party will be liable for any losses

⁸⁰ Treaty, Art. 10.16(1)(b)(i)(C) (C-001).

⁸¹ *Id.*, Art. 10.28 (C-001).

⁸² RER Contract, Clause 1.4.24 (C-002).

arising from its conduct. As explained above, Peru's myriad interfering measures over the history of the Mamacocha Project made it impossible for CHM to achieve many of the project milestones under the RER Contract.

- d. Peru breached the RER Contract by misrepresenting material terms and conditions thereunder on which CHM reasonably relied. Article 211 of the Civil Code provides that a party to a contract that makes misrepresentations in bad faith is in breach and financially responsible for all damages arising from such misrepresentations. Here, the RER Contract incorporates by reference Legislative Decree No. 1002, which in turn provides that Peru will work to protect and advance renewable energy projects. In breach of these obligations, Peru interfered with the Mamacocha Project and threatens to terminate the RER Contract and collect CHM's performance bond.
- e. Peru failed to exercise its duty to use "best efforts" to help CHM secure the necessary government permits, licenses, and concessions, as required under Clause 4.3 of the RER Contract. CHM requested this assistance on many occasions. MINEM did not heed these requests.
- f. Peru failed to perform under the RER Contract with the requisite good faith. Article 1362 of the Civil Code provide that contracts should be negotiated, celebrated, and executed under the principles of good faith and fair dealing between the parties. Peru has breached this principle, among other ways, through its: (i) attempts to nullify Addenda 1 and 2; (ii) disregard of the suspension period that was formalized under the contract through Addenda 3 through 6; (iii) adoption of inconsistent positions as to when the works execution schedule can be

amended to mitigate losses resulting from acknowledged government interferences; and (iv) opening and pursuing a baseless criminal investigation against CHM and its reputable outside legal counsel.

241. Peru's aforementioned breaches have made it impossible for CHM to perform and, thus, the RER Contract is terminated as per Article 1432 of the Civil Code, notwithstanding that the RER Contract does not provide CHM with an express right to unilaterally terminate the contract prior to the commencement of commercial operations.⁸³ If for some reason the RER Contract is not terminated, CHM invokes its right under Article 1426 of the Civil Code to unilaterally suspend the performance of its contractual obligations under the RER Contract due to Peru's breaches of the same.

VII. THE TRIBUNAL HAS JURISDICTION UNDER THE TREATY

A. Latam Hydro Is a Protected Investor Under the Treaty

242. Article 10.28 of the Treaty defines "investor of a Party" as follows:

a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.⁸⁴

243. Article 10.28 of the Treaty defines "enterprise of a Party" as follows: "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."⁸⁵

244. Article 1.3 of the Treaty defines an "enterprise" as:

any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned,

⁸³ See *id.*, Clauses 10.1 – 10.5 (C-002).

⁸⁴ Treaty, Art. 10.28 (C-001).

⁸⁵ *Id.*, Art. 10.28 (C-001).

including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.⁸⁶

245. Latam Hydro is an “enterprise of” the United States of America. Latam Hydro is a limited liability company duly incorporated under the laws of the State of Delaware in May 2014, with registration number 5527780, and maintains its principal place of business at 1865 Brickell Avenue, A-1603, Miami, Florida 33129-1645, United States.⁸⁷

246. As discussed in the facts section and below, Latam Hydro has “made an investment in the territory of another Party,” namely, Peru. Consequently, Latam Hydro is an American “enterprise” of a Party and thus qualifies as a protected “investor” under the Treaty.

B. Latam Hydro Brings Treaty Claims on Behalf of CHM

247. Article 10.16(1)(b)(i)(C) of the Treaty allows a claimant to submit a claim to arbitration “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.”⁸⁸

248. CHM, formerly known as Hidroeléctrica Laguna Azul S.R.L.,⁸⁹ is a legal entity constituted or organized under applicable laws of Peru by incorporation on November 16, 2012.⁹⁰ CHM is a Peruvian “enterprise” and a juridical person. Latam Hydro has always been the one-hundred (100) percent owner of CHM. From May 2014 (when Latam Hydro was incorporated) until December 21, 2016, Latam Hydro indirectly owned and controlled CHM through entities that it directly or indirectly fully owned and controlled. The entities were interposed with the ultimate goal of attracting investment to Latam Hydro’s renewable energy

⁸⁶ *Id.*, Art. 1.3 (C-001).

