

UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AND THE TRADE PROMOTION AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF PERU

CASE NUMBER: ARB-21/[PENDING]

KALOTI METALS & LOGISTICS, LLC

CLAIMANT,

v.

THE REPUBLIC OF PERU

RESPONDENT.

REQUEST FOR ARBITRATION
APRIL 30, 2021

Claimant's counsel
Hernando Díaz-Candia



Mikel A. Del Valle
WDA Legal
848 Brickell Ave, Suite 1000
Miami, Florida 33131
United States of America
Telephone: (+1) 305-988-8002

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I. INTRODUCTION

1. Kaloti Metals & Logistics, LLC, (“**Kaloti Metals**” or “**Claimant**”) submits this Request for Arbitration (“**Request**”) to the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**”) in accordance with Article 36 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “**ICSID Convention**”) and the Rules of the International Centre for Settlement of Investment Disputes (the “**ICSID Rules**”).

2. The Request concerns a legal dispute between Kaloti Metals and the Republic of Peru (“**Peru**” or “**Respondent**”) under Article 10.16 of the United States–Peru Trade Promotion Agreement (“**TPA**” or “**Treaty**”),¹ with respect to Kaloti Metals’ investments in Peru’s gold industry.

3. Kaloti Metals is a gold and precious metals company that provided both US-based and Latin America-based customers with complete precious metals solutions, including trading, analyzing, and assaying.

4. Kaloti Metals is a limited liability company incorporated in 2010 in the state of Florida, of the United States of America (“**United States**”), and had, at all times relevant, substantial business activities (including a physical presence) in the territory of the United States.² Kaloti Metals is still in good standing under the laws of Florida and the United States but has ceased all business operations. Its founder and only manager is a national (natural person) of the United States.³

5. The dispute arose from public measures, omissions, and official orders taken by Peruvian authorities, within the country’s territory, against Kaloti Metals’ properties and assets

¹ TPA, Preamble (C-1).

² Kaloti Metals’ Art. of Inc. (C-2).

³ [REDACTED]’s US Passport (C-3).

(i.e., investments) protected under the TPA. The measures taken by Peru include, without limitation, seizures of goods, regulatory harassment, discriminatory measures, undue administrative procedures, violations of due process rights, and a failure to negotiate in good faith. Peru's actions kept Kaloti Metals from its property through a progressive and indirect expropriation, and denied them fair and equitable treatment, which consequently deprived Kaloti Metals of basic procedural and substantive rights. Peru's actions consummated into violations of the TPA on November 30, 2018, which is the date Kaloti Metals' investments lost all business value as a result of Peru's illegal conduct.

6. Peru's actions include, without limitation, the illegal creeping and progressive expropriation of Kaloti Metals' gold ingots, currently worth more than USD \$27,000,000.00.

II. THE PARTIES

A. Claimant: Kaloti Metals

7. Kaloti Metals is a limited liability company constituted under the laws of the United States and the state of Florida, with its principal place of business located at [REDACTED] [REDACTED].⁴

8. Kaloti Metals had, at all times relevant, substantial business activities in the territory of the United States, including a physical presence, and its only manager (since inception) and founder is Mr. [REDACTED], a United States citizen.⁵

9. Kaloti Metals' counsel and representatives, to whom all correspondence should be sent to in this arbitration, are:

Hernando Díaz-Candia
[REDACTED]
[REDACTED]
Mikel Del Valle
WDA Legal
848 Brickell Ave, suite 1000

⁴ Kaloti Metals' Art. of Inc. (C-2).

⁵ Mr. [REDACTED]'s US Passport (C-3).

Miami, Florida 33131
United States of America
Telephone: (+1) 305-988-8002 / (+1) 786-395-9084
Email: Hernando.diaz@wdalegal.com, [REDACTED]
[REDACTED] Mikel.delvalle@wdalegal.com, and
[REDACTED]⁶

B. Respondent: Peru

10. The Respondent is the Republic of Peru, which is a sovereign state. Peru is a signatory party and member to both the ICSID Convention and the TPA.⁷

11. In the event that the ICSID Secretariat has to notify the Respondent regarding this Request, the ICSID Secretariat is hereby requested to notify the authorities of Peru at the following addresses, as provided by the TPA:

Dirección General de Asuntos de Economía Internacional, Competencia e
Inversión Privada Ministerio de Economía y Finanzas
Jirón Lampa 277, piso 5; Lima, Perú

With a copy to:

Presidente(a) de la Comisión Especial que representa al Estado en
Controversias Internacionales de Inversión
Jr. Junín 319; Lima, Perú | Tel.: (+51) 3115930 (2442) | www.mef.gob.pe

III. CLAIMANT'S INVESTMENTS IN PERU

12. In 2011, Kaloti Metals began investing in Peru because it was attracted by a rich supply of precious metals and by what then appeared to be a favorable investment environment. Its goal was to provide precious metals and related services to customers in the United States and Latin America. Its business included importing and exporting gold to and from the United States and Latin America, as well as providing customers with assaying, or purity-testing services, to ensure that customers' products met certain quality standards.

⁶ Kaloti Metals' Power of Att'y (C-4).

⁷ Signatories to the ICSID Convention (C-5); Peruvian Legal Gazettes (C-19).

13. Kaloti Metals established substantial operations in Peru. It hired local employees to manage and monitor the purchase, storage, transportation, assay, and the sale of gold. Kaloti Metals also invested in contracting with [REDACTED] (“[REDACTED]”), a Peruvian company, to rent offices and vault space, to provide transportation for its precious metals, and to use [REDACTED] facilities for the assay and storage of the metals.⁸ Moreover, Kaloti Metals had an Anti-Money Laundering Program and Compliance Program established and operating since it began conducting business in Peru.

14. Kaloti Metals conducted its business in part through established and continuous relationships with reputable Peruvian precious metals suppliers. These suppliers included, among others, [REDACTED], (“[REDACTED]”), [REDACTED], (“[REDACTED]”), [REDACTED], (“[REDACTED]”), and [REDACTED], (“[REDACTED]”).⁹ [REDACTED], [REDACTED], and [REDACTED] were all duly registered with the Registry of the Ministry of Mining and Energy (*Registro Especial de Comercializadores y Procesadores de Oro*) and were in good standing at the time of Kaloti Metals’ purchases.¹⁰ Kaloti Metals executed a series of purchase and sale agreements with [REDACTED], [REDACTED], [REDACTED], and [REDACTED], pursuant to which they delivered the metals to Kaloti Metals’ facilities. After receiving the metals, Kaloti Metals’ employees would then test the weight and purity of the metals, and export the precious metals to the United States to be sold to refineries.

15. Kaloti Metals financed these operations initially through lender financing of approximately USD \$12 million and startup capital of USD \$800,000.00, provided by Kaloti Metals’ members, to include Mr. [REDACTED].

⁸ [REDACTED] & Kaloti Metals Contract (C-11).

⁹ See generally [REDACTED] document package (C-6); [REDACTED] document package; (C-7); [REDACTED] document package (C-8); [REDACTED] document package (C-9).

¹⁰ RECPO (C-10).

