INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

KALOTI METALS & LOGISTICS, LLC

v.

REPUBLIC OF PERU

(ICSID CASE NO. ARB/21/29)

I hereby certify that the attached documents are true copies of the English and Spanish versions of the Tribunal's Award dated 14 May 2024.

Gonzalo Flores
Acting Secretary-General

Washington, D.C., 14 May 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

KALOTI METALS & LOGISTICS, LLC
Claimant

and

REPUBLIC OF PERU
Respondent

ICSID Case No. ARB/21/29

AWARD

Members of the Tribunal
Prof. Donald McRae, President of the Tribunal
Prof. Dr. José Carlos Fernández Rozas, Arbitrator
Prof. Dr. Rolf Knieper, Arbitrator

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

Date of dispatch to the Parties: 14 May 2024

REPRESENTATION OF THE PARTIES

Representing Kaloti Metals & Logistics, LLC:

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Mr. Ramón A. Azpúrua-Núñez
Mr. Mikel Del Valle
Ms. Gabriella Hormazabal
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Presidenta de la Comisión Especial que Representa al Estado en Controversias Internacionales de Inversión
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TABLE OF ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
BIT	Bilateral Investment Treaty/Treaties
Brattle-Report1	First Expert Report of Messrs. Darrell Chodorow and Fabricio Núñez of the firm Brattle, dated 3 August 2022
Brattle-Report2	Second Expert Report of Messrs. Darrell Chodorow and Fabricio Núñez of the firm Brattle, dated 12 May 2023
C-[#]	Claimant's Exhibit
Cl. Mem.	Claimant's Memorial on the Merits, dated 16 March 2022
Cl. Reply	Claimant's Reply on the Merits and a Counter-Memorial on Jurisdiction, dated 13 January 2023
CL-[#]	Claimant's Legal Authority
Coria-Report1	Legal Opinion of Dr. Dino Carlos Coria, dated 10 February 2022
Coria-Report2	Second Legal Opinion of Dr. Dino Carlos Coria, dated 4 November 2022
FTA	Free Trade Agreement
Hearing	Hearing on Jurisdiction and the Merits held in Washington, D.C., from 24 July to 29 July 2023
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Kaloti Jewellery (Dubai) or Kaloti Jewellery	International conglomerate with headquarters in Dubai, and Kaloti's principal gold buyer

Kaloti, KML or the Claimant	Kaloti Metals & Logistics, LLC
Kaloti-WS1	First Witness Statement of Mr. Awni K. Kaloti, dated 8 February 2022
Kaloti-WS2	Second Witness Statement of Mr. Awni K. Kaloti, dated 10 November 2022
Llano-WS	Witness Statement of Mr. Pacco Llano, dated 12 January 2022
Llivina-WS	Witness Statement of Ms. Mariela Llivina, dated 8 February 2022
Missiego-Report1	First Expert Report of Prof. Joaquín Missiego, dated 4 August 2022
Missiego-Report2	Second Expert Report of Prof. Joaquín Missiego, dated 7 May 2023
Peru or the Respondent	The Republic of Peru
R-[#]	Respondent's Factual Exhibit
Ramírez-WS	Witness Statement of Mr. Jorge Ramírez, dated 3 November 2022
Request for Arbitration	Claimant's Request for Arbitration dated 30 April 2021
Request for Security for Costs	Respondent's Request for Security for Costs, dated 5 August 2022
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated 5 August 2022
Resp. Rej.	Respondent's Rejoinder on the Merits and Reply Memorial on Jurisdiction, dated 12 May 2023
RL-[#]	Respondent's Legal Authority
Secretariat-Report1	First Expert report of Mr. Almir Smajlovic of the firm Secretariat, dated 4 March 2022
Secretariat-Report2	Second Expert Report of Mr. Almir Smajlovic of the firm Secretariat, dated 4 January 2023

SUNARP	Peruvian Superintendencia Nacional de los Registros Públicos
SUNAT	Peruvian National Customs and Tax Management Agency
TPA or Treaty	United States-Peru Trade Promotion Agreement, which entered into force on 1 February 2009
Tr. Day [#] [page:line]	Transcript of the Hearing
U.S. Non-Disputing Party Submission	Submission filed by the U.S. through its Office of International Claims and Investment Disputes, dated 26 May 2023
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the United States-Peru Trade Promotion Agreement, which entered into force on 1 February 2009 (the "**TPA**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The Claimant is Kaloti Metals & Logistics, LLC ("**Kaloti**" or the "**Claimant**"), a company incorporated under the laws of the State of Florida, United States of America.

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

4. The Claimant and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 30 April 2021, ICSID received a request for arbitration from the Claimant against the Respondent (the "**Request**"), supplemented by a letter of 20 May 2021. The Request was accompanied by Exhibits C-1 through C-24.

6. On 20 May 2021, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.

7. On 18 June 2023, the Claimant appointed Prof. José Carlos Fernández-Rozas, a national of Spain, as arbitrator. Prof. Fernández-Rozas accepted his appointment on 23 June 2021.

8. On 26 and 27 July 2021, the Parties informed the Centre that they had agreed on the method of constitution of the Tribunal.

9. On 4 August 2021, the Respondent appointed Prof. Dr. Rolf Knieper, a national of Germany, as arbitrator. Prof. Dr. Knieper accepted his appointment on the same date.

10. On 27 August 2021, the Centre sent a list of five candidates to the Parties, pursuant to the Parties' Agreement on the method of constitution of the Tribunal. On 7 September 2021, each Party communicated to the Centre the two candidates that it wished to strike from the list. On 8 September 2021, the remaining candidates were circulated to the Parties. On 14 and 17 September 2021, each Party communicated to the Centre their ranking of the remaining candidates.

11. On 20 September 2021, the Centre informed the Parties that they had agreed to appoint Prof. Donald McRae, a national of Canada and New Zealand, as the presiding arbitrator in this case, pursuant to the Parties' agreement.

12. On 21 September 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anneliese Fleckenstein, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

13. On 27 October 2021, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by video conference.

14. Following the first session, on 28 October 2021, the Tribunal issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington D.C., United States of America. PO1 also sets out an agreed schedule for the jurisdictional/merits phase of the proceeding (the "**Procedural Calendar**").

15. In accordance with PO1 and the Procedural Calendar, on 16 March 2022, the Claimant filed a Memorial on the Merits, together with the Witness Statements of Mr. Pacco Llano ("**Llano-WS**"), Ms. Mariela Llivina ("**Llivina-WS**"), and Mr. Awni K. Kaloti ("**Kaloti-WS1**"); the Expert Report of Mr. Almir Smajlovic of Secretariat ("**Secretariat-Report1**"); the Legal Opinion of Dr. Dino Carlos Coria ("**Coria-Report1**"); Exhibits C-0001 through C-0115 and Legal Authorities CL-0001 to CL-0081 ("**Cl. Mem.**").

16. On 2 August 2022, the Parties informed the Tribunal that they had agreed to amend the Procedural Calendar.

17. On 5 August 2022, the Respondent filed a Counter-Memorial on the Merits and a Memorial on Jurisdiction; the Expert Reports of Professor Joaquín Missiego ("**Missiego-Report1**") and The Brattle Group ("**Brattle-Report1**"); Exhibits R-0001 to R-0238 and Legal Authorities RLA-0001 to RLA-0220 ("**Resp. C-Mem.**").

18. On the same date, and together with its Counter-Memorial on the Merits and Memorial on Jurisdiction, the Respondent filed a request for security for costs ("**Request for Security for Costs**").

19. On 12 September 2022, the Claimant filed observations on Peru's Request for Security for Costs of 5 August 2022, together with Exhibits C-0116 through C-0122, and Legal Authorities CL-0082 through CL-0098.

20. On 14 September 2022, following exchanges between them, each Party filed a request for the Tribunal to decide on production of documents.

21. On 26 September 2022, the Respondent filed a response to the Claimant's observations of 12 September 2022, together with Legal Authorities RL-0221 to RL-0234.

22. On 28 September 2022, the Tribunal issued Procedural Order No. 2 ("**PO2**") concerning the Parties' requests on production of documents.

23. On 11 October 2022, the Claimant filed further observations on the Respondent's response of 26 September 2022.

24. On 24 October 2022, the Tribunal issued Procedural Order No. 3 ("**PO3**") concerning the Respondent's Request for Security for Costs.

25. On 13 January 2023, the Claimant filed a Reply on the Merits and a Counter-Memorial on Jurisdiction, together with the Witness Statement of Mr. Jorge Ramírez ("**Ramírez-WS**"), the Second Witness Statement of Mr. Awni K. Kaloti ("**Kaloti-WS2**"), the Second Legal Opinion of Dr. Dino Carlos Coria ("**Coria-Report2**"), the second Expert Report of Mr. Almir Smajlovic of Secretariat ("**Secretariat-Report2**"), Exhibits C-0123 through C-0169 and Legal Authorities CL-0099 through CL-0141 ("**Cl. Reply**"). Together with its Reply, the Claimant requested that "*the issue of Security for Costs be closed by the Tribunal with prejudice*" and, pursuant to the Tribunal's PO3, Claimant further submitted an "*undertaking*".

26. On 23 January 2023, the Tribunal invited the Respondent to submit its comments on the Claimant's request and undertaking of 13 January 2023. On 17 February 2023, having received the Parties' exchanges on the matter of the Security for Costs, the Tribunal informed the Parties that the "*undertaking*" provided by Claimant with its Reply had not "*been made in the terms specified in the Tribunal's Procedural Order No. 3. As such, the Tribunal reiterates its decision in Procedural Order No. 3 and will keep open the question of security for costs and will, if appropriate, revert to it at a later stage of these proceedings.*"

27. On 23 February 2023, the Respondent reserved its rights regarding the matter of Security for Costs.

28. On 28 March 2023, the Respondent renewed its request for an undertaking from the Claimant pursuant to the terms laid out by the Tribunal in its PO3 and requested that the Tribunal suspend the deadline for Peru's submission of its Rejoinder on the Merits until such undertaking is provided. On 5 April 2023, the Claimant submitted its comments, rejecting Peru's renewed request and stating that no new grounds have been alleged by the Respondent.

29. On 18 April 2023, the Tribunal rejected the Respondent's renewed request and informed the Parties that because Mr. Kaloti had failed to provide the requested undertaking as envisaged in PO3, the Tribunal would review the matter of Security for Costs before the Hearing.

30. On 12 May 2023, the Respondent filed a Rejoinder on the Merits and a Reply Memorial on Jurisdiction, together with the Second Expert Reports of Professor Joaquín Missiego ("**Missiego-Report2**") and The Brattle Group ("**Brattle-Report2**"), Exhibits R-0239 to R-0378 and Legal Authorities RL-0235 through RL-0290 ("**Resp. Rej.**").

31. On 26 May 2023, the United States of America filed a written submission as a Non-Disputing State Party pursuant to Article 10.20.2 of the TPA (the "**U.S. Non-Disputing Party Submission**").

32. On 12 June 2023, the Centre conveyed to the Parties a draft Procedural Order No. 4 regarding the organization of the Hearing and invited them to consult and send their agreements and disagreements to the Tribunal. On 20 June 2023, the Parties agreed to forgo the Pre-Hearing Organizational Conference, given their full agreement with the draft Procedural Order No. 4.

33. On 22 June 2023, the Tribunal issued Procedural Order No. 4 ("**PO4**") concerning the organization of the hearing.

34. On 10 July 2023, the Respondent referenced the Tribunal's letter of 18 April 2023, and inquired whether the Tribunal had reviewed the matter of Security for Costs. On 11 July 2023, the Tribunal informed the Parties that it remained of the view that an undertaking by Mr. Kaloti would be sufficient and that if such an undertaking were not provided before the hearing "*the Tribunal will, at the outset of the hearing, invite Mr. Kaloti to provide such an undertaking.*"

35. On the same date, the Claimant informed the Tribunal that Mr. Kaloti would not provide any further undertaking because he had "*previously provided a substantial undertaking about costs, with very serious assurances.*"

36. On 12 July 2023, the Tribunal took note of the Claimant's communication and informed the Parties that in light of this communication, which included the statement that Mr. Kaloti had "*previously provided a substantial undertaking about costs, with very serious assurances,*" "*the Tribunal does not plan to pursue the matter of an undertaking regarding security for costs at the hearing scheduled to commence on 24 July 2023.*"

37. A hearing on jurisdiction and the merits was held in Washington, DC, from 24 to 29 July 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:	
Prof. Donald McRae	President
Prof. Dr. José Carlos Fernández Rozas	Arbitrator
Prof. Dr. Rolf Knieper	Arbitrator
ICSID Secretariat:	
Ms. Catherine Kettlewell	ICSID Senior Legal Counsel
Mr. Federico Salon Kajganich	Paralegal
For the Claimant:	
Mr. Hernando Díaz Candia	WDA Legal
Mr. Ramón Azpúrua	WDA Legal
Ms. Gabriella Hormazabal	WDA Legal
Mr. Sebastián Ordoñez	WDA Legal
Mr. Mikel Del Valle-Corona	WDA Legal
Party Representatives	
Mr. Awni Kaloti	Founder
Ms. Jenna Kaloti	Finance Manager
For the Respondent:	
Ms. Vanessa Rivas Plata Saldarriaga	President, Special Commission that Represents Peru in International Investment Disputes
Mr. Jhans Panihuara Aragón	Counsel, Technical Secretariat to the Special Commission that Represents Peru in International Investment Disputes
Mr. Gino Campaña Albán (Remote)	SUNAT's Representative before the Special Commission
Mr. Juan Falconí Gálvez (Remote)	Ministry of Justice's Representative before the Special Commission

Mr. Patricio Grané Labat	Arnold & Porter, LLP
Ms. Mélida Hodgson	Arnold & Porter, LLP
Mr. Álvaro Nistal	Arnold & Porter, LLP
Ms. Katelyn Horne	Arnold & Porter, LLP
Mr. Timothy Smyth	Arnold & Porter, LLP
Ms. Cristina Arizmendi	Arnold & Porter, LLP
Mr. Peter Saban	Arnold & Porter, LLP
Ms. Andrea Mauri Paricio	Arnold & Porter, LLP
Ms. Paloma García Guerra	Arnold & Porter, LLP
Mr. Agustin Hübner	Arnold & Porter, LLP
Mr. Andrés Álvarez Calderón	Arnold & Porter, LLP
Mr. Jorge Lazo (Remote)	Lazo Abogados
Mr. Rochar Allemant (Remote)	Lazo Abogados
Mr. José Jaramillo (Remote)	Lazo Abogados

For the United States of America:

Mr. David Bigge	Office of the Legal Adviser United States Department of State
Ms. Melinda E. Kuritzky	Office of the Legal Adviser United States Department of State

Court Reporters:

Mr. David Kasdan	English Court Reporter
Mr. Dante Rinaldi	Spanish Court Reporter

Interpreters:

Ms. Silvia Colla	English-Spanish Interpreter
Mr. Daniel Giglio	English-Spanish Interpreter
Ms. Monique Fernández	English-Spanish Interpreter

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

On behalf of the Claimant:

Mr. Awni Kaloti	Founder
Mr. Jorge Ramírez	
Ms. Mariela Llivina	
Mr. Pacco Llano	
Mr. Carlos Coria	Legal Expert
Quantum Expert-Secretariat	

On behalf of the Respondent:

Mr. Joaquín Missiego Quantum Expert-Brattle	Legal Expert

39. At the end of the Hearing, the Parties agreed that they would submit brief statements of costs without supporting documentation or arguments on principles.[1] On 13 September 2023, each Party filed its submission on costs.

40. The proceeding was closed on 26 April 2024.

III. FACTUAL BACKGROUND

41. The following is a brief and non-exhaustive introduction to the factual background in this case. Further factual details will be discussed throughout the Tribunal's analysis. Where facts are contested, this has been noted.