⁸⁷ Latam Hydro LLC, Certificate of Formation, May 5, 2014 (C-019).

⁸⁸ Treaty., Art. 10.16(1)(b)(i)(C) (C-001).

⁸⁹ Hidroeléctrica Laguna Azul changed its name to CH Mamacocha S.R.L. on February 7, 2017. *See* Registration of Hidroeléctrica Laguna Azul S.R.L.’s name change to CH Mamacocha S.R.L., February 22, 2017 (C-020).

⁹⁰ Registration of Hidroeléctrica Laguna Azul S.R.L.’s (today CH Mamacocha S.R.L.) Articles of Incorporation, November 23, 2012 (C-021).

projects from investors who could not otherwise take advantage of dual taxation treaties. In December 2016, the intermediary entities between Latam Hydro and CHM were collapsed, and Latam Hydro became the 100% direct shareholder of CHM. In June 2017, Latam Hydro became the direct owner of 99% of CHM's shares and an indirect owner of 1% of CHM's shares. Accordingly, Latam Hydro also brings claims on behalf of CHM under Article 10.16(1)(b)(i)(C) of the Treaty for Peru's breaches of an investment agreement.⁹¹

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

249. Article 10.28 of the Treaty defines "investment" as:

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

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debit instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.⁹²

⁹¹ Treaty, Art. 10.16(1)(b)(i)(C) (C-001).

⁹² *Id.*, Art. 10.28 (original footnote reference omitted) (C-001).

250. At the time of the measures complained of in this Request for Arbitration, Latam Hydro held protected investments, including, but not limited to: (i) investments in CHM, “an enterprise” for purposes of the Treaty; (ii) ownership of shares in CHM; (iii) loans to CHM; (iv) investments in “construction, management, production, concession ... and other similar contracts,” relating to the Mamacocha Project; (v) investments in “intellectual property rights,” including those concerning the development, construction, and commissioning of the hydroelectric plant and transmission line contemplated in the Mamacocha Project; (vi) investments in “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law,” including those obtained by CHM in furtherance of the Mamacocha Project; and (vii) investments in “other tangible, or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges,” including investments in equipment, vehicles, easements and other property rights obtained in the execution of the Mamacocha Project.

251. Latam Hydro has at all relevant times directly or indirectly held 100% ownership interest in CHM and fully controlled CHM and the Project.

252. Consequently, the present dispute concerns alleged breaches of the Treaty by Peru that have caused loss or damage to a protected investor and its qualifying investments, as required by Article 10.16 of the Treaty. The claimed damages directly relate to covered investments that were established or acquired in reliance on the RER Contract and the Third Public Tender.

D. The Parties' Consent to Arbitration Under the Treaty and the ICSID Convention

1. Claimants Have Fulfilled the Requirements of the Treaty

253. Chapter 10, Section B of the Treaty contains the Investor-State Dispute Settlement mechanism which applies “in the event of an investment dispute” between qualifying investors and a Party.

254. Article 10.15 of the Treaty provides that “the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.”⁹³

255. As discussed in Section IV.N, *supra*, Claimants made numerous substantive efforts to engage in consultations and negotiations with the Republic of Peru regarding the present dispute. Claimants’ efforts were unsuccessful. Claimants consider that the dispute cannot be settled by consultations and negotiations and thus, they have decided to submit this dispute to ICSID arbitration as provided in the RER Contract and the Treaty.

256. Article 10.16 of the Treaty reads, in material part, as follows:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation or negotiation:
 - (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
 - (i) that the respondent has breached
 - (A) an obligation under Section A,
 - (B) an investment authorization, or
 - (C) an investment agreement; and
 - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

⁹³ *Id.*, Art. 10.15 (C-001).