16. As Kaloti Metals' investment in Peru began bearing fruit, Kaloti Metals in turn injected large sums of money into the Peruvian economy. From the time it entered the Peruvian market, and until Peru's breaches of the TPA became actionable, Kaloti Metals successfully operated and conducted a substantial volume of transactions in Peru (until at least July of 2018) involving the purchase and sale of gold from its suppliers.

17. In 2012, only a year after Kaloti Metals initiated operations in Peru, it generated over USD \$10 million in sales after purchasing 255.98 kilograms of gold in Peru. The following year, Kaloti Metals significantly expanded its activity in Peru by engaging in over 500 transactions, buying 14,010.8 kilograms of gold from over twenty suppliers, and increasing sales to USD \$563 million.

18. In 2013 Kaloti Metals purchased roughly nine percent of the Peru's total annual production of gold, which made Kaloti Metals a key leader in Peru's gold industry.¹¹ This is especially notable considering that Peru is the number one producer of gold in Latin America.¹²

19. Notably, none of these over 500 transactions were ever questioned or challenged by Peruvian authorities. The only plausible explanation for Peru's actions is that it did not want a company from the United States (*i.e.*, foreign), such as Kaloti Metals, becoming a key or dominant player in its gold industry.

¹¹ See CEIC, *Peru Gold Production, 1990-2021 Data*, available at: <https://www.ceicdata.com/en/indicator/peru/gold-production> (Kaloti Metals produced 14,010 kg of gold in 2013 when the total amount of gold produced in Peru that year was 156,264 kg, and 14,010 kg divided by 156,264 kg equals roughly 9%).

¹² *Perú Sigue Siendo Mayor Productor de Oro en América Latina*, Banca y Negocios, May 8, 2019, available at: <https://www.bancaynegocios.com/peru-sigue-siendo-mayor-productor-de-oro-en-america-latina/>.

IV. STATEMENT OF FACTS REGARDING PERU'S VIOLATIONS OF THE TPA

20. On November 30, 2018, Peru's actions consummated into actionable violations of the TPA, and Kaloti Metals suffered an irreversible loss of its investment and value, which shut down Kaloti Metals' business operations permanently after it was already forced to leave Peru in September 2018.

21. Kaloti Metals' success in the Peruvian gold industry made it an unprovoked target for the Peruvian authorities. As will be described in detail below, Peru initiated actions aimed at temporarily immobilizing and seizing Kaloti Metals' gold, which had been lawfully purchased from its Peruvian suppliers—purchases it made hundreds of times before without incident.

22. Peru also enacted a defamatory and retaliatory campaign to falsely allege that Kaloti Metals was engaged in corrupt practices when it was in fact the Peruvian authorities themselves who were engaged in corrupt practices. Peru has enacted its strategy of seizure and allegations of corruptions against other foreign gold companies operating in Peru as well.

23. Beginning in 2014, despite Kaloti Metals attempts to mitigate the harm caused by Peru's actions, Kaloti Metals' sales started to take a downward spiral until the damage became irreversible. Finally, on November 30, 2018, devastated by Peru's actions, Kaloti Metals was forced to shutter its global operations (having terminated operations in Peru in September of 2018). Therefore, November 30, 2018 is the relevant date when the Peru's breaches of the TPA caused permanent damage and became actionable under Article 10.16 of the TPA.¹³

¹³ TPA, Art. 10.16 (C-1).

A. Peru's Interim Immobilizations and Seizures of Kaloti Metals' Gold

24. Peru's breaches of the TPA became actionable in October and November of 2018 when Peru's denial of justice was consummated, and Kaloti Metals was forced to shut down its business operations. However, it is important to analyze the factual background of Peru's actions that constituted a progressive and creeping expropriation of Kaloti Metals' investment. Separately, these prior actions did not constitute treaty breaches in and of themselves, but they must be taken into account in this case for other relevant purposes, as is normally the case with progressive and creeping expropriations.

25. In November 2013, Peru began a series of interim or temporary immobilizations and seizures that later served to irreversibly cripple Kaloti Metals' operations in November of 2018. Such initial immobilizations, which at the time were not permanent, were conducted under the pretext of verifying the legal origin of the gold acquired by Kaloti Metals. However, even though Kaloti Metals and its suppliers, [REDACTED], [REDACTED], [REDACTED], and [REDACTED] verified the legal origin of the gold with extensive documentation, the gold was never returned.

26. Instead, Peru initiated sham criminal proceedings against Kaloti Metals' suppliers alleging that the gold was purchased from illegal sources to facilitate money laundering. Kaloti Metals, however, was not made a party to said proceedings, much less a defendant, even though it legally owned the gold that was the object of the proceedings. Peru used these proceedings against third parties, and later a civil suit, to prolong its seizure of gold that belonged to Kaloti Metals. Peru then rejected Kaloti Metals' petitions for the return of the gold because Kaloti Metals was not a party to the criminal proceedings in which its gold was seized. Thus, in a Kafkaesque denial of due process consummated after October 11, 2018, Peru treated Kaloti Metals as a non-party when it served to block the company from the courthouse but treated it as a party when the time came to impose criminal sanctions.

27. Not a single authority anywhere in the world has found that Kaloti Metals engaged in corruption, or was connected to corruption, in Peru. The rampant corruption by Peruvian authorities, on the other hand, is a notorious fact.

28. The following chart details Kaloti Metals' purchases that have been immobilized and/or seized by Peru and the facts surrounding those immobilizations and/or seizures are discussed in detail below.

Purchase No.	Seller	Status	Gross Weight Declared (Grams)	*Current Value
Purchase No.1	██████████	Seized	111,545.37	\$ 6,435,052
Purchase No.2	██████████	Seized	98,591.20	\$ 5,687,726
Purchase No.3	██████████	Seized	38,600.90	\$ 2,226,886
Purchase No.4	██████████	Seized	126,775.30	\$ 7,313,667
Purchase No.5	██████████	Immobilized	99,843.22	\$ 5,759,955
Total			475,355.99	\$27,423,287

* Current value is derived based on the market spot rate of \$57.69 per gram of gold

(i) Purchase No. 1 - Immobilization and Seizure of Gold Purchased by Kaloti Metals from ██████████

29. Peru's actions and seizures began with its temporary immobilization of gold purchased from ██████████, a reputable supplier with whom Kaloti Metals had previously conducted hundreds of transactions without incident. Those actions caused legal and economic effects that became permanent on November 30, 2018.

30. On or about November 27, 2013, Kaloti Metals purchased 111,545.37 grams (gross weight) of gold from ██████████,¹⁴ a company which at the time was duly registered

¹⁴ ██████████ document package, pp. 59-63 (C-6).

with the Registry of the Ministry of Mining and Energy in Peru.¹⁵ Before delivery, Kaloti Metals verified that [REDACTED]'s business information was up-to-date and accurate, and confirmed, upon delivery, that the gold was legally sourced, and provided all documentation required under Peruvian law. For example, Kaloti Metals obtained and delivered: (i) bills of lading (*guías de remisión*) describing the items shipped as well as their origin and destination; (ii) Declaration of the Origin of Material (*Declaración jurada de procedencia de mineral aurífero*), confirming the lawful origin of the gold; (iii) "Anexo N° 5," a declaration in which the exporter confirms company information; and (iv) a certificate of assay from a certified laboratory in Peru attesting to the purity of the gold to be sold (collectively, the "**Supporting Documentation**").¹⁶

31. Upon confirming the documentation and legal origin of the gold, Kaloti Metals paid for the gold and had it transported to its [REDACTED] facility.