A. REGULATION OF GOLD MINING IN PERU

42. Peru is Latin America's largest producer of gold which is an important contributor to the Peruvian economy.[2] Faced with an increase in illegal mining and money laundering connected to gold mining, in 2012 Peru adopted legislation constituting "*a robust new legal framework, to supplement and enhance the norms that already existed to address those crimes.*"[3] These laws gave authorities the power "*to commence and conduct administrative investigations and proceedings, criminal investigations and prosecutions, and in those contexts to issue orders to preserve evidence and ensure the non-dissipation of proceeds of crime.*"[4] The relevant authorities were "*SUNAT, the Prosecutor's Office, the State Attorney's Office, and Peru's criminal courts.*"[5] SUNAT is the "*Peruvian National Customs and Tax Management Agency.*"

[1] Tr. Day 6, 1616:7-21; 1617:1-14.
[2] Resp. C-Mem., para. 24.
[3] Resp. C-Mem., para. 25.
[4] Resp. C-Mem., para. 26.
[5] Resp. C-Mem., para. 60.

B. THE CLAIMANT'S BUSINESS

43. Kaloti was incorporated in Florida in October 2010 and had "*substantial business activities in the United States of America, including an office, a dealing room, and warehousing, melting and assaying facility, located at 55 N.E. 1st St., Miami, FL 33132.*"[6] Kaloti's primary business is as "*a gold processing and trading company*"[7] involved in the "*importing and exporting [of] gold to and from the United States and Latin America.*"[8]

44. Kaloti started purchasing gold in Peru in 2012. In that year Mr. Awni Kaloti, the founder and sole manager of Kaloti, made several trips to Peru and learned about the gold business there. In his First Witness Statement, Mr. Kaloti indicated that among the principal reasons for engaging in the gold business in Peru were that Peru "*had large gold reserves, offered personal safety to foreigners, and a favorable, stable regulatory framework (including, for instance, an international Trade Promotion Agreement –a treaty with the United States).*"[9] Indeed, Mr. Kaloti stated that the regulatory framework for precious metals in Peru, "*gave me confidence that KML would be able to operate safely and with legal predictability in that country.*"[10]

45. Kaloti states that it opened a "*physical office in Lima […] with capabilities to weight and assay gold for subsequent export to the United States.*"[11] It also rented an apartment in Lima "*to house expatriate and travelling personnel.*"[12] It hired local employees in Peru, and a compliance officer "*who worked for KML in Miami.*" It then "*developed a very robust compliance and anti-money laundering manual in order to operate in Peru safely and legitimately.*"[13] Much of this is disputed by the Respondent.

46. Kaloti further states that its business strategy had two aspects. *First*, Kaloti paid suppliers a higher price to purchase gold than was paid by other purchasers: 99.2% of world prices

[6] Kaloti-WS1, para. 15, **C-0103**.
[7] Cl. Mem., para. 3.
[8] Secretariat-Report1, para. 5.11, **C-0106**.
[9] Kaloti-WS1, para. 26, **C-0103**.
[10] Kaloti-WS1, para. 20, **C-0103**.
[11] Cl. Mem., para. 19.
[12] Cl. Mem., para. 20.
[13] Cl. Mem., para. 21.

instead of the 98-99% of world prices that other purchasers paid.[14] *Second*, Kaloti paid for gold at the time the gold reached its facilities in Lima, whereas other buyers generally paid suppliers only when the gold was exported from Peru.[15] The Respondent disputes this.

47. Kaloti's business strategy was facilitated by the fact that it could obtain loans from Kaloti Jewellery (Dubai),[16] an "*international conglomerate*" which is "*headquartered in Dubai, with a geographical footprint stretching from the Far East to the Americas; and is amongst the largest contributors to the global precious metals OTC, futures, and derivatives markets.*"[17] This enabled Kaloti to purchase gold earlier than its competitors and to advance loans to suppliers to purchase gold. Kaloti Jewellery (Dubai) was also Kaloti's principal buyer of gold, having assured Kaloti that it was ready to purchase up to 45,000kg of gold per year from Kaloti.[18] This made possible that, "*when KML bought gold in Peru, KML knew the price at which it was going to resale [sic] the gold to Kaloti Jewellery (Dubai).*"[19]

48. In the first years of its entry into the Peruvian market, Kaloti enjoyed significant success. Its annual purchases of gold in Peru went from USD 417,487.10 in 2011 to USD 1,332,970,387.00 by 2013,[20] representing approximately 9.25% of the gold produced in Peru in that year.[21] In April 2013, the shareholders of Kaloti gave Mr. Kaloti authority to study the opportunity to establish a gold refinery in Peru.[22] However, after 2013, purchases of gold declined until 2018 when Kaloti exited the Peruvian market. Kaloti attributes the decline in its business to the measures taken by Peru[23] (discussed below). The Respondent disputes this.

[14] Kaloti-WS1, para. 33, **C-0103**.
[15] Kaloti-WS1, para. 34, **C-0103**.
[16] Kaloti-WS1, para. 32, **C-0103**.
[17] Kaloti-WS1, para. 13, **C-0103**.
[18] Kaloti-WS1, para. 39, **C-0103**.
[19] Kaloti-WS1, para. 37, **C-0103**.
[20] Cl. Mem., para. 16.
[21] Cl. Mem., para. 23.
[22] Minutes of KML granting permission to study the opportunity to establish a gold refinery in Peru, dated 8 April 2023, **C-0049**.
[23] Cl. Mem., para. 17.

C. THE ACTIONS TAKEN BY PERUVIAN AUTHORITIES

49. In 2013 and 2014, the Claimant asserts,[24] five shipments of gold from suppliers to Kaloti, held at the premises of customs agent Talma Servicios Aeroportuarios S.A in Callao,[25] were subject to orders of "*temporary immobilization.*" The shipments were as follows:

> Shipment No. 1 from C.G. Koenig, 111.54 (gross) kilograms, Immobilization Order initiated on November 20, 2013.
>
> Shipment No. 2 from Oxford, 98.59 (gross) kilograms, Immobilization Order initiated on January 8-10, 2014.
>
> Shipment No. 3 from San Serafin, 36,60 (gross) kilograms, Immobilization Order initiated on January 9-10, 2014.
>
> Shipment No. 4 from Sumaj, 126.77 (gross) kilograms, Immobilization Order initiated on January 7, 2014.
>
> Shipment No. 5 from Sumaj, 99.84 (gros) kilograms, Immobilization Order initiated on March 13, 2014.

50. The Claimant asserts that the immobilization orders were made "*mostly with the excuse of investigating the origin of the gold purchased by KML and, in other cases, based on anti-money laundering investigations against third parties.*"[26]

51. The Respondent, however, points out that only Shipments 1-4 were immobilized by SUNAT and that Shipment 5 was never immobilized by SUNAT.[27] The immobilization orders against Shipments 1-4 were "*for the purpose of verifying the gold's 'lawful origin' and the shipments' 'compliance with tax and customs requirements'.*"[28] Moreover, the

[24] Cl. Mem., para. 49.
[25] The Shipments had been sent there from the Claimant's premises in Hermes en route to Miami.
[26] Cl. Mem., para. 49.
[27] Resp. C-Mem., para. 117.
[28] Resp. C-Mem., para. 118.

Respondent asserts, SUNAT's inspection of Shipments 1 to 4, "*confirmed that the supporting documents submitted by the Suppliers had failed to establish the lawful origin of the gold*" in those shipments.[29]

52. SUNAT then passed its findings onto the Prosecutors Office which decided that there was a sufficient basis for opening criminal investigations of the suppliers. The Prosecutor's Office then "*asked the competent Criminal Court to order Precautionary Seizures*" of the shipments.[30] The immobilizations were lifted by SUNAT, and the shipments were seized in accordance with the "*Precautionary Seizures.*"[31] On the basis of the evidence provided by the Prosecutor's Office, and other information it had acquired, the State Attorney's office commenced preliminary investigations of the suppliers of each of the five shipments.[32]

53. The result of these investigations was that criminal proceedings were commenced against each of the suppliers for money laundering. In respect of Koenig, criminal proceedings were initiated on 15 March 2015. In the case of Oxford, criminal proceedings were initiated on 14 May 2015. In the case of San Serafin, criminal proceedings were initiated on 9 September 2014. And criminal proceedings were issued against Sumaj on 10 March 2015. The criminal courts maintained the precautionary seizures issued with respect to these four shipments issued during the preliminary investigation phase. These proceedings are still continuing, and the precautionary seizures have not been lifted.

54. These facts relating to the precautionary seizures and the criminal investigations are not challenged by the Claimant.

55. In respect of Shipment 5, the Respondent states that no precautionary seizure was ever imposed by the criminal court, but a precautionary seizure had been granted in the context of a contractual dispute between Sumaj and Kaloti.[33] Sumaj had brought a claim against Kaloti on the ground that Kaloti had failed to pay for Shipment 5, requesting an annulment

[29] Resp. C-Mem., para. 138.
[30] Resp. C-Mem., paras. 155-156.
[31] Resp. C-Mem., para. 157.
[32] Resp. C-Mem., para. 185.
[33] Resp. C-Mem., para. 210.

of the contract, and the return of the gold to Sumaj. On 18 June 2014, the civil court in which the claim had been brought ordered the civil attachment of the gold, which remains in effect today.[34] These facts also do not appear to be challenged by the Claimant.

56. The Claimant states that "*multiple requests made by, or on behalf or for the benefit of KML*" to have the immobilizations lifted were made to Peru but were ignored.[35]

57. The Respondent states that of the eleven requests to lift the immobilizations identified by the Claimant, only four were made in respect of SUNAT's immobilization orders, and of that four one was a request to Talma, where the shipments were being held, and not to SUNAT.[36] The Respondent further states that the requests were not "*ignored*": "*SUNAT considered them and concluded that it could not lift the immobilizations, for two separate reasons: (i) because the Suppliers had failed to prove the lawful origin of the gold, and (ii) because there were indicia of criminal activity.*"[37]

58. Of the remaining seven requests identified by Kaloti, four were filed with the Prosecutor's Office and related to the precautionary seizures ordered by the criminal courts.[38] The other three requests were submissions relating to the precautionary seizures filed before the criminal courts themselves.[39]

59. It is the contention of the Respondent that "*none of Kaloti's attempted interventions complied with the legal requirements under Peruvian law*"[40] and that Kaloti failed to pursue the remedies that were available under Peruvian law.[41]

60. After 2014 many suppliers discontinued selling gold to Kaloti and this extended to other suppliers in 2016 and 2017.[42] The Claimant attributes this to the actions of Peru. Also, from

[34] Resp. C-Mem., para. 246.
[35] Cl. Mem., para. 115.
[36] Resp. C-Mem., paras. 147-151.
[37] Resp. C-Mem., para. 148.
[38] Resp. C-Mem., para. 218.
[39] Resp. C-Mem., para. 222.
[40] Resp. C-Mem. para. 212
[41] Resp. C-Mem., para. 217.
[42] Cl. Mem., paras. 59-60.

2014 on, banks in the United States started closing Kaloti's bank accounts. Kaloti also attributes this to the actions of Peru.[43]

61. The Respondent denies that it was Peru's actions that were the cause of suppliers and banks discontinuing their relationship with Kaloti, arguing instead that it was the consequences of Kaloti's link with Kaloti Jewellery (Dubai) against which there had been serious international accusations of involvement in the trade of illegal gold and money laundering.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

62. The Claimant requests the Tribunal to render an award:

a. Upholding the claims asserted by Claimant in this proceeding;

b. Determining that Peru breached the TPA:

i. By failing to accord fair and equitable treatment ("**FET**") to the Claimant's investments; by taking arbitrary or discriminatory measures that impaired the use and enjoyment of the Claimant's investments; by failing to accord to those investments the same treatment that it provided to nationals or companies of Peru, or third States;

ii. By wrongfully expropriating the Claimant's gold without complying with the requirements of the Treaty, including nondiscrimination and payment of prompt, adequate and effective compensation; and

iii. By wrongfully expropriating the Claimant's going concern enterprise business without complying with the requirements of the Treaty, including nondiscrimination and payment of prompt, adequate and effective compensation.

c. Determining that such breaches have caused damages incurred by the Claimant;

[43] Cl. Mem., paras. 65-66.

d. Ordering Peru to pay to the Claimant full reparation in accordance with the TPA and customary international law, including:

i. Compensation for damages sustained as a result of the discriminatory, unfair and unequitable treatment; the expropriation of gold; and the expropriation of the enterprise, in an amount to be established in the proceeding;

ii. Compound interest thereon (both pre-award and post-award) in accordance with applicable law;

iii. Determining that the Claimant shall be protected from taxation of such compensation, in the manner specified in the Claimant's Memorial;

iv. Ordering Peru to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the tribunal, and the cost of legal representation (counsel's fees), plus interest thereon in accordance with applicable law; and

v. Such other or additional relief as may be appropriate under the applicable law or may otherwise be just and proper. [44]

63. For its part the Respondent requests that the Tribunal:

a. Dismiss all of Claimant's claims for lack of jurisdiction and/or inadmissibility;

b. Dismiss for lack of merit any and all claims in respect of which the Tribunal may determine that it has jurisdiction;

c. Reject in its entirety Claimant's request for compensation, should the Tribunal find that it has jurisdiction and that there is merit to any of Claimant's claims;

d. Order Claimant to pay all costs of the arbitration, including the totality of Peru's legal fees and expenses, expert fees and expenses, and all other expenses incurred in

[44] Cl. Reply, para. 522(d).

connection with Peru's defense in this arbitration, plus compounded interest on such amounts until the date of payment, calculated at the risk-free US Treasury Bill rate; and

e. Pursuant to Peru's previous requests, order Claimant to post security for costs.[45]

V. THE APPLICABLE LEGAL FRAMEWORK

64. Pursuant to Article 10.1 of Chapter 10 of the TPA ("**Investment**") "*applies to measures adopted or maintained by a Party relating to:*

> *[…]*
>
> *(b) covered investments; and*
>
> *[…]*".

65. As defined in Article 1.3 of the TPA:

> ***covered investment*** *means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.*

66. The definition of Article 10.28 of the TPA reads in its relevant part as follows:

> ***investment*** *means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*

67. Section B of Chapter 10 of the TPA is devoted to 'Investor-State Dispute Settlement' and provides in its relevant parts, preceded by Article 10.14:

> ***Article 10.14: Special Formalities and Information Requirements***
>
> *1. Nothing in Article 10.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors*

[45] Resp. Rej., para. 840.

be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and covered investments pursuant to this Chapter.

Article 10.15: Consultation and Negotiation

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.

Article 10.16: Submission of a Claim 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,

[…]

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; […]

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). […]

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(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;

[…]

Article 10.18: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired,

or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article10.16.1(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement.

[…].

68. Article 25 (1) of the ICSID Convention provides:

> *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. […]*

69. Unlike Article 10.28 of the TPA, no definition of investment is provided in Article 25. However, the official "*Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of Other States*" dated 18 March 1965 and accompanying the submission of the Convention to member governments of the World Bank, affirmed that "*adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention*".[46]

VI. ARGUMENTS OF THE PARTIES

A. JURISDICTION

1. Objection *ratione materiae*: On the requirements of lawful investments covered by the TPA and the ICSID Convention

[46] ICSID Convention, Regulations and Rules, 2022, para. 12, p. 29 *et seq*.

a. Respondent's Position

70. The Respondent submits that the Claimant bears the burden of proving the facts necessary to establish jurisdiction. This interpretation is shared by the U.S. Non-Disputing Party Submission, dated 26 May 2023, which states:

> *In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim*.[47]

71. With regard to the ICSID Convention, the Respondent relies among others on the award in *Blue Bank v. Venezuela*, where the Tribunal held that "*the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent.*"[48]

72. Here, it says, the Claimant must prove that it made an investment in Peru, satisfying the requirements provided for under both the TPA and the ICSID Convention, and that it owns the investments in Peru.[49]

73. The Respondent asserts that the Claimant has failed to establish these facts. In fact, the Centre has no jurisdiction and the Tribunal has no competence to decide the Claimant's claims for compensation for damage resulting from alleged violations of TPA obligations with respect to alleged investments consisting of the going concern business enterprise, the five shipments of gold and the infrastructure for the weighing, assaying and testing of gold, because none of these items fulfil the criteria of covered investments as defined in the TPA and in the ICSID Convention.