(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 directed damages directly related to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.⁹⁴

257. Latam Hydro submits claims for arbitration under Article 10.16(1)(a)(i)(A) of the Treaty for Peru's breaches of its obligations under Section A of the Treaty. Additionally, Latam Hydro submits claims for arbitration on behalf of CHM under Article 10.16(1)(b)(i)(C) of the Treaty for Peru's breaches of the RER Contract. Claimants "incurred loss or damage by reason of, or arising out of," these breaches.

258. Peru's consent to submit investment disputes with investors to ICSID arbitration is provided in the Treaty under Article 10.17, which reads in material part as follows:

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

⁹⁴ *Id.*, Art. 10.16 (C-001). The RER Contract is an "investment agreement," as defined in Article 10.28 of the Treaty because it is a "written agreement between a national authority of [Peru] and a covered investment (*i.e.*, CHM) . . . on which the covered . . . investor (*i.e.*, Latam Hydro) relies in establishing or acquiring a covered investment (*i.e.*, the Mamacocho Project and CHM) other than the written agreement itself, that grants rights to the covered investment (*i.e.*, CHM) . . . to supply services to the public on behalf of [Peru], such as power generation or distribution, water treatment or distribution, or telecommunications."

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:
 - (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;⁹⁵

259. The Claimants in the present Request for Arbitration accept the Respondent's offer to arbitrate and consent to the jurisdiction of ICSID over their claims.⁹⁶

260. The Treaty provides for the fulfilment of certain procedural requirements prior to the submission of a claim to arbitration. Those requirements are found in separate provisions of the Treaty.

261. Article 10.16 provides in pertinent part:

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). 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.
3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

⁹⁵ *Id.*, Art. 10.17 (C-001).

⁹⁶ See Resolution and Waiver of the Board of Directors of Latam Hydro LLC, August 14, 2019 (C-003); Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 (C-004).

- (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 ...⁹⁷

262. Additionally, Article 10.18 of the Treaty establishes certain conditions and limitations on consent of each Party. It reads:

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

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16.

.....

4. (a) No claim may be submitted to arbitration:
 - (i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or

⁹⁷ Treaty, Art. 10.16.3 (C-001).

(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.

263. The requirements of the Treaty to submit a dispute to arbitration have been fulfilled in this case:

- a. Claimants offered Peru to engage in negotiations or consultations before submitting the present dispute to ICSID arbitration in accordance with Articles 10.15 and 10.16 of the Treaty. Despite the Claimants' efforts to resolve this dispute with Peru amicably, no settlement was reached.
- b. Claimants provided Peru with written notice of their intention to submit the present dispute to arbitration on May 28, 2019, more than 90 days before submitting its claims to ICSID arbitration (the "Notice of Intent"). In the Notice of Intent, Claimants: (i) stated the name, addresses and place of incorporation; (ii) identified the provisions of the Treaty alleged to have been breached and any other relevant provisions; (iii) summarized Peru's breaches for each claim, and (iv) stated the approximate value of their losses resulting from Peru's breaches.
- c. At the time of filing of this Request for Arbitration, six months have elapsed since the events giving rise to the claims.

- d. At the time of the filing of this Request for Arbitration, less than three years have elapsed since Claimants first acquired, or should have first acquired, knowledge of Peru's breaches of the Treaty and knowledge that the Claimants incurred loss or damage, as Claimants first acquired that knowledge on the date of the measures complained of in this Request.
- e. Latam Hydro on its own behalf, and on behalf of CHM expressly consents in writing to arbitration in accordance with the procedures set out in the Treaty.
- f. Claimants have expressly waived any right to initiate or continue before any administrative tribunal or court under the laws of any Party to the Treaty, or other dispute settlement proceedings, any proceeding with respect to any measure alleged to constitute a breach of (a) an obligation under Section A of Chapter 10 of the Treaty; (b) an investment authorization, as defined in Article 10.28 of the Treaty; or (c) an investment agreement, as defined in Article 10.28 of the Treaty. This waiver shall be interpreted as broadly as necessary to satisfy Claimants' requirement to submit an express waiver under Article 10.28(2)(b) of the Treaty.⁹⁸
- g. Claimants have not submitted this dispute for resolution before Peru's administrative tribunals or courts, or to any other binding dispute settlement procedures.