32. On November 27, 2013, Kaloti Metals scheduled its newly purchased 111,545.37 grams of gold for export to Miami, Florida, in the United States. In preparation for exporting the gold, Kaloti Metals again provided the necessary Supporting Documentation to the Peruvian authorities.¹⁷ However, despite presenting the required documentation and complying with all Peruvian regulations, the customs branch of the Superintendencia Nacional de Aduanas y de Administración Tributaria ("**SUNAT**") temporarily immobilized the shipment. Notably, of the over 500 transactions performed by Kaloti Metals, this was the first shipment to be temporarily immobilized.

33. In the temporary immobilization documents (*Acta de Inmovilización* #316-0300-2013-001479 & #316-0300-2013-001497), SUNAT claimed that the immobilization was

¹⁵ RECPO (C-10).

¹⁶ [REDACTED]'s Supporting Documentation, pp. 36-42 (*guías de remisión*); pp. 34-35 (*Declaración jurada de procedencia de mineral aurífero*); pp. 49 (Anexo N° 5); pp. 47-48 (Certificates of assay) (C-6).

¹⁷ [REDACTED] document package, pp. 62-63 (C-6).

necessary to investigate and obtain clarification of the local transport document, or *Guías de Remisión*, and verify the source of gold, *i.e.*, that the gold was sourced through legal means.¹⁸ Specifically, the *Actas* stated that the immobilization was necessary “to substantiate the origin of the gold from its source.”¹⁹ Later in November of 2018, it became clear that the requests for information were merely a pretext for arbitrarily taking Kaloti Metals’ gold.

34. On December 2 and 5 of 2013, following the immobilization, SUNAT continued to request the same information from [REDACTED]. Even though the information requested had already been provided to SUNAT at the time of export, [REDACTED] timely complied with each request.²⁰

35. The temporary immobilization, however, continued even though all of the information relating to the gold’s legal origin was presented to SUNAT both at the time of exportation and pursuant to SUNAT’s subsequent, repeated requests. Notably, as of April 2021, no formal notice or determination has ever been made that [REDACTED] supplied Kaloti Metals with gold produced from illegal mining sources. [REDACTED] has been in operation for over 18 years²¹ and, apart from this incident, has not experienced a problem of this kind.

36. Peru’s actions, however, did not stop with the temporary immobilization. While the initial immobilization of the gold was lifted without prejudice on February 26, 2014, the gold was later seized again (on a temporary or preventative basis) pursuant to judicial orders issued by local courts. These actions were taken in furtherance of a criminal investigation into

¹⁸ [REDACTED] document package, p. 2 (*Acta de Inmovilización* #316-0300-2013-001479); p. 3 (*Acta de Inmovilización* #316-0300-2013-001479) (C-6).

¹⁹ *Id.* (C-6).

²⁰ *See Id.* at pp. 5-11 (SUNAT’s request on Dec. 2, 2013 and [REDACTED]’s answer on Dec. 4, 2013); pp. 12-15 ([REDACTED]’s Dec. 2, 2013 communications addressing immobilizations and providing supporting documentation) (C-6).

²¹ *See* [REDACTED], Universidad de Peru, available at: [https://www.universidadperu.com/empresas/\[REDACTED\].php](https://www.universidadperu.com/empresas/[REDACTED].php) ([REDACTED] started operations on Dec. 9, 1993).

alleged money laundering by Kaloti Metals' suppliers, initiated at SUNAT's request. The criminal investigation came as a surprise to Kaloti Metals.

37. SUNAT's orchestration of a new temporary seizure on unrelated grounds relating to a third party just as the original immobilization orders were being lifted highlights the arbitrary nature of the Peru's efforts to seize and retain the gold by any means possible. The seized gold purchased by Kaloti Metals from [REDACTED] is currently valued at USD \$6,435,052.39. As of the date of this Request, the gold remains under judicial seizure. At such time in 2014, however, no permanent or irreversible damage had been caused to Claimant.

(ii) Purchase Nos. 2-4 - Immobilization and Seizure of Gold Purchased by Kaloti Metals from [REDACTED], [REDACTED], and [REDACTED]

38. Peru's pattern of arbitrary immobilizations and temporary seizures continued in early 2014, even though, at the time, no permanent damage had been caused to Kaloti Metals. Pursuant to contracts with Kaloti Metals, between January 7 and 8 of 2014, [REDACTED], [REDACTED], and [REDACTED], delivered gold shipments weighing approximately 98,592.00 grams,²² 38,600.90 grams,²³ and 126,775.30 grams,²⁴ respectively, to Kaloti Metals at its [REDACTED] facility. All three of these suppliers were, at all times relevant, duly registered with the Registry of the Ministry of Mining and Energy.²⁵ Just as with prior shipments, before delivery, Kaloti Metals verified that the suppliers' business information was up-to-date and accurate; and confirmed, upon delivery, that all requirements relating to the source of the gold were met and all Supporting Documentation was provided.²⁶

²² [REDACTED] document package, pp. 24-27 (C-7).

²³ [REDACTED] document package, p. 18 (C-9).

²⁴ [REDACTED] document package, pp. 36-54 (C-8).

²⁵ RECPO (C-10).

²⁶ See [REDACTED] document package, pp. 24-27 (C-7); [REDACTED] document package, p. 18 (C-9); [REDACTED] document package, pp. 36-54 (C-8).

39. Between January 7 and 9 of 2014, Kaloti Metals paid [REDACTED] and [REDACTED] for the gold by wire transfers to their banks in Peru. And in light of SUNAT's prior immobilization and seizure of Kaloti Metals' gold, [REDACTED] agreed to give Kaloti Metals possession and title of the gold, but not pay for it until it reached the United States. In return, Kaloti Metals credited the gold to [REDACTED]'s account.

40. On January 8, 2014, after providing the required documentation to export the gold purchased from [REDACTED],²⁷ [REDACTED],²⁸ and [REDACTED],²⁹ the customs division of SUNAT temporarily immobilized the shipments. Similar to the prior temporary immobilization, SUNAT claimed that the immobilizations were to verify the source of the minerals, even though Kaloti Metals and the suppliers had presented SUNAT with documentation that demonstrated the lawful origin of the gold.

41. Notwithstanding that it had already provided all the information regarding the gold's origin, SUNAT proceeded to request the information a second time. Kaloti Metals, [REDACTED], [REDACTED], and [REDACTED] complied with SUNAT's requests, and by the end of February 2014, SUNAT had timely received all the requested documentation. In fact, with respect to the gold purchased from [REDACTED] and [REDACTED], SUNAT issued documents acknowledging that all documentation had been received. Nonetheless, SUNAT refused to release the gold to Kaloti Metals.