1) The going concern business enterprise

74. The Respondent quotes the Claimant's self-characterization[50] which confirms:

> *KML is an "enterprise" of the U.S. because:*

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[47] U.S. Non-Disputing Party Submission, para. 7.
[48] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award (26 April 2017), para. 66, **RL-0184**.
[49] Resp. C-Mem., paras. 321-322.
[50] Resp. Rej., para. 470.

> *• KML is a limited liability company incorporated under the laws of the State of Florida, United States of America;*
>
> *• At all times relevant, KML maintained its principal place of business at 55 NE 1st Street, Ste. #34, Miami, FL 33132, United States of America, and continues to maintain said address as its registered office;*
>
> *• KML, at all times relevant, maintained substantial business activities in the U.S. prior to ceasing operations; and*
>
> *• KML made investments in Peru, which is a party to the TPA.*[51]

75. The Respondent adds that 53% of the Claimant's overall revenues prior to the challenged measures came from outside Peru,[52] that the Claimant did not pay taxes in Peru, and that KML was not registered in Peru.[53] It explains that, had KML created a permanent establishment in Peru, it would have had to register with the Single Taxpayers' Registry RUC. KML's registration with the "*Superintendencia Nacional de los Registros Públicos"* ("**SUNARP**"), as presented by the Claimant under Exhibit C-0159, does not replace such registration to prove that the Claimant had an investment in Peru. Rather it was done for the limited purpose to register powers of attorney although being only a foreign company. Thus, such registration reinforces the evidence that KML had no investment in Peru.[54]

76. All these facts converge, it says, to establish that the Claimant's investments in its enterprise have no territorial nexus with Peru. The Respondent asserts that such nexus is required both by the TPA and by the ICSID Convention.

77. As to the TPA, the Respondent refers to the definitions of a "*covered investment*" in Articles 1.3 and 10.28 and to the U.S. Non-Disputing Party Submission, which concludes:

> *A conclusion that the U.S.-Peru TPA Chapter Ten extends substantive protections and the right to arbitrate to investors of a Party that are not seeking to make or have not made investments in the territory of the other Party whose measure is at issue would constitute a radical expansion of the*

[51] Cl. Mem., para. 76.
[52] Resp. C-Mem., para. 385.
[53] Resp. Rej., para. 473 *et seq*.
[54] Resp. Rej., para. 477.

> *rights that the Parties have granted to foreign investors under BITs and other international agreements into which they have entered*.[55]

78. The Respondent submits that this interpretation of Article 1.3 of the TPA by the U.S. coincides with the interpretation made in the written submissions of Peru, which must be considered as an agreement by the Parties to the TPA and shall be taken into account by the Tribunal in accordance with Article 31.3 (a) of the Vienna Convention on the Law of Treaties ("**VCLT**").[56] This view is shared by the U.S. whose counsel, Ms. Kuritzki, summarized the U.S. opinion by stating:

> *whether the Tribunal considers that the interpretations presented by the TPA Parties are subsequent agreement under Article 31(3)(a), subsequent practice under 31(3)(b), or both, on any particular provision, the outcome is the same. The Tribunal must take the TPA Parties' common understanding of the provision of their Treaty into account*.[57]

79. As to the ICSID Convention, the Respondent relies on the recent award in *Hope Services v. Cameroon*, where "*the Tribunal recalls that it is well established (and the Parties agree on this point) that both the Treaty and the Convention require a link between the investor's investment and the territory of the host State.*"[58]

80. The Respondent summarizes its argument by asserting that since the territorial nexus is a mandatory requirement for the definition of an investment covered by the TPA and the ICSID Convention, it was the Claimant's burden to establish that its business enterprise was "*an investment located* in the territory of Peru." In fact, it did the opposite when stating that it was incorporated in the State of Florida and had its substantial business activities and its principal place of business in the territory of the United States. Therefore, the going concern business enterprise does not qualify as an investment covered by the TPA and the ICSID Convention.[59]

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[55] U.S. Non-Disputing Party Submission, para. 9.
[56] Tr. Day 1, 217: 21-22; 218:1-14; 219:3-12, 17-21; 220:1-2.
[57] Tr. Day 1, 340:18-22; 341:1-3.
[58] *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Award (23 December 2021), para. 215, **RL-0207**.
[59] Resp. C-Mem., para. 382 (emphasis in original).

2) The five Shipments of Gold

81. The Respondent rebuts the Claimant's assertion that "*gold (a physical asset) owned by KML and seized by Peru inside its territory*" qualifies as an investment for purposes of the Treaty,[60] by asserting that "*the Treaty, ICSID Convention, and international law […] impose certain requirements that Claimant's alleged investment simply does not meet*."[61]

(i) ***No ownership nor control***

82. The Respondent asserts that in accordance with Article 10.28 of the TPA only assets that a person owns or controls may qualify as an investment, that "*it was the Claimant's burden of proof to present those terms and to demonstrate that it acquired ownership over the gold*" in whatever form, and that the Claimant has failed to present any evidence in that sense either by written purchase agreements or otherwise, so "*we don't know the exact terms of the Agreement*." The consequences of the lack of evidence must be borne by the Claimant.[62]

83. The Respondent asserts further that the Claimant's own submissions as well as the evidence on the record indicate that the Claimant never acquired ownership of the gold, which remained in the suppliers' possession and control until the immobilizations and seizures. The Respondent presents a variety of reasons and alternatives in light of the incomplete documentation produced by the Claimant.

84. *First*, the 'Terms and Conditions for Bullion Trading and Related Transactions' between KML and the suppliers Koenig, Oxford, San Serafin and Sumaj,[63] suggest that the Claimant acted like a broker or agent, financing the suppliers' operations of buying gold in Peru and helping them to sell it to third parties. This construction is confirmed by Mr. Kaloti, who described the operation as "*somewhat similar to when stocks are traded on*

[60] Cl. Reply., para. 156.
[61] Resp. Rej., para. 397.
[62] Tr. Day 6, 1546:6-13.
[63] *See* Terms and conditions for Bullion Trading and Related Transactions between KML and C.G. Koening, dated 13 May 2013, **R-0307**; Terms and Conditions for Bullion Trading and Related Transactions between KML and Oxford Corp., dated 2 October 2023, **R-0308**; Terms and conditions for Bullion Trading and Related Transactions between KML and San Serafín, undated, **R-0309**; Terms and conditions for Bullion Trading and Related Transactions between KML and Sumaj Orkro, dated 29 October 2013, **R-0310**.

margin in Wall Street"[64] and the Claimant's Memorial that qualifies the KML's position as that of "*middlemen*."[65] Under such construction, the Claimant would never have acquired ownership.[66]

85. *Second*, under Peruvian law, the waybills and customs declarations for the transport of the gold from the storage facilities with Hermes, and then for the planned transport from Lima to Miami were to be filled by the owner of the assets. While Shipment 5 did not leave the Hermes storage facilities after the attachment in a private lawsuit between the Claimant and Sumaj,[67] the transport and export documents for shipments 1-4 are all in the name of the suppliers Koenig, Oxford, San Serafin and Sumaj (for shipment 4). The Respondent asserts that this way of processing evidences the ongoing ownership of and control over the gold by the suppliers until its immobilization.[68]

86. In addition, the Respondent insisted that the suppliers rather than the Claimant had to pay for the export transportation costs.[69] The Respondent summarizes the argument:

> *Claimant has failed to explain why its Suppliers would have processed, paid and been responsible for the export to Miami of the Gold contained in the Five Shipments (after its alleged delivery in Kaloti's Lima facilities), if—on Claimant's theory—at that point the Suppliers were no longer the owners of the Gold*.[70]

87. *Third*, the Respondent argues that the Claimant failed to establish that it paid the purchase price. On the contrary, it has admitted that it has not paid the full price for Shipments 1, 2 and 4, and "*that it has made no payment whatsoever for Shipments 3 and 5*."[71] In this context, it says that it is important to note that the competent Peruvian courts decided that

[64] Kaloti-WS2, para. 30, **C-0147**.
[65] Cl. Mem., para. 146.
[66] Resp. Rej., paras. 56-64.
[67] Resp. C-Mem., paras. 244-248.
[68] Resp. C-Mem., para. 130; Resp. Rej., para. 77; Tr. Day 1, 177:4-22; 178:1-11; Respondent's Opening Presentation of 24 July 2023, Slides 34-36; Tr. Day 6, 1543:1-4; 1544:1-6.
[69] Resp. Rej., para. 77; Tr. Day 1, 177:18; Respondent's Opening Presentation of 24 July 2023, Slide 37.
[70] Resp. Rej., Para. 78.
[71] Tr. Day 1, 173:17-18.

the contract on Shipment 5 be terminated and that KML had no property right over the gold.[72]

88. In substance, Respondent argues that there is no difference between Shipment 5 and the other Shipments. Since "*any Purchase Agreement would have required that Kaloti pay the price of the gold,*" and since "*it has failed to prove that, pursuant to these agreements, ownership would transfer to Kaloti once it took possession of the gold in its Lima facilities,*" the Claimant has thereby failed to prove that it has become the owner of the gold.[73]

89. *Fourth*, the Respondent presents the principles of Peruvian mining law, based on Article 66 of the Constitution, according to which all natural resources, unseparated from the ground, are "*patrimony of the Nation*" and exclusive property of the State.[74] Concession rights to extract them can be granted, necessitating a number of licenses and permits. Gold and other minerals extracted without such permits and licenses are illegally mined, cannot constitute property rights, and must be returned to the state.[75]

90. The Respondent submits that laws have been enacted in order to implement these fundamental principles. Accordingly, buyers of mineral products must verify the lawful origin of the mined product as well as the lawful status of the seller. Article 11 of the 'Illegal Mining Controls and Inspection Decree'[76] provides that the following minimum data must be obtained: the identification of the mining concession and its ongoing validity, the authorization of the miner to exploit the products, the validity of other permits and licenses such as the environmental permit, the identity of the trader/supplier, its incorporation, the shareholders and management, the detailed description of the product, proof of payments, proof of transport of the product from the mining site to the place of

[72] Resp. C-Mem., paras. 244-250, 370; Resp. Rej., paras. 263-273.
[73] Tr. Day 1, 173:5-13; 174:17-22.
[74] Official English translation of the Political Constitution of Peru, enactment dated 29 December 1993, Art. 66, **CL-0002**.
[75] Resp. C-Mem., paras. 361-364.
[76] Legislative Decree No. 1107, dated 19 April 2012, **R-0049**.

the delivery, including the identity of shippers, recipients and drivers, means of transport, addresses of departure and delivery, dates and purpose of transport.[77]

91. It further submits that the Claimant was aware of these requirements. In its own "*AML/CFT Program Manual*"[78] it prepared an extensive list of due diligence steps to be undertaken for any transaction, based on the OECD "*Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*":

> *a. obtain from each supplier a trade license, certificate of incorporation, proof of address and "[p]hotos of [its] business/office;"*
>
> *b. "identify each and every Ultimate Beneficial Owner" of the supplier;*
>
> *c. carry out "a full web search" of each supplier;*
>
> *d. conduct "[s]ite visits" to "verify business location and other specific KYC data," "monitor and evaluate the supplier's operational activities and practices," and "assess whether compliance related risks are present;"*
>
> *e. prepare a "Site Visit Report" to "detail and summarize key site visit issues, findings, and possible recommendations" and, "[i]f necessary, . . . a follow-up plan addressing specific concerns or issues identified during the site visit;"*
>
> *f. obtain "[d]ocumentation in the form of invoices, contracts, licenses and/or other documentation that provides clear evidence that metals have been procured through legal means;"*
>
> *g. "apply a comprehensive approach to monitoring supplier account activity in order to ensure that transactions are conducted in accordance with the relevant guidelines related to the proposed business," including by collecting "[e]xportation authorization and supporting documents granted by the appointed government agency in the country of export" and "[s]upplier Internal Purchase (SIP) documentation;"*
>
> *h. obtain "[d]ocumentation related to supplier's [AML/CGT] program and independent audits;"*
>
> *i. "[a]fter client's approval and onboarding, [perform] daily checks . . . and review[s] to ensure accuracy;" and*

[77] Resp. Rej., paras. 84-90.
[78] Kaloti AML/CFT Program Manual, **C-0025**.

j. "[i]n accordance with best practices as well as US Federal Regulations," "retain […] for a period of at least seven (7) years" all "documentation required under KML's AML/CFT Program Manual."[79]

92. The Respondent alleges that "*the evidence on the record shows that Kaloti manifestly failed to comply with its due diligence obligations under Peruvian law, as well as with its own AML/CFT Manual, in relation to both the Suppliers and the origin of the Gold.*"[80]

93. With respect to the four suppliers of the five shipments, it alleges that – among other irregularities:

- Supplier 'Koenig' had no mining concession from which it could have extracted the gold and the concession holders testified not to have had business with Koenig, it was new on the market and yet was able to deliver large quantities, the identity documents of Koenig's management were not valid;[81]

- Supplier 'Oxford' had been incorporated with a minimal share capital shortly before supplying extraordinary quantities of gold to KML, had not undergone independent audits, had submitted an incomplete account application to KML, had started to supply gold before the completion of its account application, had not provided payment documents nor complete waybills for the gold delivered, had indicated mines from where the gold originated that have either testified to be unaware of business relations or had no environmental permits or were inoperative, had one shareholder and manager who was a notorious criminal;[82]

- Supplier 'San Serafin' had a disproportionately small share-capital in relation to the gold supplied, had no industry/business knowledge in international gold transactions, did not hold a concession in a mine where it alleged to have extracted the gold, which in reality had a concessionaire who was not entitled to operate the mine, had procured

[79] Resp. Rej., para. 98 (footnotes omitted).
[80] Resp. Rej., para. 99.
[81] Resp. Rej., paras. 109-122.
[82] Resp. Rej., paras. 123-136.

the gold through criminal activities, used falsified shipping documents, had no registered business address, used strawmen as shareholders;[83]

- Supplier 'Sumaj' was a recently incorporated company with a minimal capital and no experience in the trading of gold, had shareholders and managers who were close relatives of a notorious criminal who had spent time in prison for charges related to money laundering, drug trafficking, tax evasion and export of illegally mined gold, procured gold from a mine that did not have the necessary authorizations.[84]

94. These facts, the Respondent says, were partly reported in the press, were identifiable through an examination of the documents, and were partly red flags that necessitated an enhanced due diligence. It alleges that "*Kaloti either failed to conduct even minimal due diligence on the Suppliers and the Gold or, having conducted such due diligence (of which there is no evidence), it willfully and recklessly ignored the garish red flags showing that the Gold had in all likelihood been unlawfully obtained.*" It says that the evidence and the cross-examination of Mr. Kaloti as well as KML's compliance officer reveal that multiple red flags were raised by the circumstances and simply ignored, that Claimant has traded "*thousands of kilograms of gold worth hundreds of millions of dollars for convicted criminals,*" and that "*Kaloti simply did not care whether the gold had been illegally mined.*"[85]

95. The Respondent asserts that under such circumstances the Claimant cannot pretend to have acted *bona fide* and to have acquired ownership of the gold. All transactions were void *ab initio*, and no property right ever existed.

96. *Fifth*, and in any event, the Respondent submits, Article 948 of the Civil Code of Peru "*does not allow even a good-faith purchaser to walk away with the proceeds of a crime […] as confirmed by Claimant's own legal expert.*"[86] Article 948 reads:

> *Whoever receives in good faith, and as owner, the possession of an object, will acquire the property over such object, even if the transferor does not*

[83] Resp. Rej., paras. 137-148.
[84] Resp. Rej., paras. 149-164.
[85] Tr. Day 6, 1552:6-8,19-20.
[86] Tr. Day 6, 1513:10-14.