264. Therefore, Claimants have satisfied all requirements to access ICSID arbitration under the Treaty.

⁹⁸ See Resolution and Waiver of the Board of Directors of Latam Hydro LLC, August 14, 2019 (C-003); Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 (C-004).

2. Claimants Have Fulfilled the Requirements Under the ICSID Convention

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

Arbitration as follows:

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

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

(...)

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

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

267. All these elements are satisfied in the present dispute:

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

- b. The dispute arises directly out of the Claimants' investments in Peru, which are qualifying investments under the Treaty and the ICSID Convention, as described above;
- c. The dispute has arisen between Peru, an ICSID Contracting State,⁹⁹ and Claimants, namely Latam Hydro, a national of an ICSID Contracting State (United States), on its own behalf and on behalf of CHM (a juridical person having the nationality of Peru), as per the Treaty language.
- d. Peru consented to submit this dispute to ICSID arbitration pursuant to Article 10.17 of the Treaty. As stated above, Latam Hydro on its own behalf, and on behalf of CHM expressly consents in writing to arbitration in accordance with the procedures set out in Article 10.18 of the Treaty.

268. Further, Claimants have paid the US \$25,000 lodging fee in advance of filing this Request for Arbitration required under the ICSID Convention.¹⁰⁰

269. Therefore, the Tribunal has jurisdiction to adjudicate the dispute under the Treaty and under the ICSID Convention.

VIII. THE TRIBUNAL HAS JURISDICTION UNDER THE RER CONTRACT

A. CHM Brings Contractual Claims On Its Own Behalf Under Clause 11.3(a) of the RER Contract

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

271. Clause 11.3(a) of the RER Contract provides:

[d]isputes whose amount is greater than Twenty Million Dollars (US \$20,000,000) or its equivalent in national currency, will be resolved by

⁹⁹ The ICSID Convention entered into force for Peru on September 8, 1993, following its signature of the Convention on September 4, 1991 and the deposit of its instrument of ratification on August 9, 1993.

¹⁰⁰ Wire Transfer Confirmation of Lodging Fee, August 28, 2019 (C-022).

legal international arbitration through a procedure processed in accordance with the Rules of Conciliation and Arbitration of [ICSID] established in the Convention on the Settlement of Investment Disputes between States and Nationals of other States, approved in Peru by Legislative Resolution No. 26210, to which regulations the Parties submit unconditionally.¹⁰¹

272. The RER Contract expressly authorizes CHM to bring claims under the ICSID Rules of Arbitration where, as here, the matter in dispute exceeds US \$20 million in value.

273. By executing the RER Contract, both Peru and CHM have consented to ICSID arbitration of these claims.

274. Therefore, the Tribunal has jurisdiction to decide claims under the RER Contract.

**IX. CONSTITUTION OF THE TRIBUNAL, PLACE,
AND LANGUAGE OF THE ARBITRATION**

275. In accordance with Article 10.19 of the Treaty and Clause 11.3(a) of the RER Contract, the Tribunal shall consist of three arbitrators. Both instruments state that each Party shall appoint one arbitrator. However, both instruments have slightly different provisions with respect to the appointment of the chair of the Tribunal. Article 10.19 of the Treaty states that the third arbitrator, who shall be the presiding arbitrator, shall be appointed by agreement of the disputing parties. Clause 11.3(a) of the RER Contract states that the third arbitrator, who shall be the presiding arbitrator, shall be appointed by agreement of the two arbitrators appointed by the Parties. Claimants hereby propose that the third arbitrator, who shall serve as the presiding arbitrator, be appointed by the two arbitrators appointed by the Parties, after consultation with the Parties.