42. The reason for SUNAT's delay in lifting the temporary immobilization orders, even after they received the requested documentation, was so that other interim seizure orders could be issued by the local criminal courts. On March 11, 2014, March 27, 2014, and May 6,

²⁷ [REDACTED] document package, pp. 2-3 (*SUNAT's Acta de Inmobilizacion & Acta de Inspeccion*); pp. 10-13 (*SUNAT's request for information*); pp. 14-51 ([REDACTED] providing required information) (C-7).

²⁸ [REDACTED] document package, pp. 2-3; 6-7; 10-11 (*SUNAT's Actas de Inmobilizacion*); pp. 15-31 (*SUNAT's Actas de Inspeccion*), pp. 36-61 ([REDACTED] providing supporting information) (C-8).

²⁹ [REDACTED] document package, pp. 9-10 (*SUNAT's request for information*); pp. 2-4; 15-26 ([REDACTED] providing required information) (C-9).

2014, local prosecutors obtained preventative and temporary judicial seizures of the gold purchased from [REDACTED], [REDACTED], and [REDACTED], premised, again, upon criminal investigations into alleged money laundering by third parties, without notice to Kaloti Metals.

43. These three seized purchases from [REDACTED], [REDACTED], and [REDACTED] are valued at USD \$5,687,726.32, USD \$2,226,885.92, and USD \$7,313,667.05, respectively for a total of USD \$15,228,279.29. As a result of the temporary seizures, Kaloti Metals has been unable to export and sell the gold it lawfully purchased and owned.

(iii) Purchase No. 5 - Seizure, Attachment, and Continuing Immobilization of Gold Purchased from [REDACTED]

44. On January 8, 2014, [REDACTED] agreed to sell 99,843.22 grams of gold to Kaloti Metals for a price of USD \$4,150,000. However, on March 26, 2014, the *Segunda Fiscalía Supraprovincial a cargo de los Delitos de Lavado de Activos y Pérdida de Dominio* issued a temporary seizure order for the gold as part of a criminal investigation into the suspected conduct of parties, that did not include Kaloti Metals, despite Kaloti Metals having already proven legal origin of the gold. Regardless of this setback and Peru's repeated pattern of misconduct, Kaloti Metals continued operations.

45. While the March 26, 2014 temporary seizure order was later lifted, on June 18, 2014, the *33° Juzgado Civil de Lima* immobilized the gold (on an interim basis through a *medida cautelar*) based on breach-of-contract claims brought by [REDACTED]. On December 11, 2015, the same court ruled on [REDACTED]'s claims and ordered the attachment of the gold (albeit not on a permanent basis) in favor of [REDACTED], a successor in interest to [REDACTED]. Kaloti Metals then appealed this decision.

46. On October 11, 2018, the *Corte Superior de Justicia de Lima* overturned the lower court's decision, finding that the lower court had denied Kaloti Metals its due process rights and an opportunity to present a defense against [REDACTED]'s claims, and that the court had

failed to provide a reasoned decision.³⁰ To this day, however, Kaloti Metals remains without access to this gold.

47. The immobilized gold purchased by Kaloti Metals from [REDACTED] is currently valued at USD \$5,759,955.36.

(iv) Peruvian Courts Refuse Petitions to Return the Gold

48. Between 2015 and 2016, following the issuance of the interim seizure orders, Kaloti Metals submitted three petitions to the courts presiding over the criminal proceedings pertaining to the seizures, including the *Sexto Juzgado Penal del Callao*, the *Octavo Juzgado Penal del Callao*, and the *Juzgado Penal Transitorio del Callao*.³¹

49. The petitions requested Peruvian courts to order the return of the gold that Kaloti Metals had legally purchased.³² Each of the requests were rejected by the Peruvian courts. The ruling of the *Cuarta Sala Penal Reos Libre*, dated February 3, 2016, is representative of the arbitrary nature of these rejections, which merely stated that “not being a party to this proceeding, the petition is deemed to have not been filed.”³³

50. After the October 11, 2018 judicial decision from the *Corte Superior de Justicia de Lima*, the Peruvian authorities and courts denied justice to Kaloti Metals by depriving it of a meaningful opportunity to defend itself and by leaving Kaloti Metals without a means of vindicating its rights.³⁴ As of the date of this Request, Peru continues to hold Kaloti Metals’ gold while denying it the opportunity to participate in the proceedings where its legal property rights are being determined. Peru’s individual actions against Kaloti Metals finally culminated into an actionable breach of the TPA on November 30, 2018, as discussed below.

³⁰ Decision from the *Corte Superior de Justicia de Lima* (C-17).

³¹ See Petition before the *Sexto Juzgado Penal del Callao* (C-13); Petition before the *Octavo Juzgado Penal del Callao* (C-14); Petition before the *Juzgado Penal Transitorio del Callao* (C-15).

³² *Id.*

³³ Decision from the *Cuarta Sala Penal Reos Libre* (C-16).

³⁴ Decision from the *Corte Superior de Justicia de Lima* (C-17).

B. Consequences of Peru's Actions

51. To date, Kaloti Metals is the rightful owner of 475,355.99 grams of gold being illegally held by Peru worth USD \$27,423,287. Kaloti Metals purchased the gold by using funds from external sources, pursuant to which Kaloti Metals is required to pay interest at rate of ten percent per annum. Notably, due to Peru's actions, Kaloti Metals was unable to sell its gold to a refinery and has been forced to incur millions of dollars in interest in relation to its external funding sources.

52. Kaloti Metals has also suffered, and continues to suffer, significant reputational harm as a direct result of Peru's illegal actions. Notably, the immobilizations, seizures, and allegations of illegal trading and money laundering have been publicized in newspapers and other media sources both in Peru and around the world. For example, one Swiss news outlet reported that "while Swiss refineries, including Metalor and MKS/PAMP, appear to have stopped buying gold from dubious traders following local press reports exposing the metal's provenance, other refiners, particularly in the United States (such as Atomic Gold, NTR Metals and **Kaloti Metals**), have stepped in to buy from the questionable Peruvian exporters."³⁵ The cloud of Peru's false allegations continues to follow Kaloti Metals and anyone who worked for them, ensuring Kaloti Metals' inability to operate in Peru.

53. Kaloti Metals attempted to mitigate the adverse impact of Peru's actions through extreme diligence, willpower, and business acumen. However, as a direct result of the reputational and economic damage that Peru inflicted on Kaloti Metals, the company's customer and supplier base dwindled, resulting in a lethal decrease in revenue. On November 30, 2018, devastated by the government's actions and omissions, Kaloti Metals was forced to shut down its business operations.

³⁵ Paula Dupraz-Dobias, *Criticism Mounts Over 'Dirty Gold' Imports*, Swissinfo, March 27, 2014, https://www.swissinfo.ch/eng/precious-metal_criticism-mounts-over--dirty-gold--imports/38257264 (emphasis added).

54. Notably, each of Peru’s individual or isolated actions against Kaloti Metals by themselves did not constitute a breach of the TPA; it was not until November 30, 2018, when the combined effect of Peru’s actions destroyed Kaloti Metals’ investment that Kaloti Metals’ claims against Peru under the TPA became actionable.