> *have a valid right to transfer the property. Exempted from this rule are the assets that have been lost or which have been acquired in contravention of the Criminal Law.*[87]

97. The Respondent argues that once an object is obtained in contravention of criminal law, "*any subsequent purchaser does not acquire legal ownership, even if it claims to have been acting in good faith.*" In the present case, the Claimant was not a good faith purchaser; but even if it had been it would not have acquired property over the gold. "*An acquisition in violation of Peruvian criminal law earlier in the ownership chain vitiates subsequent acquisitions.*"[88]

98. For all these reasons, the Respondent asserts, the five shipments of gold do not qualify as an investment because the Claimant has failed to prove that it acquired ownership, and has therefore failed to establish jurisdiction *ratione materiae*.[89]

(ii) *No covered investment*

99. The Respondent asserts that additionally, and irrespective of the issue of ownership or control, the gold does also not possess the characteristics of an investment in the sense of Article 10.28 of the TPA and Article 25 of the ICSID Convention, and the jurisdiction *ratione materiae* of the Centre and the competence of the Tribunal do not extend to disputes over it for this reason alone.

100. The Respondent relies on the text of Article 10.28 of the TPA which states clearly that to be an investment an asset must have the characteristics of an investment such as the commitment of capital, the expectation of gain or profit, or the assumption of risk.[90]

101. It further relies on the U.S. Non-Disputing Party Submission which states, in agreement with Peru's interpretation:

> *The enumeration of a type of an asset in Article 10.28 is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of*

[87] Legislative Decree No. 295, Civil Code, dated 24 July 1984, Art. 948, **R-0222**.
[88] Resp. Rej., paras. 439, 442.
[89] Resp. C-Mem., paras. 361-371; Resp. Rej., para. 396.
[90] Resp. C-Mem., paras. 331-332.

> *an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Article 10.28's use of the word '"including" in relation to "characteristics of an investment" indicates that the list of identified characteristics, i.e., "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk," is not an exhaustive list; additional characteristics may be relevant*."[91]

102. The Respondent argues that, contrary to the Claimant's interpretation of Article 10.28, the use of the plural form in "*characteristics*" as well as the indication that even additional characteristics may be relevant, unequivocally convey the 'ordinary meaning' (Article 31(1) of the VCLT) that one isolated characteristic is not sufficient to qualify an asset as an investment.[92]

103. As to Article 25 of the ICSID Convention, which becomes relevant if the TPA's requirements are satisfied and the reference of Article 10.16 TPA to ICSID operates, the Respondent asserts that, although the term "*investment*" is not defined in Article 25, certain objective criteria have been established in the jurisprudence that concretize it. Like the Claimant who relies on identical arbitral decisions, namely *Fedax v. Venezuela* and *Salini v. Morocco,*[93] the Respondent identifies the following characteristics of the term "investment" in Article 25, namely "*(i) a contribution having an economic value; (ii) an expectation of return; (iii) the assumption of an investment risk; and (iv) a certain minimum duration."*[94] The Respondent also accepts the Claimant's assertion that the further criterion of *"[s]ignificance for the host State's development*"[95] is relevant.[96]

104. The Respondent asserts that none of the criteria in both Article 10.28 of the TPA and Article 25 of the ICSID Convention are met. A closer examination of the characteristics of

[91] U.S. Non-Disputing Part Submission, para. 4.
[92] Resp. Rej., para. 403.
[93] Cl. Reply., para. 158, Claimant relies on *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997), **CL-0109** ("*Fedax v. Venezuela*"), and *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001), **CL-0110** (*"Salini v. Morocco*").
[94] Resp. Rej., para. 399.
[95] Cl. Reply., para. 158.
[96] Resp. Rej., para. 400.

the Claimant's business operations reveals that they are akin to commercial transactions and not to investments.

105. As to the **contribution and the commitment of capital** or other resources, the Respondent refers to the Claimant's confirmation that its "*business operation is limited to purchase and sale of the already-mined gold or future mining from a proven supply and authorized commodity traders/sellers*,"[97] and that it "*essentially transacted buying gold in Peru and selling it to buyers abroad.*"[98]

106. The Respondent submits that the Claimant's self-characterization as "*buying gold in Peru and selling it to overseas buyers at a small profit margin*"[99] "*is the textbook description of an ordinary commercial sale, which is not a covered investment.*"[100] This is Peru's and the U.S. Non-Disputing Party's common understanding of Article 10.28 of the TPA according to which "*ordinary commercial contracts for the sale of goods or services typically do not fall within the list*" of Article 10.28 subsection (e).[101]

107. In the Respondent's view, any trader has to spend money to identify suppliers, search for products, to control, weigh, assay and assess the quality of the product such as the purity or gold, and to organize the transport. These are ordinary costs of any transaction, or "*simply the mechanism by which the export and sale is conducted.*"[102] They do not establish "*a real intent to develop economic activities*" and do not transform a commercial contract into an investment.[103] Each contract on a shipment of gold is separate and independent and "*cannot be taken as an indivisible whole.*"[104]

108. The Respondent relies on *Global Trading v. Ukraine*,[105] where:

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[97] Secretariat-Report1, para. 6.78, **C-0106**, confirmed by witness A. Kaloti in Tr. Day 2, 534:19-22.
[98] Cl. Mem., para. 144; Cl. Reply, para. 396.
[99] Cl. Mem., para. 3.
[100] Tr. Day 1, 212: 21-22; 213:1.
[101] U.S. Non-Disputing Party Submission, para. 3.
[102] Resp. C-Mem., para. 341.
[103] Resp. C-Mem., para. 336, Respondent refers to *Phoenix Action, Ltd. v. Czech Republic* ICSID Case No. ARB/06/5, Award (15 April 2009), para. 119, **RL-0183** ("*Phoenix v. Czech Republic*").
[104] Tr. Day 1, 211:2-3.
[105] Resp. Rej., para. 409.

> *the Tribunal considers that the purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention. When the circumstances of the present case are examined and weighed, it can readily be seen that the money laid out by the Claimants towards the performance of these contracts was no more than is typical of the trading supplier under a standard CIF contract […] the Tribunal is compelled to the conclusion that these are each individual contracts, of limited duration, for the purchase and sale of goods, on a commercial basis and under normal CIF trading terms, and which provide for delivery, the transfer of title, and final payment, before the goods are cleared for import into the recipient territory.*[106]

109. The Respondent further asserts that the fact that the Claimant may have committed and spent considerable amounts of money to buy the gold does not establish the criteria of an investment because the activities remained limited to commercial transactions.[107] It quotes *Apotex*, *v. United States*, where the:

> *Tribunal has no reason to doubt that Apotex has committed significant capital in the United States towards the purchase of raw materials and ingredients used in its […] products. But this activity was evidently undertaken for the purposes of manufacturing in Canada products intended for export to the United States (and subsequent sale by others).*

And these activities:

> *amount to no more than the ordinary conduct of a business for the export and sale of goods. And […] simply supported and facilitated its Canadian-based manufacturing and export operations.*[108]

110. The Respondent insists that the Claimant's position is even weaker than in the case of *Apotex*, because it did not even pay the full price for all of the shipments.[109]

111. More generally, the Respondent distinguishes between a contribution in form of the payment of a purchase price on the one hand, and in the form of an investment on the other, following the tribunal in *Poštová v. Hellenic Republic* that held:

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[106] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, (1 December 2010), para. 56, **RL-0177**.
[107] Resp. C-Mem., paras. 338-339; Resp. Rej., para. 405; Tr. Day 6, 1539:10-15.
[108] *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, (14 June 2013), paras. 239, 235, **RL-0202** ("*Apotex v. United States*").
[109] Tr. Day 6, 1539:19.

> *In a sale there is also a contribution of goods or services by the seller and a contribution of money by the buyer, but this is different from the contribution to an economic venture required in order to find an investment*.
>
> *If an "objective" test is applied, in the absence of a contribution to an economic venture, there could be no investment. An investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values*.[110]

112. In the present case, says the Respondent, the Claimant has consistently argued that its operation is limited to the purchase of gold in Peru (and other countries) and its on-sale to third countries. Its contribution is – at best – the payment of the purchase price, which is even doubtful for the five shipments that were not paid at all or only in part. Therefore, no contribution of capital was made to the creation of value, and thus there was no investment.[111]

113. As to the criterion of **risk**, the second requirement for the definition of an investment in the sense of Article 10.28 of the TPA and Article 25 of the ICSID Convention, the Respondent argues, relying on arbitral jurisprudence, that an "*investment risk involves uncertainty as to both the amount that the investor will have to invest in its project in the host State and the return that the investment will yield,"* which cannot be compared to *"ordinary commercial risk.*"[112]

114. The Respondent quotes *Nova Scotia v. Venezuela*, where the tribunal found that "*any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction,*"[113] and *Romak v. Uzbekistan*, where the award describes an "*investment risk*" as "*a situation in which the investor cannot be sure of a return on his investment, and may not know the*

[110] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015), paras. 506, 361, **RL-0194** ("*Poštová v. Hellenic Republic*").
[111] Resp. C-Mem., paras. 336-340; Resp. Rej., paras. 409-412.
[112] Resp. C-Mem., para. 350; Resp. Rej., para. 415.
[113] *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award (30 April 2014), para. 105, **RL-0203** ("*Nova Scotia v. Venezuela*").

amount he will end up spending, even if all relevant counterparties discharge their contractual obligations."[114]

115. In contrast, the Respondent argues, relying on, among other decisions, *Seo v. Korea*, a commercial risk such as the risk of the decline in value of the asset, the risk of being subject to the laws of the host country or the risk of being expropriated is "*inherent in the purchase of* any *asset*" and cannot be equated to an investment risk.[115]

116. Moreover, and in any event, the Respondent asserts, the commercial risks were, as exposed by the Claimant itself, minimal or extremely low.[116] It is the Claimant who confirms that the "*only business risk to KML was its access to the Peruvian gold, and access to financial institutions*" and that its "*risk associated with its trading operations was non-existent*."[117]

117. The Respondent summarizes that for these reasons, the Claimant bore no investment risk and had therefore no investment in Peru covered by the TPA and the ICSID Convention.[118]

118. As to the **duration** as a further required characteristic of a covered investment, the Respondent refers to *Bayindir v. Pakistan*, where the tribunal held in fact that the "*element of duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions*."[119]

119. According to the Respondent, the Claimant cannot argue that its business operations in general spanned over several years and encompassed "*multiple transactions (investments)*"[120] because it alleges the violation of Treaty obligations with respect to no more than five shipments or five individualized transactions of gold. The Claimant's "*alleged investment amounted to no more than the acquisition of gold in Peru, based on*

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[114] *Romak S.A. v. Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award (26 November 2009), para. 230, **RL-0198** ("*Romak v. Uzbekistan*").
[115] Resp. C-Mem., paras. 347-348; Resp. Rej., paras. 415-417, Respondent refers to *Seo Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Final Award (27 September 2019), paras. 130-133, **RL-0191** ("*Seo Jin Hae v. Korea*").
[116] Resp. C-Mem., para. 351; Resp. Rej., para. 416.
[117] Cl. Mem., para. 31.
[118] Resp. C-Mem., para. 352; Resp. Rej., para. 418.
[119] Resp. C-Mem., para. 354; Resp. Rej., para. 419, Respondent refers to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 132, **RL-0196** ("*Bayindir v. Pakistan*").
[120] Cl. Reply, para. 184.

ordinary sales contracts" to be sold on to refineries in third countries so swiftly[121] and – as the Claimant explains – "*efficiently, that in 2013 end-of-the-year total inventory on-hand amounted to less than a day's worth of KML sales.*"[122]

120. The Respondent summarizes that purchase of the five shipments of gold did not have the duration necessary to be considered an "*investment*" under the TPA and the ICSID Convention.[123]

121. As to a **contribution to the State's development** which the Claimant explicitly recognized as one characteristic of an investment under Article 25 of the ICSID Convention,[124] the Respondent alleges that *"[f]ar from contributing positively to Peru's development,*" the Claimant failed to conduct due diligence and contributed to money laundering and illegal mining. Further, by not paying taxes in Peru, the Claimant refused to act as "*a genuine participant in Peru's national economy*" let alone to contribute to its development.[125]

122. The Respondent concludes that the Claimant:

> *has utterly failed to demonstrate that the Five Shipments of Gold possessed the objective characteristics of an investment under the ICSID Convention and the Treaty. The Tribunal therefore lacks jurisdiction ratione materiae over all of Claimant's claims based upon the Five Shipments of Gold*.[126]

(iii) *Lack of legality*

123. The Respondent submits that alleged investments made in violation of the host country's (Peru) law or of international public law "*are not protected by investment treaties or the ICSID Convention*."[127] It states that "*Peru and the United States agree that compliance with domestic law is a prerequisite to protection under the Treaty*," and quotes the U.S. Non-Disputing Party Submission as stating:[128]

[121] Resp. C-Mem., para. 355; Resp. Rej., para. 421.
[122] Cl. Mem., para. 26.
[123] Resp. C-Mem., para. 359; Resp. Rej., para. 421.
[124] Cl. Reply, para. 158.
[125] Resp. Rej., paras. 422-423.
[126] Resp. Rej., para. 424; Resp. C-Mem., para. 360.
[127] Resp. C-Mem., paras. 372, 377; Resp. Rej., para. 445.
[128] Tr. Day 1, 206:2-4.

> *[w]hile Article 10.28 does not expressly provide that each type of investment must be made in compliance with the laws of the host state, it is implicit that the protections in Chapter Ten only apply to investments made in compliance with the host state's domestic law at the time that the investment is established or acquired*.[129]

124. The Respondent recalls that this fundamental view is widely shared by arbitral jurisprudence. It relies on the award in *Phoenix v. the Czech Republic* which states that "*[s]tates cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws*,"[130] as well as in *Mamidoil v. Albania* which states that the:

> *[t]ribunal shares the widely held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions*.[131]

125. The Respondent asserts that this 'widely held opinion' extends also to treaties which do not explicitly formulate such a legality requirement. As stated by the *Phoenix* tribunal and many others, "*the conformity of the establishment of the investment with the national laws is implicit even when not expressly stated in the relevant BIT*."[132]

126. The Respondent declares that Article 10.14 of the TPA does not provide otherwise and claims that "*the award in Bear Creek v. Peru, which found that Article 816 of the Canada-Peru Free Trade Agreement ("FTA") operated to exclude any legality requirement […] is an outlier and is contrary to the long and settled line of jurisprudence.*"[133]

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[129] U.S. Non-Disputing Party Submission, para. 6 (footnotes omitted).
[130] *Phoenix v. Czech Republic*, para. 101, **RL-0183**.
[131] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015), para. 359, **RL-0285**; also – among others – *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 138, **RL-0097** ("*Plama v. Bulgaria*"); *Álvarez and Marín Corporación S.A., et al., v. Republic of Panama*, ICSID Case No. ARB/15/14, Award (12 October 2018), para. 135, **RL-0214**.
[132] *Phoenix v. Czech Republic*, para. 101, **RL-0183**.
[133] Resp. Rej., paras. 458-460, 452-453.

127. The Respondent further says that tribunals have linked the legality requirement to general principles of international law, such as the principle of good faith, of "*nemo auditur propriam turpitudinem allegans*", and of "*clean hands*".[134]

128. Considering this standard and applying an evidentiary "*balance of possibilities*" test, as done by other tribunals,[135] the Respondent says, the Tribunal should "*conclude that the Five Shipments were part of a money laundering scheme related to illegal mining, and thus that they have an illegal origin*". Under circumstances where the Claimant had failed to conduct due diligence and comply with obligations under Peruvian law to verify that the gold was lawfully mined, the Tribunal should accept, based on the preponderance of evidence, that the five shipments of gold were illegally procured.[136]

129. The Respondent concludes that as a consequence of the Claimant's (and the suppliers') conduct, the five shipments "*do not deserve protection under the Treaty, and Kaloti's claims must be dismissed for lack of jurisdiction ratione materiae*."[137]

3) *Other alleged investments in Peru*

130. The Respondent submits that "[i]*n addition to the Five Shipments of Gold and Kaloti as a 'going concern,' Claimant mentioned sundry other alleged investments*" such as the consideration to establish a refinery in Peru, advertisement investments, an apartment, an office, and the employment of personnel.[138]

131. It alleges that the Claimant had the burden to prove the existence of an investment and that none of these items meet this burden.