276. In accordance with Article 10.16(2)(6)(a) of the Treaty and Clause 11.3(a) of the RER Contract, Claimants hereby appoint Prof. Dr. Guido S. Tawil, Suipacha 268, Piso 12, C1008AAF Buenos Aires, Argentina, as arbitrator to hear the present dispute.

¹⁰¹ RER Contract, Clause 11.3(a) (C-002).

277. Under Article 62 of the ICSID Convention and Article 11.3(a) of the RER Contract, the place of the arbitration will be Washington DC, in accordance with CHM's choice under the RER Contract.

278. In accordance with ICSID Rule 22(1), Claimants select English as the official language for the arbitration. On the assumption that Peru will select Spanish and the RER Contract provides that an arbitration between CHM and MINEM would be conducted in Spanish, Claimants propose that the arbitration be conducted in both English and Spanish, subject to such procedures as are agreed between the Parties or ordered by the Tribunal.

X. NAMES AND ADDRESSES OF THE PARTIES

279. Latam Hydro is a limited liability company organized under the laws of Delaware with its registered office at 1865 Brickell Avenue, A-1603, Miami, Florida 33129-1645, United States.

280. CHM is a Peruvian entity with its registered office at Juan Dellepiani 354, Urb. Country Club El Golf, San Isidro, Lima 15076, Peru.

281. All correspondence and notices relating to this case should be addressed to:

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gzeballos@bakerlaw.com
mmolina@bakerlaw.com

282. In accordance with Annex 10-C of the Treaty and Clause 12.5 of the RER Contract, Claimants respectfully request ICSID to serve copies of this Request for Arbitration on Peru at the following addresses:

Econ. Pedro Paul Herrera Catalán
Dirección General de Asuntos de Economía Internacional, Competencia y Productividad
Ministerio de Economía y Finanzas
Jirón Lampa No. 277, Piso 5
Lima 1, Perú

Dr. Ricardo Ampuero Llerena
Presidente
Comisión Especial Que Representa a la República del Perú en Controversias Internacionales de Inversión
Jr. Junín No. 319
Cercado de Lima, Lima, Perú

Ing. David G. Miranda Herrera
Director General de Electricidad
Ministerio de Energía y Minas
Av. Las Artes Sur No. 260
San Borja, Lima 41, Perú

XI. REQUEST FOR RELIEF

283. On the basis of the foregoing, without limitation and reserving the Claimants' right to supplement or revise these prayers for relief, including without limitation in the light of further actions that might be taken by Peru, Claimants respectfully request that the Tribunal:

- a. Declare that Peru has breached Articles 10.4, 10.5 and 10.7 of the Treaty;
- b. Declare that Peru has breached 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 bond is no longer required and order Peru to release and return the bond to CHM;
- e. Order Peru to compensate Claimants for its breaches of the Treaty and international law, and the RER Contract, in an amount to be determined at a later stage in these proceedings, plus interest until the date of payment;
- f. Award such other relief as the Tribunal considers appropriate;
- g. If appropriate, order interim measures to protect the status quo and enjoin the parties from aggravating the dispute pending resolution of the ICSID arbitration;
- h. If appropriate, order interim measures to enjoin Peru from pursuing the Lima Arbitration pending resolution of the ICSID arbitration;
- i. If appropriate, order interim measures to enjoin Peru from calling or collecting the performance bond;
- j. If appropriate, order Peru to cease and desist its harassment of CHM and its lawyer, Mr. Roberto Santivañez, by terminating any criminal matter that concerns their involvement in securing environmental permits for the Mamacocha Project.
- k. Order Peru to pay all costs and expenses of this arbitration, including the 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;
- l. Order further relief as counsel may advise or the Tribunal may deem just and appropriate.