55. However, the omissions by Peruvian courts and authorities after the October 11, 2018, decision from the *Corte Superior de Justicia de Lima*,³⁶ in and of themselves, constituted unfair treatment, a denial of justice, and consequently a breach of Article 10.5(1) of the TPA.³⁷

V. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

56. The ground for jurisdiction under the TPA is strong and straightforward. Jurisdiction is based on Kaloti Metals being incorporated, and having substantial business activities, in the United States, both when the investments were made and when the treaty violations occurred in October and November of 2018. Kaloti Metals’ ability to invoke the substantive and procedural protections offered under the TPA is contingent upon establishing that:

(a) Kaloti Metals is an “enterprise” and an “enterprise of a Party” (*i.e.*, the United States) within the requirements and definitions provided in Article 10.28, and Annex 1.3 of the TPA (jurisdiction *ratione personae*);³⁸

(b) Kaloti Metals’ investments in Peru are considered an “investment” within the definition provided in article 10.28 of the TPA (jurisdiction *ratione materiae*);

(c) The measures complained of happened while the US-Peru TPA was applicable, and Kaloti Metals owned the investments (jurisdiction *ratione temporis*);

³⁶ Decision from the *Corte Superior de Justicia de Lima* (C-17).

³⁷ TPA, Art. 10.5(1) (C-1).

³⁸ TPA, Art. 10.28 & Annex. 1.3 (C-1).

(d) Kaloti Metals has fulfilled the TPA’s requirements to initiate arbitration (within the statute of limitations); and

(e) ICSID has jurisdiction over this dispute under Article 25 of the ICSID Convention.

A. *Ratione Personae*: Kaloti Metals is a Protected Investor Under the TPA

57. Kaloti Metals meets the requirements to be a protected investor under the TPA.

58. Under Article 10.28 of the TPA an “investor of a Party” is “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.”³⁹

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

60. And under Article 1.3 of the TPA an “enterprise” is “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.”⁴⁰

61. Here, Kaloti Metals is an “enterprise” of the United States because:

(a) Kaloti Metals is a limited liability company incorporated under the laws of the state of Florida in the United States;⁴¹

(b) At all times relevant, Kaloti Metals has maintained its principal place of business at [REDACTED], and continues to maintain said address as its principal place of business;

³⁹ *Id.*, Art. 10.28 (C-1).

⁴⁰ TPA, Art. 10.28 (C-1).

⁴¹ Kaloti Metal’s Art. of Inc. (C-3); TPA, Art. 10.28 (C-1).

(c) Kaloti Metals has, at all times relevant, maintained substantial business activities in the United States prior to ceasing operations; and

(d) As discussed in Section II of the Request, Kaloti Metals made investments in Peru, which is a party to the TPA.⁴²

62. Therefore, Kaloti Metals is a United States “enterprise” that has made an investment in Peru and thus qualifies as a protected “Investor”⁴³ under the TPA.⁴⁴

B. *Ratione Materiae*: Kaloti Metals’ Claims Arise Out of its Investments that are Protected by the TPA.

63. This dispute arises out of investments Kaloti Metals made in Peru that are protected under the TPA. Article 10.28 of the TPA defines “investment” as:

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

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

⁴² See discussion *supra* Part II.

⁴³ See TPA Art. 1.3 & Art. 10.28 (C-1).

⁴⁴ Peru cannot deny Kaloti Metals the benefits of the Treaty pursuant to Article 10.12 of the TPA, which sets forth the only and exclusive basis for a denial of benefits. No other legal basis can be imported by Peru into this case for such denial.; See TPA Art. 10.12 (C-1).

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

64. At the relevant time of the measures complained of in this Request (October 11, 2018 and November 30, 2018), Kaloti Metals directly controlled protected investments, including, but not limited to, tangible movable objects such as gold, and its infrastructure for testing and selling gold.

C. *Ratione Temporis*: Peru and Kaloti Metals have Consented to Arbitration Under the TPA and the ICSID Convention.

65. Peru is a Contracting Party to the TPA. Peru signed the TPA on April 12, 2006, approved it on June 28, 2006, and it entered into force on February 1, 2009.⁴⁵ Article 10.17 of the TPA explicitly provides Peru's consent to submit claims under the TPA to arbitration, and states as follows:

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

66. Peru is also a signatory to the ICSID convention, having signed the Convention on September 4, 1991, and the Convention entering into force in Peru on September 8, 1993.⁴⁶

67. Peru's irreversible interference with Kaloti Metals' investments in Peru occurred after October 11, 2018 and its effects were consummated on November 30, 2018, while the TPA was in force, therefore, the Tribunal has Jurisdiction *Ratione Temporis* over this dispute.

⁴⁵ See Statement of U.S. Trade Representative (C-18); Peruvian Legal Gazettes (C-19).

⁴⁶ Signatories to the ICSID Convention (C-5).

68. Kaloti Metals therefore accepts Peru's offer to arbitrate and consents to the Jurisdiction of ICSID over this dispute.

D. Kaloti Metals has Fulfilled the TPA's Requirements to Initiate Arbitration

69. Chapter 10, Section B of the TPA provides the Investor-State Dispute Settlement mechanisms which govern this dispute.⁴⁷

70. Under Article 10.15 of the TPA, claimant and the respondent are required to attempt to resolve any investor-state dispute through consultation and negotiation.⁴⁸

71. Notably, Kaloti Metals, after sending its Notice of Intent on April 8, 2019, tried to engage in good faith negotiations with Peru pursuant to Article 10.15 of the TPA.

72. Peru, however, ultimately acted passive-aggressively and in bad faith by simply ignoring Kaloti Metals, with the hope that it would not have the funds to commence arbitration at ICSID.⁴⁹ Peru must not be rewarded or allowed to avoid investment arbitration claims through its own bad-faith tactics.

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

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

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement; and

⁴⁷ TPA, Chapter 10, Section B (C-1).

⁴⁸ *Id.*, Art. 10.15 (C-1).

⁴⁹ E-mail between Kaloti Metals & Peru regarding negotiations (C-20).

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

74. The dispute described in this Request concerns breaches of the TPA by Peru that caused damage to a protected investor, Kaloti Metals, and its qualifying investments, as required by Article 10.16 of the TPA. The damages suffered by Kaloti Metals are directly related to Peru's progressive and creeping expropriation of Kaloti Metals' gold. Therefore, Kaloti Metals submits this Request under Article 10.16 of the TPA.⁵⁰

(i) Kaloti Metals has Complied With the TPA's Requirements to Submit its Claims to Arbitration After Negotiations with Peru Failed

75. Article 10.16 of the TPA also requires the following before being able to submit a claim to ICSID arbitration after negotiations fail:

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:
 - (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 ...

⁵⁰ TPA, Art. 10.16 (C-1).

76. Additionally, Article 10.18(1) states that a claim may not be submitted to arbitration if more than three years have elapsed from the date on which the claimant “first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.”⁵¹

77. Finally, Article 10.18(2) requires that Kaloti Metals “consents in writing to arbitration in accordance with the procedures set out” in the TPA and that it consents in writing to waive “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”⁵²

78. Kaloti Metals has complied with the TPA’s requirements for submission of its claims to arbitration in the following ways:

(a) On April 8, 2019, Kaloti Metals provided Peru with written notice of its intention to submit the present dispute more than 90 days before submitting its claims to ICSID arbitration.⁵³ The April 8, 2019 notice also: (i) stated the Claimant’s name, addresses and place of incorporation; (ii) identified the provisions of the TPA alleged to have been breached and any other relevant provisions; (iii) summarized Peru’s breaches for each claim; (iv) stated the approximate value of Claimant’s losses that resulted from Peru’s breaches; and (v) notified Peru of its election to submit its claims to arbitration as the only dispute resolution mechanism.⁵⁴

(b) At the time of filing this Request, six months have elapsed since the events giving rise to Kaloti Metals’ claims.