132. As to the idea of a refinery in Peru, the Claimant has limited its evidence to the presentation of minutes of a KML shareholder meeting which "*grant[s] Mr. Awni Kaloti the permission to studying the opportunity to establishing/building gold refinery and trading house in*

[134] Resp. Rej., paras. 454-457.
[135] Resp. Rej., para. 464, Respondent relies on *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013), paras. 182-183, **RL-0024**.
[136] Resp. C-Mem., paras. 374-375; Resp. Rej., paras. 463-465.
[137] Resp. C-Mem., para. 377; Resp. Rej., para. 466.
[138] Resp. Rej., paras. 479-486; Resp. C-Mem., paras. 342-345.

Lima."[139] The Respondent argues that such authorization is not an asset nor even a commitment to invest,[140] and does not prove the intention "*to develop any economic activities in Peru beyond the mere purchase of gold and minimal services to export that mineral from the country*";[141] as to the advertisement investments, "*Claimant did not even bother to explain what such investments are*" or why advertisement should qualify as an investment;[142] as to the apartment, it was the private residence of the Claimant's operational manager in Lima, rented for one year (July 2013-July 2014) with no sublease allowed;[143] as to the office, it "*was in fact a facility that the courier company Hermes leased to Kaloti as part of a broader service agreement for Hermes' 'transportation and storage [of] KML's precious metals' prior to their export to the United States*", which was valid for one year, until July 2014, as specified in the Lease Agreement between the Claimant and Hermes;[144] and finally as to the personnel, the Claimant ran its business mostly from the U.S., and had concluded "*three service contracts for the performance of specific tasks regarding the testing of minerals before their export and eventual acquisition by Kaloti,*" which the Claimant could terminate at any time.[145]

133. The Respondent points to Mr. Kaloti's witness statement[146] where he confirms an "*extremely low cost of financing of operations, and low overhead.*"[147]

134. The Respondent concludes that these activities and short-term contracts do not amount to a business infrastructure, an economic activity and an investment in Peru, covered by Article 10.28 of the TPA and Article 25 of the ICSID Convention but related merely to the

[139] Minutes of KML granting permission to study the opportunity to establish a gold refinery in Peru, dated 8 April 2023, **C-0049**; reproduced in Cl. Reply, para. 163.
[140] Resp. Rej., paras. 480-482.
[141] Resp. C-Mem., para. 346.
[142] Resp. Rej., para. 483.
[143] Resp. C-Mem., para. 343; Resp. Rej., para. 485.
[144] Resp. C-Mem., para. 342; Resp. Rej., para. 485; the Lease agreement between Hermes Transportes Blindados S.A. and KML, dated 8 July 2013 is reproduced as Exhibits **C-0028** and **R-0208**.
[145] Resp. C-Mem., paras. 344, 358; Resp. Rej., para. 485. *See* Employment agreements between KML and Ms. Josefina Boza Celi, Mr. Dante Joaquín Cornejo Pérez and Mr. Carlos Enrique Blume Dibos, **C-0037**.
[146] Resp. C-Mem., para. 345.
[147] Kaloti-WS1, para. 36, **C-0103**.

commercial contracts of purchasing and exporting gold, and providing the mechanism to conduct these operations.[148]

b. Claimant's Position

135. The Claimant submits as a threshold matter that:

> *[i]t is important to note also that, at the jurisdictional stage, a tribunal must be guided by the case as put forward by the Claimant in order to avoid breaching the Claimant's due process rights*.[149]

136. In that perspective, it has consistently argued that:

> *[a]t all relevant times of the measures complained of in this arbitration (since the first temporary gold seizure occurred on November 29, 2013, to November 30, 2018), KML directly controlled protected investments, including, but not limited to, tangible movable objects such as gold, and its infrastructure for testing, processing, and selling gold*.[150]

137. The Claimant asks the Tribunal to subsume these investments under Article 10.28 of the TPA, to interpret that provision only in accordance with Article 31.1 and 31.2 of the VCLT. It "*strongly disagree(s)*" with the statement of both Peru and the U.S. "*that the submissions of the United States, to the extent that it* [sic] *coincides to the submissions that Perú has made in its written submissions in this case, should be taken as an agreement. […] Nothing of what has been submitted in this Arbitration comes from an authority with treaty-making powers or a senior representative of Perú or the U.S. like an Ambassador or a representative before an international organization.*"[151]

138. The issue, it says, becomes relevant for instance when interpreting the term "characteristics" in Article 10.28 of the TPA. The text enumerates three such characteristics that are linked by an "or". It follows that "*by having met one characteristic KML has already met its burden*," contrary to the opinion of the Respondent.[152] It further quotes the oral submission of the U.S., where it states that in order to qualify as an

[148] Resp. C-Mem., paras. 341, 346, 358; Resp. Rej., paras. 486, 487.
[149] Tr. Day 1, 60:2-6; Tr. Day 6, 1427:10-13.
[150] Cl. Mem., para. 81; Cl. Reply, para. 154.
[151] Tr. Day 6, 1469:11-14; 1471:11-15.
[152] Cl. Reply, para. 161.

investment in accordance with Article 10.28 of the TPA, "*it can meet some but not necessarily all of the requirements of that Article.*"[153]

139. In any event, the Claimant argues, the Respondent distorts the award in *Seo v. Korea*,[154] where the tribunal had to decide whether a fourth characteristic should be added to the list of Article 11.28 of the FTA between Korea and the United States, which corresponds, with respect to the three characteristics, exactly to Article 10.28 of the TPA. The tribunal decided that "*the three listed characteristics […] were deemed particularly important to the drafters of the KORUS FTA*," and that a fourth one could not be added to be considered cumulatively, because "*the three listed characteristics are not cumulative requirements.*"[155] The Claimant interpreted the *Seo* decision as stating that the characteristics of that FTA were "*concurrently applicable*," which is different from the text of the TPA.[156]

140. In any event, the Claimant affirmed that "*KML did meet the three characteristics: KML did commit 'capital or other resources' in Peru, did have 'the expectation of gain or profit,' and did assume 'risks' in its investment in Peru*."[157]

1) The going concern enterprise

141. The Claimant asserts that although "*the essence of this case relates to Five Shipments of gold,*"[158] the investment "*was a going concern that actually produced revenues for Kaloti Metals as a minimum in the real world until 2018. That operation, the going concern, is the Investment, not the individual contracts that […] surrounded or through which the Investment was structured.*"[159] It was "*not a few isolated transactions*," which would not qualify as investments, but the purchase of gold "*continuously through the years.*"[160]

[153] Tr. Day 6, 1434:2-3.
[154] Cl. Reply, para. 161.
[155] *Seo Jin Hae v. Korea*, paras. 58, 96, 97, **RL-0191**.
[156] Cl. Reply, para. 161.
[157] Cl. Reply, para. 161.
[158] Tr. Day 6, 1448:1-2.
[159] Tr. Day 6, 1429:19-22; 1430:1-2.
[160] Cl. Reply, paras. 179, 184.

142. It is true that KML is a company incorporated in the U.S. and continues to be legally in good standing with the state of Florida and the United States, but it was equally registered in Peru with the SUNARP "*as a company and ongoing business,*"[161] and made contributions in Peru "*in terms of know-how, equipment, personnel, physical office, and leased apartment*," which it held until 2018, and had an economic value in accordance with Article 10.28 of the TPA.[162] KML also explored the establishment of a refinery in Lima, which although "*in and of itself, may not be an investment, it should be considered as part of the activities and the value of Claimant's going-concern operation inside Peru.*"[163]

143. Claimant further affirms that its founder and CEO, Mr. Kaloti, devoted his time and resources to travel several times to Lima, to study the market and the legal framework, buy legal, auditing and other expert advice. As a "*prudent manager*," he set up "*a small-sized 'shop' in Peru*," and leased instead of buying the office and an apartment, and hired staff in Peru that "*were independent contractors instead of employees for Peruvian labor-law purposes*".[164] All "*the payments made into Peru […] were originated from bank accounts in the United States. All the gold purchased by KML in Peru was exported to the United States.*"[165]

144. What matters, the Claimant says, is that there "*were people inside Peru with authority to represent the Company, who met with customers who had a role in closing the transaction and purchasing gold and sourcing gold, who were physically inside Lima until 2018.*"[166]

145. As witness Llivina confirmed, when asked about "*the role of the individuals based in Peru*"[167]:

> *They could also take closings, but I entered those in the system. They could determine whether a transaction was conducted or not, they could negotiate the rates up to a certain limit. They had the capabilities of a regular office […] If they took a closing, they could take it and pass it on. They could*

[161] Cl. Reply, paras. 155, 454; Cl. Mem., paras. 76-77.
[162] Cl. Reply, paras. 163, 169; Llivina-WS, para. 24, **C-0105**; Tr. Day 1, 21:7-12; Tr. Day 6, 1429:4-8; 1445:17-19; 1450:16-19.
[163] Tr. Day 1, 21:20-22; 22:1; Cl. Reply, para. 163.
[164] Cl. Reply, paras. 165, 167; Kaloti-WS1, paras. 17-20, **C-0103**.
[165] Cl. Reply, para. 47.
[166] Tr. Day 6, 1434:19-22.
[167] Tr. Day 3, 693:19-20.

> *decide to increase the rates. After an account was opened, they could close it. And they could make decisions.*
>
> *[…]*
>
> *All of the accounts, all of them, had to be approved for a transaction to begin in Miami. They had to be approved by the Compliance Officer Pacco.*
>
> *[…]*
>
> *They [the contracts] were signed between Mr. Kaloti as KML representative and the representatives of the companies that supplied the metal*.[168]

146. In addition, the scale or the costs of an investment is not a criterion for its existence, as long as an asset contributes to an economic activity.[169] The Claimant relies on *Phoenix v. Czech Republic,* where the Tribunal held:

> *If there is indeed a real intent to develop economic activities on that basis, the existence of a nominal price is not a bar to a finding that there exists an investment*.[170]

147. The Claimant distinguishes its situation clearly from the one prevailing in *Apotex v. United States*, which is quoted by the Respondent, arguing that Peru has made a "*bad faith analogy*" which is "*out of context*".[171] In *Apotex*, the tribunal had not found an investment because "*it did not have offices or a physical presence in the host country*," while the Claimant had a strong physical presence inside Peru.

148. The Claimant explains in what way it met the requirements of Article 10.28 of the TPA, as well as those of Article 25 of the ICSID Convention, as "*initially outlined in Fedax v. Venezuela in 1997, and then Salini v. Morocco in 2001.*"[172]

149. As to the **contribution and the commitment of capital**, the Claimant submits that "*beyond the real estate rent, salaries, other fixed infrastructure costs, and advertisement investments, KML actually bought 344,421 kg of gold worldwide between 2012 and 2018,*

[168] Tr. Day 3, 693:21-22; 694:1-9; 699:6-9; 700:1-4.
[169] Cl. Reply, para. 165.
[170] *Phoenix v. Czech Republic*, para. 119, **RL-0183**.
[171] Cl. Reply, para. 162.
[172] Cl. Reply, para. 158, Claimant relies on *Fedax v. Venezuela*, para. 43, **CL-0109**; and *Salini v. Morocco*, para. 52, **CL-0110**.

from which 161,168 kg of that gold was in Peru (alone). That amount, in itself, is very significant; and the corresponding prices were paid to sellers inside Peru. KML contributed money and assets inside Peru."[173] "*Only in the Year 2013, Kaloti paid for approximately 1.3 billion, with a B, of gold, most of it in Peru to Peruvian banks. All that money went into the Peruvian economy.*"[174]

150. As to the regularity and **expectation of gain and profit**, the Claimant submits that "*KML was financially cash-flow positive in 2012, 2013, 2016, and 2017. KML operated in Peru until 2018 and bought gold in Peru until, and including, such year. Due to the nature of KML's investment and its well-established profit margin, it is reasonable to conclude that absent Peru's measures, its continuous activity in Peru would have remained profitable well after November 30, 2018*."[175]

151. As to the **risk**, the Claimant's position has evolved. While it explains in its Memorial that "*the only business risk to KML was its access to the Peruvian gold, and access to financial institutions*" and that its "*risk associated with its trading operations was non-existent,*"[176] it submits in its Reply that "*KML assumed, and in fact faced, an operational or investment risk in Peru, not only the risks of a few isolated transactions of purchase. KML established ground operations to invest in multiple purchases (and the infrastructure required to make such purchases, and to process the gold), over an indefinite period of time, without knowing with certainty what would happen with the operation. KML also considered establishing a refinery in Peru and planned to expand its market share in Peru.*"[177] "*Most importantly, […] the risk of loss of the gold was bared [sic] by Kaloti. If after delivery of the gold to Kaloti at the offices in Hermes, that […] gold was lost by lightning, fire, or by the illegal actions or arbitrary actions under the Treaty of the Peruvian Government, that loss was for Kaloti Metals, not for those Sellers.*"[178]

[173] Cl. Reply, para. 158.
[174] Tr. Day 1, 68:18-21.
[175] Cl. Mem., para. 27.
[176] Cl. Mem., para. 31.
[177] Cl. Reply, paras. 158, 184.
[178] Tr. Day 1, 67:16-22; 68:1.

152. As to the **duration**, the Claimant submits that "*KML actually operated in Peru from 2012 to 2018 (seven years). This was not based on one or a couple of contracts with such fixed duration, but on multiple transactions (investments), and a track record that has been sufficiently established*" by the undisputed list of all purchases between 2012 and 2018.[179]

153. As to the **contribution to Peru's development**, the Claimant submits that "*beyond the real estate rent, salaries, other fixed infrastructure costs, and advertisement investments, KML actually bought 344,421 kg of gold worldwide between 2012 and 2018, from which 161,168 kg of that gold was in Peru (alone)*"; that "*KML processed and assayed the gold inside Peru. Value was added to the gold itself. Also, KML contributed to the economy of Peru, beyond the purchase of gold, by paying commercial and residential leases (rentals of an office and an apartment), attending marketing events, making advertisements, and hiring local personnel, among other things*"; and that "*Kaloti had personnel who trained, Kaloti had a law firm who [was] paid. Kaloti had accountants in Peru who Kaloti paid. All that Investment, again, that went into the Peruvian economy, all that money that was put into the Peruvian economy by the Claimant, […] fully contributed to the development of Peru.*"[180]

154. "*In summary*," the Claimant affirms, "*KML did much more than simply entering into commercial contracts inside Peru. KML's assets in Peru constituted an investment under the TPA*."[181]

2) The five Shipments of Gold

155. The Claimant alleges that it "*is really hard to fathom how gold (a physical asset) owned by KML and seized by Peru inside its territory, would not qualify as an investment for purposes of the Treaty. Peru did not take away KML's ongoing personal rights, or contracts, to purchase gold in Peru; it took away physical inventory of actual gold owned by KML, even after KML disbursed monies to several sellers in Peru.*"[182]

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[179] Cl. Reply, paras. 158, 184, Claimant refers to KML transaction summary of all purchases between 2012 and 2018 in Exhibit **C-0030**.
[180] Tr. Day 1, 68:21-22; 69:1-6; Cl. Reply, paras. 184, 158.
[181] Cl. Reply, para.185; Cl. Mem., paras. 42-44.
[182] Cl. Reply, para. 156.