XII. WAIVER

284. Latam Hydro “expressly waive[d] any right to initiate or continue before any administrative tribunal or court under the laws of any Party to the [Treaty], or other dispute settlement proceedings, any proceeding with respect to any measure alleged to constitute a breach of (a) an obligation under Section A of Chapter 10 of the [Treaty]; (b) an investment authorization, as defined in Article 10.28 of the [Treaty]; or (c) an investment agreement, as defined in Article 10.28 of the [Treaty]. This waiver shall be interpreted as broadly as necessary to satisfy Claimants’ requirement to submit an express waiver under Article 10.28(2)(b) of the [Treaty].”¹⁰²

285. CHM “expressly waive[d] any right to initiate or continue before any administrative tribunal or tribunal under the laws of any Party of the [Treaty], or other dispute settlement proceedings, any proceeding with respect to any measure alleged to constitute a breach of (a) an obligation under Section A of Chapter 10 of the [Treaty]; (b) an investment authorization, as defined in Article 10.28 of the [Treaty]; or (c) an investment agreement, as defined in Article 10.28 of the [Treaty]. This waiver shall be interpreted as broadly as necessary to satisfy the Claimants' requirement to submit an express waiver under Article 10.18 (2) (b) of the [Treaty].”¹⁰³

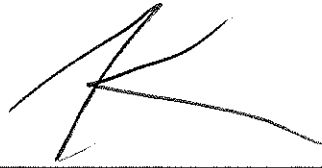
286. Claimants thereby have entered into such waiver as is necessary to comply with Article 10.28(2)(b) of the Treaty.

¹⁰² Resolution and Waiver of the Board of Directors of Latam Hydro LLC, August 14, 2019 (C-003).

¹⁰³ Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 (C-004).

August 30, 2019

Respectfully submitted,



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**Legal Counsel for Claimants Latam Hydro LLC
and CH Mamacocha S.R.L.**

ANNEX A

GLOSSARY

AAA	Autoridad Administrativa del Agua Caplina - Ocoña: Regional governmental water authority with jurisdiction over water-related matters in the Arequipa region, where the Mamacocha Project was located.
ANA	Autoridad Nacional del Agua: Governing body of Peru’s water resource management that is tasked with the oversight of regional governmental water authorities, including AAA.
Arequipa Environmental Prosecutor	Fiscalía Especializada en Materia Ambiental de Arequipa: The office of the Arequipa prosecutor who specializes in enforcing Arequipa’s environmental criminal laws.
ARMA	Autoridad Regional del Medio Ambiente: Regional environmental authority with jurisdiction over environmental matters in the Arequipa region, where the Mamacocha Project was located.
CHM	Claimant CH Mamacocha S.R.L.: Peruvian company, formerly known as Hidroeléctrica Laguna Azul S.R.L., created to oversee the development, construction, and operation of the Mamacocha Project.
DEG	Deutsche Investitions-und Entwicklungsgesellschaft: German Development finance institution that closely vetted, and agreed to finance, the Mamacocha Project before Peru’s interferences made the Project impossible to complete.
GCZ	GCZ Ingenieros S.A.C.: Contracting company based in Peru that closely vetted, and agreed to provide contracting services to, the Mamacocha Project before Peru’s interferences made the Project impossible to complete.
Innergex	Innergex Renewable Energy Inc.: Developer, owner, and operator of run-of-the-river hydroelectric facilities that closely vetted and agreed to invest in the Mamacocha Project before Peru’s interferences made the Project impossible to complete.
Latam Hydro	Claimant Latam Hydro LLC: U.S. limited liability company that at all relevant times owned or controlled, directly or indirectly, CHM and invested millions of dollars in the Mamacocha Project.
MINEM	Ministerio de Energía y Minas del Perú: Entity of the Peruvian government responsible for managing the energy and mining sectors and overseeing the distribution of energy throughout Peru.