⁵¹ *Id.*, Art. 10.18(2) & 10.16.1(b) (C-1).

⁵² *Id.*, Art. 10.16 (C-1).

⁵³ Kaloti Metals’ April 8, 2019 Notice of Intent (C-22).

⁵⁴ *Id.*

(c) Kaloti Metals' Request also complies with the TPA's prescription period found in Article 10.18 because Kaloti Metals sent Peru a notice on April 8, 2019, and December 1, 2020.⁵⁵ Claimant's April 8, 2019 and December 1, 2020 statements provided sufficient notice to Peru to preserve evidence and be subject to arbitration.⁵⁶ Peru's breaches of the TPA became irreversibly consummated (*i.e.*, ripe for arbitration) and the resulting damages to Claimant became permanent, on November 30, 2018. Moreover, the actions and omissions by Peru constitute stand-alone breaches of the TPA which occurred (*i.e.*, became ripe and actionable under the TPA) within three years from the date hereof, including after the October 11, 2018 decision from the *Corte Superior de Justicia de Lima*.⁵⁷ Kaloti Metals continued trying to mitigate the damage done by Peru by buying Peruvian gold up until July 2018, but was forced to close operations in Peru in September 2018, and globally in November 2018, as a result of Peru's actions and omissions.

(d) Kaloti Metals has consented in writing, at the appropriate time and within the statute of limitations, to arbitration in accordance with the procedures set out in the TPA as required by Article 10.18(2)(a).⁵⁸

(e) Kaloti Metals waives any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach of the TPA as described herein, as required by Article 10.18(2)(b)(ii).⁵⁹ These waivers shall be interpreted as broadly as necessary to satisfy Kaloti Metals' requirements to submit any express waiver required by Article 10.28(2)(b) of the TPA.⁶⁰

⁵⁵ TPA, Art. 10.18 (C-1).

⁵⁶ Kaloti Metals' April 8, 2019 Notice of Intent (C-22); E-mail between Kaloti Metals & Peru regarding negotiations (C-20).

⁵⁷ Decision from the *Corte Superior de Justicia de Lima* (C-17).

⁵⁸ *Id.*, Art. 10.18(2)(a) (C-1).

⁵⁹ *Id.*, Art. 10.18(2)(b)(ii) (C-1).

⁶⁰ Kaloti Metals' Consent and Waiver Form (C-24); TPA, Art. 10.28(2)(b) (C-1).

(f) Kaloti Metals also is not currently pursuing resolution of this dispute before Peru's administrative tribunals or courts or any other binding dispute settlement procedures.⁶¹

79. Therefore, Kaloti Metals, having satisfied all the requirements to submit a claim to arbitration under the TPA, hereby submits this dispute to arbitration under Article 10.16(1)(a)(i)(A) of the TPA based on Peru's breaches of Section A of the Treaty.⁶²

E. ICSID has Jurisdiction Over this Dispute

80. Under Article 25 of the ICSID Convention, an investor-state dispute may be submitted to ICSID jurisdiction when the following five elements are met: (a) the dispute in question is a legal dispute, (b) the dispute arises directly out of an investment, (c) the State party is a Contracting State to the ICSID Convention, and (d) the other party is a national or company of another.⁶³

81. Kaloti Metals has satisfied all of these elements as follows:

(a) Kaloti Metals has a legal dispute with Peru regarding its breaches of the TPA as described in this Request.

(b) The dispute arises directly out of Kaloti Metals' investments in Peru, which are qualifying investments under the TPA and the ICSID Convention.⁶⁴

(c) Peru is a Contracting State of the ICSID Convention.⁶⁵

(d) Kaloti Metals is an enterprise incorporated under the laws of the United States, which is also a Contracting State of the ICSID Convention.⁶⁶

⁶¹ Kaloti Metals' Consent and Waiver Form (C-24).

⁶² TPA, Art. 10.16(1)(a)(i)(A) (C-1).

⁶³ ICSID Convention, Art. 25.

⁶⁴ See discussion *supra* Part V, Section D.

⁶⁵ Signatories to the ICSID Convention (C-5).

⁶⁶ Kaloti Metals' Arts. of Incorp. (C-2).

(e) Peru has consented to submitting this dispute to ICSID under Article 10.17 of the TPA and Kaloti Metals has expressly consented to arbitration in accordance with Article 10.18 of the TPA.⁶⁷

82. Moreover, Kaloti Metals has paid the USD \$25,000 lodging fee in advance of submitting this Request as required under the ICSID Convention.⁶⁸

83. Therefore, the Tribunal has jurisdiction to adjudicate the dispute described in this Request under both the TPA and the ICSID Convention.

VI. PERU'S BREACHES OF THE TPA

84. The omissions and actions taken by the Peruvian government against Kaloti Metals progressively constituted expropriation, and discriminatory and arbitrary conduct that on November 30, 2018 permanently deprived Kaloti Metals of its investments in violation of Articles 10.3, 10.5, 10.7, and 10.15 of the TPA.⁶⁹ Moreover, Peru has not offered, much less provided, Kaloti Metals with any compensation for said conduct and expropriation. The expropriation was hence illegal.

A. Peru's Progressive and Creeping Expropriation of Kaloti Metals' Investment

85. The economic effects of Peru's temporary immobilizations of Kaloti Metals' gold became permanent and irreversible on November 30, 2018, and as of such date amounted to a progressive and creeping expropriation of the gold itself and also an indirect expropriation of Kaloti Metals' entire investment in Peru in violation of Article 10.7 of the TPA.⁷⁰ Peru implemented these expropriations in bad faith.⁷¹

⁶⁷ TPA, Art. 10.17 (C-1); ICSID Convention, Chapter II Art. 25; Kaloti Metals' Consent and Waiver Form (C-23).

⁶⁸ Kaloti Metals' ICSID lodging-fee wire transfer (C-21).

⁶⁹ TPA, Art. 10.3; 10.5; 10.7; 10.15 (C-1).

⁷⁰ *Id.*, Art. 10.7 (C-1).

⁷¹ As early as May 3, 2016, Kaloti Metals warned the central government of Peru, to no avail, that the temporary

86. Article 10.7 of the TPA provides the following protections against expropriation:

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 10.5.

87. Here, the Peruvian government engaged in a creeping and progressive expropriation of Kaloti Metals’ investments and applied measures in bad faith that were equivalent to direct expropriation without adequate compensation, which amounts to an illegal expropriation in violation of Article 10.7 of the TPA.⁷² Peru progressively expropriated the value of Kaloti Metals’ investments in Peru by seizing Kaloti Metals’ gold (currently worth USD \$27,423,287) on an initially temporary basis.