156. It asserts that the five shipments of gold were an "*inventory*" and the inventory, taken together, was an investment,[183] "*even if commercial contracts, alone or isolated, are not investments.*"[184]

(i) *Ownership and Control*

157. The Claimant submits that the Respondent has never questioned the Claimant's ownership of the five shipments of gold until its Counter-Memorial of 5 August 2022. In fact, for all shipments, the requirements for the transfer of legal title from the suppliers to the Claimant under Peruvian law were met, as is recognized by the suppliers and – for Shipment 5 – also by the Peruvian courts.[185]

158. The Claimant explains that these requirements were a valid contract and the '*traditio'*. Once these conditions are met, "*a sale is perfected, therefore the purchaser becomes the legal owner.*"[186] "*Actual payment of the purchase price is not a requisite for the conveyance of legal title regarding movable assets in Peru.*"[187] It explains further, as recognized by both experts on Peruvian law, that oral contracts are valid and binding.[188]

159. Therefore, it says, the lack of total payment of the shipments did not hinder the transfer of title.

160. The Claimant refers to the presentation of its expert on Peruvian law, who confirms that the purchase transactions were completed in accordance with Article 947 of the Civil Code,[189] because a consensual sales contract was concluded, which requires an agreement on the object and on the price but not its actual payment, and the gold was physically transferred to the Claimant, *i.e.*, the required *traditio* was executed.[190]

161. Further, the Claimant stresses that Peru initiated the immobilizations and seizures in the context of money laundering investigations against the sellers of the gold and not against

[183] Cl. Mem., paras. 41, 47, 49; Cl. Reply, paras. 12, 15, 383, 385¸ Tr. Day 6, 1428:12-14.
[184] Cl. Reply, para. 184.
[185] Cl. Mem., paras. 38-39, 49; Cl. Reply, paras. 29-32.
[186] Cl. Reply, para. 33.
[187] Cl. Reply, para. 31.
[188] Tr. Day 6, 1454:2-5.
[189] Peruvian Civil Code, publication dated 25 July 1984, Art. 947, **CL-0044**.
[190] Coria-Report2, paras. 2.1-2.4, **C-0139**.

KML. In fact, KML was never subject to criminal investigations, indictments, let alone convictions in Peru or elsewhere in the world. Even if the sellers had acted improperly and criminally, this does not concern KML nor the inventory owned by it.[191]

162. The Claimant asserts that it should be shielded against the consequences of the suppliers' possible wrong-doing by the fact that it was at all times a good faith purchaser with no connection to criminal third parties. In order to comply with Peruvian legislation and to examine that its suppliers were acting legally, it had "*developed a very robust compliance and anti-money laundering manual in order to operate in Peru safely and legitimately*,"[192] and it worked only with sellers that were registered in the *Registro Especial de Comercializadores y Procesadores de Oro* (**RECPO**), which confirmed their good standing with the government and the authority to trade gold.

163. The Claimant points out that it had hired and trained a compliance officer, who in turn developed the compliance program and manual. The officer testified:

> *The KML Manual contained instructions and guideline techniques to investigate the parties with whom KML did business (especially, suppliers of gold and silver) based on know-your-client ("KYC") good practices, and the traceability of gold and silver from their origin and through their processing. The KML Manual, and the compliance program implemented based on it, was highly effective and conducted with very high professional standards (based on my professional opinion); however, no AML program, whatsoever, can offer a bullet-proof guarantee of 100% infallibility*.[193]

164. He further described that the shareholders of the suppliers were identified and researched, using a special tool, the "*World Check*,"[194] and that a thorough due diligence was conducted. This procedure was also respected with regard to the four sellers having supplied the five shipments. They had all applied before to be listed and had been verified.[195]

[191] Cl. Reply, paras. 41-49, 194.
[192] Cl. Mem., para. 21; Cl. Reply, paras. 85-86.
[193] Llano-WS, para. 8, **C-0104**.
[194] Llano-WS, para. 19, **C-0104**.
[195] Llano-WS, para. 17-18, **C-0104**; Cl. Mem., para. 39.

165. During cross-examination, the officer admitted that the documentation regarding the suppliers was not complete, and a number of "*red flags*" were detectable,[196] but confirmed that at the time everything was done to respect the process.

166. The Claimant asserts that these efforts plainly satisfy its due diligence obligations and that they document its good faith during the transactions. It had become the legitimate owner of the shipments. It distinguishes between possession and ownership: Even if under Peruvian law seizures could be extended to goods that are in the possession of third parties, they do not extend to assets "*owned by such third parties.*"[197]

167. Finally, the Claimant's expert on Peruvian law examined Article 948 of the Civil Code.[198] He held that the provision protects a good faith acquirer. As to the second sentence ("*Exceptions to this rule are lost property and property acquired in violation of criminal law*"), he noted "*that the criminal exception contemplated by Peruvian law in Article 948 of the CC is not applicable to KML in the present case because it has not been proven that KML has committed a crime in or through its acquisition (purchase) of the gold.*"[199]

168. However, in his oral testimony he opined "*that, for 948, when the property is the fruit of a crime, it doesn't matter whether there is good faith or bad faith. We agree on that. That's why I was saying that when an object is the fruit of a crime, then, of course, there is no protection.*"[200]

169. As to the alleged illegality of the sold gold and its consequences for its good faith acquisition, the Claimant asserts that "*it is not correct that, under Peruvian law or any law, these Measures could last seven or eight years. That is simply not correct. And even if you believe that this gold is illegal, again, which it's not, no Peruvian court said that within a reasonable time. They, for purposes of the Treaty, they lost the opportunity to say that this gold is illegal. They can say whatever they want for Peruvian law purposes. But for*

[196] Tr. Day 6, p. 1512 *et seq*.
[197] Cl. Reply, para. 70.
[198] Peruvian Civil Code, publication dated 25 July 1984, Art. 948; the text is reproduced in paragraph 96 above, **CL-0044**.
[199] Coria-Report2, para. 2.7, **C-0139**.
[200] Tr. Day 4, 959:20-22.

purposes of this Treaty because of the delay, Peru lost the opportunity to say that this gold is illegal. And again, illegal mining and illicit mining is not what is being investigated in connection with this gold."[201]

170. The Claimant asserts: "*[h]owever, even if there were problems of title allegedly, which, in fact, there were none, under Peruvian law, it is unquestioned that Kaloti had the control of this gold, physical control of this gold at the offices of Kaloti in Hermes. Had it not been for the Measures of Perú, Kaloti would have sent that gold to Miami, and Kaloti would have profited from the export of that gold.*"[202] "*Kaloti Metals became the owner of the Five Shipments legitimately as a good-faith purchaser under Peruvian law. But even if not, these Five Shipments were in our physical possession and control, and when the shipment was lost, it was lost for Kaloti, not for the Sellers.*"[203]

171. Thus, the Claimant deduces, the requirements of ownership or control over assets in the meaning of Article 10.28 of the TPA are met.

(ii) *Covered Investment*

172. The Claimant asserts that "*the essence of this case relates to Five Shipments of gold.*"[204] They must not be considered as "*a few isolated transactions of purchase*" and thus commercial contracts, but as parts of "*multiple purchases*," which it executed "*continuously through the years.*"[205] "*KML made hundreds of previous transactions, some with the same suppliers, a fact that had led KML to reasonably believe that it would not encounter any problems with buying, and later selling gold in Peru.*"[206]

[201] Tr. Day 6, 1453:5-17.
[202] Tr. Day 6, 1430:11-18.
[203] Tr. Day 1, 66:21-22; 67:1-5.
[204] Tr. Day 6, 1448:1-2.
[205] Cl. Reply, paras. 179, 184.
[206] Cl. Reply, para. 391.

173. In its "*[g]old trading operations*," "*[i]t invest[ed] a significant sum of money to purchase gold in Peru, and setting a physical operation in that country*".[207] It "*essentially transacted buying gold in Peru and selling it to buyers abroad.*"[208] That was its "*business model.*"[209]

174. The purchased and received gold are "*tangible movable objects*" and form an "*inventory*"[210] and an investment based on these multiple purchases.[211] The Claimant summarizes: "*Kaloti may have been a trader for some senses or some meanings of that word. […] Kaloti was a Buyer that took possession, title, and risk of loss over this gold. And this inventory was an investment for Kaloti Metals.*"[212]

175. As to the characteristics, the Claimant asserts that the analysis in paragraphs 149-153 above relating to the going concern business enterprise, of which inventories are a part, extends to the five shipments: *First*, KML purchased the five shipments and gold worth more than USD 17 million and had paid most of the price. That was a significant amount and thereby a significant **contribution of capital** which went into the economy of Peru; *second*, KML would have profited from the well-established profit margin for the on-sale of the five shipments to Dubai or other parts of the world and had, therefore, an **expectation of gain and profit**; *third*, the gold of the five shipments participated in the general operational or investment **risk**, because when executing the transactions it could not know the result of the operation, and because it bore the risk of loss once it had been delivered at its offices in Hermes; *fourth*, the five shipments were elements of the hundreds of transactions that spanned over seven years, which satisfies the characteristic of **duration**; *fifth*, the five shipments were handled by KML's infrastructure on the ground in Peru, money went into the Peruvian economy, and the transactions conducted with due diligence contributed to the fight against money laundering, helped with the plans to formalize the artisanal production, and thus contributed to Peru's **development**.[213]

[207] Cl. Mem., paras. 42, 31,14, 33, 61.
[208] Cl. Mem., para. 144.
[209] Cl. Reply, para. 396.
[210] Cl. Mem., paras. 81, 165.
[211] Cl. Reply, para. 184.
[212] Tr. Day 6, 1433:10-17.
[213] For the latter aspect, *see* Cl. Reply, para. 158.

176. For these reasons, the requirements of Article 10.28 of the TPA and Article 25 of the ICSID Convention are met and the characteristics of Article 10.28 of the TPA are satisfied.

(iii) *The legality requirement*

177. The Claimant asserts that – contrary to the Respondent's argument – it "*cannot be concluded that KML's investment in Peru had to be made in compliance with Peruvian law in order for this tribunal to have jurisdiction to hear its claim.*"[214] The Claimant relies on *Bear Creek v. Peru*, where the tribunal interpreted Article 816.1 of the FTA between Canada and Peru, which corresponds in the relevant part literally to Article 10.14.1 of the TPA. The tribunal found:

> *Article 816 identifies the legality requirement as a "special formality" that the host State is entitled to adopt if it so wishes. Since nowhere in the FTA or otherwise in the record is there an express or implied provision of law to the effect that Peru made use of this option, it can only be concluded that there is no jurisdictional requirement that Claimant's investment was legally constituted under the laws of Peru.*
>
> *The Tribunal agrees with Claimant that under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties. […] . In fact, the wording of the FTA provides further clarity, because not only does it not mention such a limit, but, by the wording cited above, provides that such a limit is considered a formality which would have to be expressly included to be effective. Here, no such formality was expressly included*.[215]

The tribunal noted that the relevance of good faith and illegality should be examined with respect to the merits.[216]

178. The Claimant notes that Peru did not adopt special formalities with respect to the legal constitution of the investment, as required by Article 10.14.1 of the TPA, and that, therefore, legality is not a requirement for the investment.

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[214] Cl. Reply, para. 197.
[215] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017), paras. 319-320, **CL-0111** ("*Bear Creek v. Peru*").
[216] *Bear Creek v. Peru*, para. 324, **CL-0111**.

179. The Claimant continues, however, to confirm that, in any event, it "*fully complied with all applicable Peruvian laws*"[217]. As described above, KML was incorporated in the United States and registered in Peru and continues to be legally in good standing. Further, it conducted its business in Peru professionally and in continually exercising due diligence. "*Peru has simply not pointed to any specific law or regulation allegedly breached by KML itself.*"[218]

3) Other investments

180. The Claimant asserts that "*KML did not limit itself to buying gold from Miami.*"[219] Rather, after having "*made its first investments in Peru, through the purchase of relatively small quantities of gold*" in 2012, its "*investments in Peru [having] increased exponentially in 2013*" and having "*continued to invest in Peru, purchasing gold, including up until 2018,*" it "*opened and equipped an physical office in Lima […] with capabilities to weigh and assay gold for subsequent export to the United States*" in 2013. It also rented an apartment and hired local personnel that assisted in the operations of customer verification, as well as the purchase, transport, testing and export of gold.[220]

181. It observes that the "*reality is that all investments normally involve commercial contracts*" but they were operated within a going concern business enterprise that had created a physical infrastructure "*on the ground*" in Peru.[221] Since the physical infrastructure was part of the going concern, it shared the characteristics that have been exposed in Sub-chapter V.B.(b).(i) (paragraphs 141-154).

***

182. Taken together, the Claimant asserts that both the going concern business enterprise with its infrastructure for testing, processing and selling gold and the five shipments of gold are covered investments in accordance with Article 10.28 of the TPA and Article 25 of the

[217] Cl. Reply, para. 197.
[218] Cl. Reply, para. 198.
[219] Cl. Reply, para. 172.
[220] Cl. Mem., paras. 14, 18-24, 42, 44, 81; Cl. Reply, paras. 158, 163-170, 184; Tr. Day 1, 67:6-10.
[221] Cl. Reply, paras. 184, 164

ICSID Convention. They are protected, and the Centre has jurisdiction and the Tribunal has competence *ratione materiae* to hear and decide the dispute over them.[222]

2. Objection *ratione temporis*: The Relevance of Limitation for the Consent to Arbitration (Article 10.18 of the TPA)

183. It is not contested between the Parties, although they draw different conclusions, (i) that the Claimant submitted its Request for Arbitration on 30 April 2021, (ii) that Article 10.18.1 of the TPA provides that "*[n]o 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 […] has incurred loss or damage,*" and (iii) that the three-year calculation backwards from the submission of the Request for Arbitration leads to 30 April 2018, the cut-off date according to the Respondent.

a. Respondent's Position

184. The Respondent submits:

- That "*the Temporal Limitations Provision is a condition of consent to arbitration that limits the jurisdiction ratione temporis of this Tribunal*";[223]

- That this condition is "*strict,*" "*clear and rigid*"; it must be met without exception and no claim may be brought once the temporal limitation period has elapsed;[224]

- That claimants have the burden to prove that they have not acquired knowledge or should not have acquired knowledge of the alleged facts and conduct of the other party that they qualify as breach of treaty obligations, whereby "*it is not necessary*" – as the

[222] Cl. Mem., paras. 80-81; Cl. Reply, paras. 153-154.
[223] Resp. Rej., para. 492; Resp. C-Mem., paras. 318-320.
[224] Resp. Rej., para. 531, Respondent relies – among others – on *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections (31 May 2016), paras. 192, 199, **RL-0135** ("*Corona Materials v. Dominican Republic*").

tribunal in *Corona Materials v. Dominican Republic* held – "*that a claimant be in a position to fully particularize its legal claim*";[225]

- That, cumulatively, claimants have the burden to prove that they have not acquired knowledge or should not have acquired knowledge that the alleged breach caused damages, whereby a "*claimant may know that it has suffered loss or damage even if the extent or quantification of the loss is still unclear*," and cannot "*be precisely determined*".[226] The Respondent also relies on *Spence v. Costa Rica*, where the tribunal held:

> *On the issue of whether loss or damage must be crystallised, and whether the claimant must have a concrete appreciation of the quantum of that loss or damage, the Tribunal agrees with the approach adopted in Mondev, Grand River, Clayton and Corona Materials that the limitation clause does not require full or precise knowledge of the loss or damage. Indeed, in the Tribunal's view, the Article 10.18.1 requirement, inter alia, to point to the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.*[227]

- That Article 10.18.1 of the TPA unequivocally points to the "first" knowledge and claimants must not thwart this crucial element by choosing the latest and not the first in a set of actions, which would – as the tribunal in *Grand River v. the United States*