OSINERGMIN	Organismo Supervisor de la Inversión en Energía y Minería: Entity of the Peruvian government responsible for regulating Peru’s energy and mining industries, including renewable energy resources projects like the Mamacocha Project.
Peru	Respondent The Republic of Peru: The South American country of Peru and any of its departments, agencies, and instrumentalities, whether local, regional, or central.
RER Contract	Contrato de Concesión para el Suministro de Energía Renovable al Sistema Eléctrico Interconectado Nacional: February 18, 2014 contract between CHM and Peru (acting through MINEM) in which Peru guaranteed to purchase up to 130,000 megawatt hours per year from CHM at the set price of US \$62 per megawatt hours for up to twenty (20) years.
RGA	Gobierno Regional de Arequipa: Regional government responsible for the department of Arequipa, where the Mamacocha Project was located.
SEIN	Sistema Eléctrico Interconectado Nacional: Peru’s electrical grid, consisting of the set of transmission lines and electrical substations connected to each other, as well as their respective load dispatch centers.
Special Commission	Comisión Especial Que Representa a la República del Perú en Controversias Internacionales de Inversión: Agency within Peru’s Ministerio de Economía y Finanzas that is responsible for resolving international investment disputes in which Peru is a party.
Treaty	U.S.-Peru Trade Promotion Agreement: Free trade agreement between the U.S. and Peru, entered into force on February 1, 2009, that, among other things, protects U.S. investors and investments in Peru from inequitable, unfair, discriminatory, arbitrary, bad-faith, or expropriatory measures by Peruvian government authorities.
TUPA	Texto Único de Procedimientos Administrativos: Document that contains all regulations and procedures governing the acts of Peru’s administrative agencies, including the length of time within which an agency can review a permit or concession application.

ANNEX B

CLAIMANTS' EXHIBIT LIST

Exhibit	Description
C-001	United States-Peru Trade Promotion Agreement (“Treaty”), February 1, 2009
C-002	Concession Agreement for the Supply of Renewable Energy to the National Interconnected Electrical System (“RER Contract”), February 18, 2014 [Certified English translation and Spanish original]
C-003	Resolution and Waiver of the Board of Directors of Latam Hydro LLC, August 14, 2019
C-004	Resolution and Waiver of the General Assembly of Shareholders of CH Mamacocha S.R.L., August 16, 2019 [Certified English translation and Spanish original]
C-005	Power of Attorney granted by Latam Hydro LLC to Baker Hostetler LLP, August 16, 2019
C-006	Power of Attorney granted by CH Mamacocha S.R.L. to Baker Hostetler LLP, August 29, 2019 [Certified English translation and Spanish original]
C-007	Legislative Decree No. 1002, May 1, 2008 [Certified English translation and Spanish original]
C-008	Addendum 1 to the RER Contract, July 22, 2015 [Certified English translation and Spanish original]
C-009	Addendum 2 to the RER Contract, January 3, 2017 [Certified English translation and Spanish original]
C-010	Regional Executive Resolution No. 665-2017-GRA/GR, December 27, 2017 [Certified English translation and Spanish original]
C-011	Newspaper Correo Arequipa, Interview of Yamila Osorio Delgado, Governor of Arequipa, December 30, 2017 [Partial Certified English translation and complete Spanish original]
C-012	Ministry of Energy and Mines’ Report No. 166-2016-EM-DGE to Carla Sosa, Director General of Electricity, October 6, 2016 (“Sosa Report”) [Certified English translation and Spanish original]
C-013	Hatch, Independent Engineering Review of the Mamacocha Project, No. H352051, April 26, 2017
C-014	Addendum 3 to the RER Contract, September 8, 2017 [Certified English translation and Spanish original]
C-015	Addendum 4 to the RER Contract, January 17, 2018 [Certified English translation and Spanish original]
C-016	Addendum 5 to the RER Contract, March 26, 2018 [Certified English translation and Spanish original]
C-017	Addendum 6 to the RER Contract, July 23, 2018 [Certified English translation and Spanish original]
C-018	Statement of Motives from the Ministry of Energy and Mines, November 11, 2018

	[Certified English translation and Spanish original]
C-019	Latam Hydro LLC, Certificate of Formation, May 5, 2014
C-020	Registration of Hidroeléctrica Laguna Azul S.R.L.'s name change to CH Mamacocha S.R.L.), February 22, 2017 [Certified English translation and Spanish original]
C-021	Registration of Hidroeléctrica Laguna Azul S.R.L.'s (today CH Mamacocha S.R.L.) Articles of Incorporation, November 23, 2012
C-022	Wire Transfer Confirmation of Lodging Fee, August 28, 2019