88. The progressive expropriation of the gold and Kaloti Metals being falsely associated with an investigation of money laundering forced Kaloti Metals into financial ruin in Peru and destroyed Kaloti Metals’ value. The seizures also caused Kaloti Metals to amass large amounts of debt in relation to this financing arrangement and ruined the reputations of Kaloti Metals, its owners, and its employees.

89. While the initial seizures and immobilization orders were all originally interim, temporary, or *cautelares* and were challenged by Kaloti Metals in Peruvian courts, the

seizures of gold could eventually become an expropriation in the future. Such expropriation materialized on November 30, 2018, which is the date Kaloti Metals’ claims became actionable under the TPA.

⁷² TPA, Art. 10.7 (C-1).

expropriation progressed, culminated, and became ripe for arbitration on November 30, 2018 when Kaloti Metals was forced to close its operations due to Peru's seizure of the gold.

90. Moreover, Peru's expropriation is coupled with Peru's total inaction after the October 11, 2018 decision from the *Corte Superior de Justicia de Lima* and Kaloti Metals' April 8, 2019, notice of intent.⁷³ Notably, the assessment of the damage done to Kaloti Metals' investments must erase all the economic effects of Peru's measures and actions even if some were taken prior to such dates.

91. Therefore, Peru, through SUNAT, progressively expropriated Kaloti Metals' investments without just compensation in violation of Article 10.7 of the US-Peru TPA.

B. Peru Failed to Provide Kaloti Metals with Fair and Equitable Treatment, Protection, Security, and Non-Discriminatory Treatment

(i) Violations of the TPA Consummated on November 30, 2018

92. The Peruvian government, through SUNAT, engaged in bad faith behavior which discriminated against Kaloti Metals with the intention of stripping Kaloti Metals of its investments and assets in violation of the Article 10.5 of the TPA.

93. Article 10.5(1) of the TPA provides the following protections regarding fair and equitable treatment ("FET"): "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."⁷⁴ And Article 10.5(2)(a) further clarifies the FET clause by stating that it "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."⁷⁵

⁷³ Decision from the *Corte Superior de Justicia de Lima* (C-17); Kaloti Metals' April 8, 2019 Notice of Intent (C-22).

⁷⁴ TPA, Art. 10.5(1) (C-1).

⁷⁵ *Id.*, Art. 10.5(2)(a) (C-1).

94. Peru violated the TPA's FET clause by acting arbitrarily and in an unjustifiable manner towards Kaloti Metals. Peru immobilized and seized Kaloti Metals' property based on a constantly shifting set of purported justifications that related solely to alleged deficiencies or illegalities on the part of entities other than Kaloti Metals. The arbitrary nature of Peru's actions is highlighted by the fact that the immobilizations and seizures (which were initially interim or temporary) continued and progressed despite Kaloti Metals and its suppliers' compliance with all of Peru's requests for information. Kaloti Metals' claim for violating the TPA's FET clause also became actionable and ripe for arbitration on November 30, 2018.

95. Relatedly, Peru is also violating Kaloti Metals' fundamental right of due process. Peru has deprived Kaloti Metals of a meaningful opportunity to present its defense and ensure that its legal rights to the seized gold are vindicated. Not only did Peru repeatedly refuse to acknowledge Kaloti Metals' ownership over the gold, it also refused to provide notice to Kaloti Metals regarding the immobilization and seizure proceedings. The Peruvian courts have unjustifiably refused several judicial petitions seeking the return of the gold to its rightful owner—Kaloti Metals (the facts of which are described in more detail in section III of this memorandum). The combined effect of these actions turned into an irreversible breach of the TPA on November 30, 2018.

96. In addition, Peru violated its own law in seizing and immobilizing Kaloti Metals' gold for such an extended period of time. Peru denied Kaloti Metals the reasonable investment-backed expectations to which they are entitled to and has failed to abide by Peruvian laws and constitutional standards. The actions taken by SUNAT and Peruvian prosecutors (at SUNAT's behest) have deprived Kaloti Metals of its property rights guaranteed by the Political Constitution of Peru. In particular, Article 2, section 16 of the Constitution

states that “[e]very person has the right ... to property.”⁷⁶ Chapter III of the Constitution, titled “Property,” further states:

The right of property is inviolable. The State guarantees it. It is exercised in harmony with the common good and within the limits of the law. No one shall be deprived of his property, save, exclusively, on ground of national security or public need determined by law and upon cash payment of the appraised value, which must include compensation for potential damages.⁷⁷

97. It also emphasizes that with regard to property, “aliens, whether they be natural or juridical persons, are in the same conditions as Peruvians.” Peru has violated these constitutional standards by depriving Kaloti Metals of the gold it legally purchased without a valid basis or justification.

98. These actions by SUNAT show that Peru disregarded the principles of procedural propriety and due process and failed to grant Kaloti Metals freedom from coercion or harassment. Therefore, Peru’s arbitrary and continued seizure of Kaloti Metals’ gold amounts to violations of Article 10.5 of the TPA, which became irreversible (as to their economic effects) as of November 30, 2018. However, actions and measures by Peru prior to November 30, 2018 must be taken into account for quantum and valuation purposes.

(ii) Peru’s Inaction After the October 11, 2018 Court Decision

99. The October 11, 2018 court decision issued by the *Corte Superior de Justicia de Lima* in favor of Kaloti Metals demonstrates that, legally, Peru’s seizures and immobilizations of Kaloti Metals’ gold before such date were temporary or interim.⁷⁸ The only logical, legally viable, and reasonable consequence from the October 11, 2018 court decision should have been the return of the gold to Kaloti Metals. Peru, however, simply failed to act, and continued to retain the gold, after such date. This constituted an additional, stand-alone

⁷⁶ Official English translation of the Political Constitution of Peru, Chapter I, Art. 2, Sec. 16, p. 6 (C-24).

⁷⁷ *Id.* at Chapter III, Art. 70, p. 22 (C-24).

⁷⁸ Decision from the *Corte Superior de Justicia de Lima* (C-17).

treaty breach by Peru, which facilitated Kaloti Metals being forced to shut down its operations on November 30, 2018 as a result of Peru's actions.

100. Peru, through the delay of its courts and passive aggressive conduct of its government authorities, acted in bad faith and breached the FET requirement both under the TPA and international law.

101. Kaloti Metals was subject to excessively long proceedings, serious procedural defects (*e.g.* violations of equal treatment of the parties, the right to be heard), and an irrational and abusive outcome going beyond the mere misapplication of Peruvian law. Peru engaged in a willful disregard of due process of law that ultimately caused an outrageously wrong and final effect: the termination of Kaloti Metals' legitimate global operations on November 30, 2018.

102. Peru's failure to act after the October 11, 2018 court decision issued by the *Corte Superior de Justicia de Lima* constituted an intentional delay by Peru that amounts to bad faith and willful neglect of duty, which falls short of international standards.⁷⁹ Moreover, Peru's bad faith conduct continued after Peru blatantly ignored Kaloti Metals' April 8, 2019 notice of intent (notice of dispute).⁸⁰

C. Peru Failed to Provide Kaloti Metals the Same Treatment as Similar Situated Peruvian Nationals or Enterprises

103. Article 10.3 of the TPA controls how Peru must treat foreign investors from the United States compared to similarly situated Peruvian investors, and states as follows:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment,

⁷⁹ Decision from the *Corte Superior de Justicia de Lima* (C-17).