[225] Resp. C-Mem., para. 398 (footnote 820), Respondent quotes *Corona Materials v. Dominican Republic*, para. 194, **RL-0135**.
[226] Resp. C-Mem., para. 398 (footnote 820); Resp. Rej., para. 513, Respondent quotes *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 87, **RL-0146**, and *Corona Materials v. Dominican Republic*, para. 194, **RL-0135**.
[227] Resp. Rej., para. 513, citing to *Spence International Investments, et al., v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017), para. 213, **RL-0138** ("*Spence v. Costa Rica*").

held – "*render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.*"[228]

185. According to Peru, the Parties to the TPA are in agreement on these principles and its interpretation in this regard, which must be taken into account, as provided for in Article 31.3(a) or (b) of the VCLT.[229] It refers to the U.S. Non-Disputing Party's Submission, which states:

> *Article 10.18.1 imposes a ratione temporis jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute. […] Because a claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.*
>
> *The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification." An investor first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot first be acquired at multiple points in time or on a recurring basis. […]*
>
> *Thus, where a "series of similar and related actions by a respondent state" is at issue, a claimant cannot evade the limitations period by basing its claim on "the most recent transgression" in that series. To allow a claimant to do so would "render the limitations provisions ineffective[.]" […]*
>
> *With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.*"[230]

186. Applied to the circumstances of the actual dispute, the Respondent alleges that "*[i]n this case, there is ample evidence which unequivocally proves that Claimant did acquire knowledge of the alleged breach and loss before the Cut-Off Date*";[231] that "*most of its*

[228] Resp. Rej., para. 498; *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006), para. 81, **RL-0136**.
[229] Tr. Day 1, 226:1-8; 236:14-21.
[230] U.S. Non-Disputing Party Submission, paras. 11-14 (footnotes omitted).
[231] Tr. Day 6, 1521:10-13.

claims are time-barred";[232] and that out of "*the following four measures: (i) depriving Kaloti of its property without due process of law; (ii) failing to return the gold to Kaloti within a reasonable amount of time; (iii) treating similarly-situated investors differently in judicial proceedings; and (iv) refusing to engage in discussions with Kaloti following receipt of Kaloti's notice of dispute… the Tribunal lacks jurisdiction over the first two because Kaloti first acquired knowledge of those alleged breaches […] prior to the Cut-off Date.*"[233]

187. During the Hearing, the Respondent confirmed that it does "*not take the position that every single one of the claims is time-barred*," and that, indeed, "*the claim that Peru breached the minimum standard of treatment and/or other provisions of the Treaty by failing to negotiate with Claimant after the dispute had arisen*" is not time-barred, being "*the sole claim*";[234] thus excluding the breach due to different treatment of similarly situated investors, as asserted in paragraphs 408-409 of the Respondent's Counter-Memorial quoted above.

188. The Respondent presented its arguments as to the limitation period for the Claimant's different claims as follows below.

189. With respect to alleged breaches of the obligation of *"treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*" (Article 10.5 of the TPA – Minimum Standard of Treatment "**MST**"), where the Claimant alleges (a) breaches of due process and (b) the failure to return the five shipments of gold within a reasonable period of time, the Respondent asserts that:

a. All actions and requests initiated by the Claimant as well as the rejections by Peru's different authorities happened between 2013 and 2016, *i.e.*, long before the cut-off date of 30 April 2018;

[232] Tr. Day 1, 231:9-10; Resp. Rej., para. 529.
[233] Resp. C-Mem., paras. 408-409.
[234] Tr. Day 6, 1533:18-21; 1534: 4-8, 14.

b. The immobilizations by SUNAT as well as the seizures by judicial authorities were executed between 2013 and 2015, and that no action was taken after these dates and before 30 April 2018.

190. The Respondent submits, further, that the Claimant's own documentation evidences it had actual knowledge about the facts and how it would use them to construe the breaches of the TPA and damages.

191. The Respondent refers to the Claimant's "*Notice of Intent to Submit a Claim to Arbitration under the Trade Promotion Agreement Peru-United States,*" dated 3 May 2016.[235] In the 'Notice', the Claimant "*gives notice of its intention to submit a claim to arbitration against the Republic of Peru*" after "*the refusal of Peruvian administrative and judicial authorities to return*" immobilized and/or seized gold.[236] It specified four heads of damages caused by the seizure, including damage for the loss "*of reputation as an international gold trader,"* amounting to more than USD 32 million.[237] Peru's "*conducts […] violate in various ways the Peru-United States Trade Promotion Agreement*,"[238] and:

> *[s]pecifically, Peru:(a) has breached the obligation in Article 10.5 of the Treaty to accord Kaloti's investment fair and equitable treatment, full protection and security, and treatment no less favorable than that required by international law;*
>
> *(b) continues to exercise unfair and arbitrary treatment that has the potential to culminate in the expropriation of Kaloti's protected investment, in violation of the obligation in Article 10.7 of the Treaty; and,*
>
> *(c) has been preventing the transfer of the protected investment, arbitrarily using its customs and judicial system. Thus, the Judges and Prosecutors, by failing to apply the criminal law fairly and in good faith in the treatment of their investment, violate the obligation of Article 10.8(4) of the Treaty*.[239]

192. Equally in May 2016, the Claimant submitted requests to Peruvian courts to lift the seizures of the gold. It referred to the 'Notice of Intent', quoted Articles 10.5 and 10.7 of the TPA

[235] Resp. C-Mem., paras. 414-418; Resp. Rej., para. 516; Kaloti's First Notice of Intent, dated 3 May 2016 was submitted both by Claimant as Exhibit **C-0158** and Respondent as Exhibit **R-0242**.
[236] Kaloti's First Notice of Intent, dated 3 May 2016, paras. 1, 5, **R-0242**.
[237] *Idem*, paras. 58, 68, **R-0242**.
[238] *Idem*, para. 66, **R-0242**.
[239] *Idem*, para. 67, **R-0242**.

on MST and on Expropriation, respectively, explained that Peru has violated its obligation to grant FET, that the seizure "*has the potential to culminate in the indirect expropriation of the protected investment*," and that, as in another ICSID award against Peru, an arbitral tribunal in a dispute between Kaloti and Peru would foreseeably condemn Peru to compensate for damages caused by its violations of the TPA, including "*indirect expropriation.*"[240]

193. Finally, the Respondent submits, the Claimant introduced an "Amparo Claim" on 11 March 2014 before the Superior Court of Justice in Lima, which was based on its conviction that "*what has been carried out against Kaloti is nothing other than indirect expropriation*" in the sense of Article 10.7 of the TPA, and a violation of due process.[241]

194. The Respondent alleges that these repeated submissions unequivocally demonstrate that the Claimant had actual knowledge of the facts and it consciously used them to construe a claim for compensation of damages based on alleged violations of the MST Provision of Article 10.5 of the TPA, including FET, as well as of the National Treatment Provision of Article 10.3 of the TPA, and finally on accusations of an expropriation of the five shipments of gold, years before the cut-off date of 30 April 2018.[242]

195. With respect to an alleged expropriation of the Claimant's business as a going concern, the Respondent asserts that all the elements alleged by the Claimant as destroying KML's business were known by the Claimant years before the cut-off date of 30 April 2018 (and, in addition, were not caused by the Respondent).[243]

196. *First*, the Respondent submits, the sharp decline in the supply of gold, that, according to the Claimant's incorrect assumptions, was caused by the seizures and the ensuing hesitations among the suppliers, took place after an initial sharp increase of purchases at the beginning of 2013, between 2013 and 2015, from when on the supply levelled off until

[240] Resp. C-Mem., para. 421; Claimant's almost identically worded requests to lift seizures, dated 3 May and 25 May 2016, *see* Petition before the *Sexto Juzgado Penal del Callao*, dated 3 May 2016, **C-0014** = **R-0228**, and Petition before the *Juzgado Penal Transitorio del Callao*, dated 25 May 2016, **C-0015** = **R-0229**, paras. 14-22.
[241] Resp. Rej., para. 524; the quotes are from the Amparo Claim of 11 March 2014, paras. 3.16, 5.1, 5.4, **R-0230**.
[242] Resp. C-Mem., paras. 414-437 and 456-461; Resp. Rej., paras. 515-523.
[243] Resp. C-Mem., paras. 438-455; Resp. Rej., paras. 525-527.

the end of purchases in 2018. That is uncontested, as it is uncontested that this fact was known by the Claimant contemporaneously. "*That means that, already in 2015, Kaloti knew or should have known of the loss or damage that it allegedly suffered as a result of Peru's actions.*"[244]

197. *Second*, the closure of a number of bank accounts, particularly in the United States, that, according to the Claimant, handicapped its abilities to do business, was not caused by Peru's conduct, as asserted by the Respondent, but by its own dubious reputation, and, in any event, had started already in 2014, when two banks closed accounts, and continued in 2016 and 2017, when five accounts were closed; only one was closed after the cut-off date, in August 2018. The Respondent recalls that the first knowledge is decisive and the exact quantification of the damage is not necessary to trigger the limitation period to run.[245]

198. *Third*, the Respondent alleges that the Claimant's decision to write off the value of gold on 30 November 2018, triggering the equity to become negative and thereby the insolvency, is "*unfounded, arbitrary and contrary to the evidence in the record*": there was no action by any Peruvian authority after 30 April 2018 that had an influence on the status of the seized gold, added to an alleged composite breach, and rendered the seizures permanent[246]. In any event, "*the fact that Claimant did not write off the value of the Gold until 30 November 2018 does not change the fact that – as demonstrated by the evidence – Claimant knew of the alleged expropriation and the fact of loss before the Cut-off Date.*"[247]

199. *Fourth* and finally, it says, the damage has not materialized on 30 November 2018, because contrary to what the Claimant submits, KML has not proven that insolvency proceedings were initiated that year or at all.[248]

200. The Respondent submits that these results must not be circumvented by efforts to create a theory of composite acts, whereby a "*wide array of alleged acts and omissions undertaken*

[244] Resp. C-Mem., paras. 440, 438-439; Resp. Rej., para. 525.
[245] *Idem*, paras. 441-442.
[246] *Idem*, paras. 443-453.
[247] Resp. Rej., para. 526.
[248] Resp. C-Mem., para. 454.

by different entities over time"[249] are amalgamated to form a whole that crystallized after the cut-off date.

201. It argues that the composite act is a defined term that was introduced in Article 15.1 of the International Law Commission's ("**ILC**") 'Articles on Responsibility of States for Internationally Wrongful Acts' which provides that a breach may occur "*through a series of actions or omissions defined in aggregate*". It is generally accepted[250] that it "*is not an expedient for an investor to sidestep and thus frustrate conditions of consent (or legal standards) contained in a treaty*,"[251] and more "*than a simple series of repeated actions, but rather, a legal entity the whole of which represents more than the sum of its parts*"[252] requiring inter-connection and a "*coordinated pattern adopted by the State.*"[253]

202. The Claimant, it says, had the burden to establish such "*legal entity*" of action and a coordinated pattern, and it has failed to do so. It has equally failed to point to any action after the cut-off date that might have had a negative impact on its alleged investments.[254]

203. Finally, the Respondent refutes the Claimant's application of the Most Favoured Nation ("**MFN**") Clause in an effort to import longer limitation periods or the absence of such periods into the TPA.

204. First of all, it underlines Peru's agreement in that regard with the United States as the other Party to the TPA, and refers to the written submission,[255] which states that "*a Party does not accord treatment through the mere existence of provisions in its other international agreements such as procedural provisions, umbrella clauses, or clauses that impose autonomous fair and equitable treatment standards.*"[256]

[249] Resp. Rej., paras. 496-510; Resp. C-Mem., paras. 399-404.
[250] Resp. C-Mem., para. 401; Resp. Rej., para. 499.
[251] Resp. Rej., para. 498.
[252] J. Crawford, *State Responsibility: The General Part* (Cambridge, 2014), p. 266, **RL-0150**.
[253] *EDF (Services) Limited. v. Romania*, ICSID Case No. ARB/05/13, Award (08 October 2009), para. 308, **RL-0216**.
[254] Resp. C-Mem., paras. 402-404; Resp. Rej., paras. 499-508.
[255] Tr. Day 1, 236:18-22.
[256] U.S. Non-Disputing Party Submission, para. 16.

205. Further, it asserts that the Claimant's argument is inconsistent with the terms of the MFN Clause in Article 10.4 of the TPA and its footnote in the TPA. Article 10.4.1 restricts the notion of "*treatment*" to "*the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*," and the footnote clarifies that this "*does not encompass dispute resolution mechanisms, such as those in Section B*," with the Temporal Limitation Provision of Article 10.18 being part of Section B.[257]

206. At the same time, the interpretation is consistent with arbitral practice that holds that MFN Clauses in treaties can only be used to import dispute resolution clauses when this is clearly provided for, which is not the case in Article 10.4 of the TPA.[258]

207. The Respondent asserts that for all these reasons, "*most of Claimant's claims do not comply with the Temporal Limitations Period of the Treaty, such that the Tribunal lacks jurisdiction ratione temporis.*"[259]

b. Claimant's Position

208. As to the standard of the *ratione temporis* objection, the Claimant submits as follows:

- That the period for limitation only starts to run when an actual breach has occurred which has caused actual damage and when the party concerned has actual or constructive knowledge of both the actual breach and the actual loss/damage,[260] as in *Infinito v. Costa Rica*, where the tribunal held that "*[f]or the claims to be time-barred, Article XII(3)(c) requires the Claimant to have first acquired both knowledge of the alleged breach and knowledge that it has incurred loss or damage, prior to the cut-off date. The Tribunal notes that the BIT refers to knowledge of the alleged breach, and not to knowledge of the facts that make up the alleged breach. In other words, the limitations period only starts to run once the breach (as a legal notion) has occurred. While a breach will necessarily have been caused by facts, as discussed below, the*

[257] Resp. Rej., paras. 538-541.
[258] *Idem*, para. 542, Respondent relies on *Plama v. Bulgaria*, Decision on Jurisdiction (8 February 2005), para. 223, **CL-0140**.
[259] Resp. Rej., para. 544.
[260] Cl. Reply, paras. 204-216, 226, 234; Tr. Day 1, 70:2-7; 72:10-20.

moment at which a breach "occurs" will depend on when a fact or group of facts is capable of triggering a violation of international law";[261] and further in *Spence v. Costa Rica* where the tribunal held that "*[f]or purposes of Article 10.18.1, the relevant date is when the claimant first acquired knowledge not simply of the breach but also that they incurred* loss *or damage as a result thereof. The Tribunal agrees with the observation of the tribunal in Corona Materials that 'knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach and knowledge of loss or damage'*."[262]

- That a "*prolonged series of acts and omissions,*" executed by a variety of territorial and national agencies, administrative and judicial bodies and offices and having "*a common, very specific denominator (an object)*"[263] that are "*consideradas en su conjunto,*"[264] do not form a simple wrongful act but "*must be considered as a unity that climaxed on November 30, 2018*,"[265] a "*composite act or creeping violation of the Treaty.*"[266] Article 15 of the ILC 'Articles on Responsibility of States for Internationally Wrongful Acts' provides for the criteria by defining a breach "*through a series of actions or omissions defined in aggregate*" in Article 15.1, and stipulating that "*the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts as long as these actions or omissions are repeated*" in Article 15.2. The Claimant quotes the authoritative "*Commentary*" on the ILC Articles which reads in paragraph 8 of Article 15 that "*[p]aragraph 1 of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series*," and in paragraph

[261] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017), para. 220, **CL-0053** ("*Infinito v. Costa Rica*").
[262] *Spence v. Costa Rica*, para. 211, **RL-0138**, the tribunal refers to *Corona Materials v. Dominican Republic*, **RL-0135**.
[263] Cl. Reply, paras. 203, 219-225.
[264] *Carlos Ríos y Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award (11 January 2021), paras. 189-190, **RL-0108** ("*Carlos Ríos v. Chile*").
[265] Cl. Mem., para. 48.
[266] Tr. Day 1, 80:22; 81:1; Cl. Reply, paras. 224, 232, referring to Cl. Mem., paras. 130-155.