⁸⁰ Kaloti Metals' April 8, 2019 Notice of Intent (C-22).

acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.⁸¹

104. Here, SUNAT has specifically targeted Kaloti Metals' shipments of gold while companies of other nationalities were not being targeted in the same arbitrary fashion. In comparison to the other companies that purchase and export gold in Peru, Kaloti Metals has been unfairly targeted and subjected to a disproportionate number of unwarranted immobilizations and seizures of its gold purchases in violation of Article 10.3 of the TPA. This treaty breach was also consummated, and became actionable, when its economic effects became irreversible on November 30, 2018.

D. Peru Failed to Negotiate in Good Faith

105. Article 10.15 of the TPA establishes an affirmative obligation on Peru to actively negotiate in good faith after it was served with Kaloti Metals' notice of intent (or notice of dispute) on April 8, 2019.⁸² However, Peru made no effort whatsoever to negotiate or even communicate with Kaloti Metals after April 8, 2019. Peru instead chose to simply wait for Kaloti Metals to disappear and go away because of its lack of resources to commence arbitration. Such egregious conduct by Peru constituted, in and of itself, a violation of the TPA; and should also be taken into account for the qualitative and quantitative adjudications of all other treaty breaches alleged herein.

VII. NUMBER OF ARBITRATORS AND METHOD OF APPOINTMENT

106. The tribunal shall be comprised of three arbitrators (fully and completely bilingual in English and Spanish). One arbitrator will be appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, will be appointed by agreement of

⁸¹ TPA, Art. 10.3 (C-1).

⁸² *Id.*, Art. 10.15 (C-1); Kaloti Metals' April 8, 2019 Notice of Intent (C-22).

the disputing parties, in accordance with Article 10.19(1) of the US-Peru TPA.⁸³ In absence of an agreement, the presiding arbitrator would be appointed by ICSID.

VIII. PLACE OF ARBITRATION

107. Kaloti Metals selects Washington, D.C. in the United States as the seat of arbitration, in accordance with Article 62 of the ICSID Convention.⁸⁴

IX. LANGUAGE

108. Kaloti Metals proposes that the arbitration be conducted in both English and Spanish, without the need for translations or interpretations, and that the arbitrators be fully and completely bilingual in such languages.

X. REQUEST FOR RELIEF

109. Kaloti Metals respectfully requests, without limitation and reserving Kaloti Metals' right to supplement or revise these requests for relief, that the Tribunal:

(a) declare that Peru breached Articles 10.3 (national treatment), 10.5 (minimum standard of treatment), 10.7 (expropriation) and 10.15 (affirmative duty to negotiate in good faith) of the TPA; as well as customary international law;⁸⁵

(b) order Peru to compensate Kaloti Metals for its breaches of the TPA and international law in an amount to be determined at a later stage in these proceedings, plus interest until the date of payment. Kaloti Metals' damages are preliminarily estimated to be USD \$75,000,000.00, excluding interests, fees, and costs; this amount is consistent with the damages claimed in Kaloti Metals' notice of intent delivered to Peru on April 8, 2019.⁸⁶

⁸³ *Id.*, Art. 10.19(1) (C-1).

⁸⁴ ICSID Convention, Art. 62.

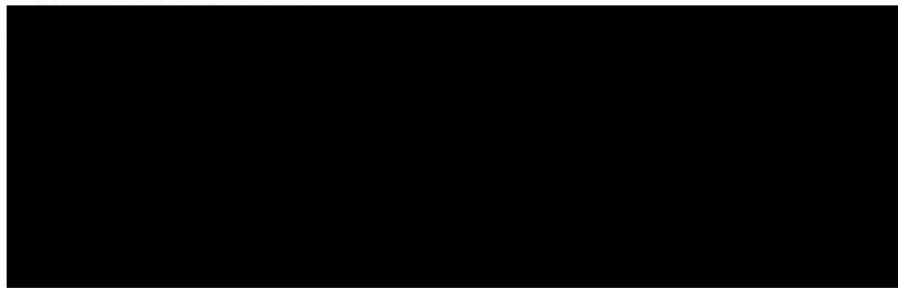
⁸⁵ *See* TPA, Art. 10.3; 10.5; 10.7 & 10.15 (C-1).

⁸⁶ Kaloti Metals' April 8, 2019 Notice of Intent (C-22).

(c) order Peru to pay all costs and expenses of this arbitration, including Kaloti Metals' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, ICSID's fees, and any other fees incurred by Kaloti Metals in relation to this dispute (the bad faith conduct of Peru after the notice of intent by Claimant, made arbitration inevitable and must be taken into account to allocate the costs of the arbitration); and

(d) provide any other relief that the Tribunal may deem just and proper.

110. Kaloti Metals has made a general, non-exhaustive description of facts and applicable law in this request in order to commence arbitration proceedings. However, Kaloti Metals fully reserves all rights to expand and substantiate its allegations at the appropriate, subsequent phase of the arbitration.



WDA Legal, S.C.

Hernando Díaz Candia



Mikel Del Valle
Counsel for the Claimant
Miami, Florida, USA

April 30, 2021

ANNEX A
Documents produced by Kaloti Metals

Reference Number	Description of Document
Doc. C-1	United States-Peru Free Trade Agreement
Doc. C-2	Kaloti Metals' Articles of Incorporation
Doc. C-3	██████████'s US Passport
Doc. C-4	Kaloti Metals' executed Power of Attorney
Doc. C-5	Convention on the Settlement of Investment Disputes between States and Nationals of Other States signatories ("Signatories to the ICSID Convention")
Doc. C-6	██████████ document package
Doc. C-7	██████████ document package
Doc. C-8	██████████ document package
Doc. C-9	██████████ document package
Doc. C-10	Registro Especial de Comercializadores y Procesadores de Oro ("RECPO")
Doc. C-11	██████████ Kaloti Metals & Logistics contract "(██████████ & Kaloti Metals Contract")
Doc. C-12	Actas de Inmovilizacion – Incautacion
Doc. C-13	Petition before the <i>Sexto Juzgado Penal del Callao</i>
Doc. C-14	Petition before the <i>Octavo Juzgado Penal del Callao</i>

Reference Number	Description of Document
Doc. C-15	Petition before the <i>Juzgado Penal Transitorio del Callao</i>
Doc. C-16	Decision from the <i>Cuarta Sala Penal Reos Libre</i>
Doc. C-17	Decision from the <i>Corte Superior de Justicia de Lima</i>
Doc. C-18	Statement of U.S. Trade Representative regarding the TPA entering into force
Doc. C-19	Peruvian legal gazettes regarding the TPA entering into force (“Peruvian Legal Gazettes”)
Doc. C-20	E-mail between Kaloti Metals & Peru regarding negotiations
Doc. C-21	Kaloti Metals’ ICSID lodging-fee wire transfer
Doc. C-22	Kaloti Metals’ April 8, 2019 Notice of Intent
Doc. C-23	Kaloti Metals’ executed Consent and Waiver Form
Doc. C-24	Official English translation of the Political Constitution of Peru