10, that "*[o]nce a sufficient number of actions or omissions has occurred […], the breach is dated to the first of the acts in the series.*"[267]

- That there "*is a contextual relation or association […] between treaty breaches and damages incurred,*" and that "*the knowledge of actual damage by a claimant can be constructive […] does not mean that the damages can, themselves, fail to be actual (i.e., real and incurred) in order to trigger the statute of limitations.*"[268] It is accepted practice that an investor's decision to shut down a factory or close operations in reaction to circumstances that have occurred before, must be considered as the crystallization of a composite act or creeping expropriation,[269] as decided in *Resolute v. Canada*, where the tribunal found that "*the expropriation did not occur until 2014, when the Claimant's Canadian subsidiary decided to close down the Laurentide mill and the Claimant was thereby deprived of the benefit of its investment.*"[270]

- That the application of the limitation period should be attenuated by taking its purpose into consideration which is to provide legal certainty, preclude the prosecution of old claims and preserve evidence. If none of these elements is present, and the claim has been submitted in a timely manner, the rigid cut-off date should not be relevant. Peru's opinion and the United States' "*unsubstantiated*" submission should not be taken into account.[271]

- That "*[i]f all of this fails, then if the Tribunal agrees with the United States that Article 10.18 of the Treaty is rigid, […] and that a loss or a treaty breach occurred before April 30, 2018, and damages, three requirements: an actual breach, actual losses relating to that breach before April 30, 2018, knowledge by Kaloti, and Article 10.18 is rigid. Then you have to take into account the most-favored-nation clause of the*

[267] Cl. Mem., footnote 78; the quotes are from ILC "Draft articles on Responsibility of States for Internationally Wrongful Acts (2001), **CL-0040**.
[268] Cl. Reply, para. 210.
[269] Cl. Reply, para. 235; Tr. Day 1, 80:21-22; 81:1-6.
[270] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018), para. 163, **RL-0137**, Claimant refers also to a case quoted in P. M. Zylberglait, *Opic's Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence*, 25 Law & Policy in International Business 359 (1993), p. 9, **CL-0112**.
[271] Cl. Reply, paras. 276-279; Tr. Day 1, 78:17-22; 79:1-2.

Treaty in Article 10.4."[272] The import of a more favorable limitation period such as in "*the Peru-Australia FTA*" or of its total absence as in "*the Peru-United Kingdom BIT, and the Peru-Italy BIT,*" is covered by Article 10.4 of the TPA and not excluded through the footnote to the Article, because the Claimant is not importing a dispute resolution mechanism.[273]

209. Applying the standard to the circumstances of the dispute, the Claimant asserts that the composite acts and the creeping expropriation only crystallized on 30 November 2018. It is "*the record as a whole*" and the "*prolonged series of acts and omissions*" by a variety of territorial and national agencies, administrative and judicial bodies and offices that determine "*that Peru breached its national treatment and fair and equitable treatment obligations, and performed creeping expropriations.*"[274] It is true, it says, "*that Peru didn't do anything by November 30, 2018. They did not return the gold. That is an omission that contributed to a breach of the Treaty. Again, had this gold been returned in August 2018, the damages would have been reversed, Kaloti would have been able to continue on a going-concern operation inside Lima, would have paid Kaloti, would have injected more than $20 million into its cash flow, and the Company would have survived.*"[275]

210. The Claimant represents that the "*breach in this case is the extension and prolongation of investigations, and of the physical control of KML's gold by Peru, for eight years (actions and omissions), until KML's investments lost all value, without affording KML any transparency.*"[276] It is true that while "*Peru took some actions against KML prior to November 30, 2018, those did not constitute a permanent and "substantial deprivation" of KML's property until that date.*"[277] It was on "*November 30, 2018, when KML became irreversibly damaged,*"[278] also because in November 2018 "*Kaloti Jewelry Dubai […] accelerated the debt and demanded full payment,*" as evidenced by Kaloti Jewellery's letter

[272] Tr. Day 6, 1446:11-19.
[273] Cl. Reply, paras. 280-284.
[274] Cl. Reply, para. 203.
[275] Tr. Day 1, 73:4-12.
[276] Cl. Reply, paras. 229, 232, 211.
[277] Cl. Reply, paras. 265, 228-230.
[278] Cl. Mem., paras. 34, 163; Cl. Reply, para. 236.

dated 14 November 2018.[279] It was at that moment that the Claimant lost hope, had to write off the gold and, like in the *Resolute v. Canada* case, closed the operation, not before.[280] "*Had Peru returned the gold at any point to KML before November 30, 2018, and publicly cleared KML of investigations, the expropriation, and the lost-profits of KML would not have been irreversible.*"[281]

211. Further, the Claimant asserts that it did not have knowledge of the "*specific Treaty breaches invoked in this arbitration until November 30, 2018. It was on such date when KML's investments lost all value. Hence, for purposes of the Treaty, damages for such breaches were not incurred before that date. Peru breached its TPA with the United States through violations that became actionable when their economic effects (damages to KML) were incurred as they became irreversible on November 30, 2018.*"[282] "*[K]nowledge of some facts forming part of, or being conducive to, a subsequent Treaty breach do not amount to actual or constructive knowledge.*"[283]

212. As to the damages, "*[n]one of the amounts or concepts currently being claimed in this arbitration were known or mentioned by KML before 2018.*" They are submitted only now in the "*very detailed and well substantiated damage reports.*"[284]

213. Contrary to the Respondent's allegations, the Claimant says, "*KML never alleged any expropriation, lost-profits, or national treatment claims; nor did it invoke application of Articles 10.3 and 10.7 of the US-Peru TPA in any way, before 2018.*"[285]

214. A letter, dated 03 May 2016, and falsely and in bad faith labelled by the Respondent as "First Notice of Intent," does "*not refer to the specific Treaty breaches, or concrete damages*,"[286] and states unequivocally that no expropriation has occurred yet but that the treatment has the "*potential to culminate in the expropriation of Kaloti's protected*

[279] Tr. Day 1, 71:18-22; Cl. Mem., para. 17; the letter is exhibited as **C-0137**.
[280] Tr. Day 1, 80:8-22; 81:1-22; 82:1-2.
[281] Cl. Reply, para. 230.
[282] Cl. Reply, paras. 211, 214-215, 232, 236, 256.
[283] Cl. Reply, para. 273.
[284] Cl. Reply, para. 270.
[285] Cl. Reply, paras. 243, 256, 259.
[286] Cl. Reply, para. 244.

investment." It was a warning of what might happen in the future, and what, indeed, did happen with the crystallization of the expropriation in November 2018.[287]

215. Equally, the Claimant submits, the Amparo Claim, that is misused by the Respondent to evidence knowledge where none existed, was a very limited challenge of two immobilizations of gold that was withdrawn when the measures were lifted. It did not relate to an expropriation which had not yet ripened and did not (and could not) contain a claim for payment of damages.[288]

216. Thus, "*KML complied with the three-year statute of limitation set forth in Article 10.18(1) of the TPA*," since the three conditions are met: the breach is the result of a composite act that crystallized only on 30 November 2018, damages were the result of a creeping expropriation that crystallized only on 30 November 2018, and the Claimant had no actual nor constructive knowledge before 30 November 2018.[289]

217. In any event, the statute of limitation should not be applied because its purpose is not at risk: this is not a case where Peru has problems to muster the evidence to defend itself and is not prejudiced by the lapse of time.[290]

218. Finally, even if the Tribunal found that the criteria of Article 10.18.1 of the TPA were met, it must apply the longer or even the absence of limitation periods in other referenced treaties of Peru, imported via the MFN Clause in Article 10.4 of the TPA, including the footnote attached to it, because the statute of limitation is not part of a dispute resolution mechanism, and "*entering into a treaty is treatment for purposes of international law.*"[291]

B. MERITS

219. The Claimant has asserted the following substantive claims under the TPA:

[287] Cl. Reply, paras. 244-253.
[288] Cl. Reply, paras. 257-260; Tr. Day 1, 76:8-21.
[289] Cl. Reply, paras. 210 *et seq*.
[290] Cl. Reply, paras. 276-279.
[291] Tr. Day 6, 1447:11-12.

- Peru has violated its duty to accord FET under Article 10.5 of the TPA, and also violated its duty to provide National Treatment by treating domestic (Peruvian) purchasers of gold differently from foreign purchasers, thus breaching Article 10.3 TPA;[292]

- Peru has violated its duty not to expropriate the Claimant's investment without compensation as required under Article 10.7 of the TPA.[293]

1. Fair and Equitable Treatment

220. The relevant provision containing the FET obligation reads:

> ***Article 10.5: Minimum Standard of Treatment***
>
> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
>
> *(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.*
>
> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*

and its Annex 10-A:

[292] Cl. Mem., paras. 101, 124; Cl. Reply, paras. 309, 356.
[293] Cl. Mem., paras. 130, 133; Cl. Reply, para. 383.

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

a. Claimant's Position

221. For the contours of the MST, the Claimant relies on *Waste Management v. Mexico*, where the tribunal held:

> *that the minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process*.[294]

222. The Claimant asserts further that, in addition to the MST, "*other more specific or stringent standards of treatment agreed by Peru in other relevant treaties*" must be applied in favor of KML, which are imported by the MFN Clause in Article 10.4 of the TPA, such as the Peru-Italy BIT, the Peru-Australia FTA and the Peru-United Kingdom BIT.[295]

223. In that perspective, a series of acts and omissions might breach the FET obligations, even if individual acts might not have done so, and it is "*not fair and equitable for Peru to make KML bear the adverse economic consequences […] of alleged money laundering of others.*"[296]

224. In detail, the Claimant asserts six components of FET.

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[294] Cl. Mem., para. 103; Claimant relies on *Waste Management*, *Inc. v. United Mexican States (II)*, ICSID Case No. ARB (AF)/00/3, Award (30 April 2004), para. 98, **CL-0045**.
[295] Cl. Reply, paras. 311-314; Tr. Day 1, 89:3-18; 90:1-14.
[296] *Idem*, paras. 315-318.

1) Denial of Justice

225. The Claimant contends that "*due process, including proper notice, and access to justice*" go "*to the essence of fair and equitable treatment.*"[297] As explained by the *Krederi v. Ukraine* tribunal, "*the right of access to the courts or other adjudicatory bodies is a basic aspect of due process.*"[298] Their violations are – in the words of the *Teco v. Guatemala* tribunal – "*a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning.*"[299] They can also consist of composite acts, where an accumulation over time amounts to "*a denial of justice as a result of undue delays in judging a case by a municipal court,*"[300] by failing to grant investors "*an adequate opportunity, within a reasonable time, to vindicate their legitimate rights.*"[301]

226. Here,

> *Peru's measures — in the aggregate — combined to deny KML due process and access to justice. Specifically, (1) SUNAT justified its seizure and holding of Claimant's gold on the basis of temporary immobilization orders, which effectively became permanent on November 30, 2108 [sic], thereby depriving KML of its property without due process of law; and (2) the Peruvian investigative and prosecutorial authorities neither charged, nor exonerated, KML with criminal wrongdoing, thereby exposing Claimant to undue delay, and keeping it in a legal black hole in which it could not assert its rights, and which caused irreversible damage to Claimant's investment*.[302]

[297] Cl. Reply, para. 319; Cl. Mem., para. 105.
[298] *Krederi Ltd v. Ukraine*, ICSID Case No. ARB/14/17, Award (2 July 2018), para. 451, **CL-0049** ("*Krederi v. Ukraine*").
[299] Cl. Reply, para. 321; *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para. 458, **CL-0051**.
[300] Cl. Reply, para. 323; *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction (19 September 2008), para. 91, **CL-0052**.
[301] Cl. Mem., para. 106; *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award (16 May 2012), para. 272, **CL-0047** ("*Reinhard v. Costa Rica*").
[302] Cl. Mem., para. 111; Cl. Reply, para. 322.

2) Due Process

227. The Claimant asserts an additional violation of Peru's due process obligations by (i) allowing alleged money launderers to "*keep money paid to them by KML*," and (ii) "*depriving KML of the use and enjoyment of its gold assets and destroying the viability and value of KML's operations*" even though KML "*was (1) never charged, (2) tried or (3) convicted for having committed a crime.*"[303] Thereby, Peru imposed *de facto* a criminal sanction on KML without granting it "*the opportunity to present a good faith buyer defense.*"[304]

228. As analyzed in his Legal Opinions, legal expert Professor Coria had concluded that KML had acquired the gold in good faith, and that Peru had the burden of proof that the gold was illegally mined, and that the buyer, *i.e.*, KML, was aware of the illegality.[305]

229. Although Peru "*never questioned KML's legal title to the seized gold*" before its Counter-Memorial on the Merits in the present proceeding, it refused to hear the Claimant's contentions on its case and "*thereby secure the release of its gold*." The more than ten applications between 2013 and 2016, addressed to administrative authorities, the prosecutor's office and the courts, which requested the recognition of the Claimant's ownership of the gold, the lifting of the different seizures and the release of the gold to its legal owner, were simply ignored, although – as confirmed by legal expert Professor Coria – they were the correct and appropriate avenues to take.[306]

230. The Claimant contends that since more than eight years have passed since the temporary immobilization orders and seizures of the gold, the seizures have become *de facto* permanent in 2018. Thereby, the Claimant has been totally deprived of its economic value in 2018 without any Peruvian court order or judgment, and thus in violation of due process.[307]

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[303] Cl. Reply, paras. 326-327; Cl. Mem., para. 112.
[304] Cl. Mem., para. 113; Cl. Reply, para. 328.
[305] Cl. Mem., para. 113; Cl. Reply, paras. 328-329, Claimant refers to Coria-Report1, para. 7.1, **C-0107**, and Coria-Report2, para. 3.2, **C-0139**.
[306] Cl. Mem., paras. 114-115; Cl. Reply, paras. 330-332; Coria-Report2, para. 5, **C-0139**.
[307] Cl. Mem., para. 117; Cl. Reply, para. 335.

3) Length of Investigations

231. The Claimant contends:

> *[t]he unreasonable length of time that Peru has taken to conclude the criminal proceedings and other investigations, and return KML's gold inventory constitutes a violation of the US-Peru TPA's fair and equitable treatment provision, especially as complemented by the MFN clause contained in such Treaty*.[308]

232. The Claimant "*recognizes that a State has the right to take prudential measures in connection with a criminal investigation [but] no State is permitted to hold a prosecutorial sword of Damocles over a party's head indefinitely.*" It states that "*[t]he foregoing must be considered under the guide of Article 3 of Peru-Australia BIT, Article 2 of Peru-United Kingdom BIT, and Article 2 of Peru-Italy BIT.*"[309]

233. It states: "*[d]elayed justice is justice denied.*"[310] This principle is translated into Peruvian and international law. The Claimant contends that as "*convincingly argued*" by legal expert Professor Coria, the extreme prolongation of the investigation and thereby the refusal to release the gold violates the constitutional principle of proportionality as well as procedural law which does not allow immobilizations for longer than ninety plus ninety days.[311]

234. Efforts by the Respondent to demonstrate the normality of eight years procedures by presenting a number of cases have no evidentiary value because no "*reference to the statistical relevance of that information*" is added.[312]

4) Different Treatment of Similarly Situated Investors/Discrimination

235. The Claimant alleges that Peru discriminated against it by treating other foreign investors, who – like the Claimant – purchased gold in Peru for on-sale abroad and whose gold was seized in 2013 and 2014 and that were, therefore, in similar circumstances, different from and more favorably than it. In its assessment of this conduct as unfair and unreasonable treatment it relies on arbitral jurisprudence, where it is held that when *"investors in like*

[308] Cl. Reply, paras. 337-342; Cl. Mem., paras. 118-119; Tr. Day 1, 94:3-7; 96:1-4.
[309] Cl. Reply, paras. 341-342 (footnotes omitted).
[310] Tr. Day 6, 1472:10.
[311] Cl. Reply, para. 341; Coria-Report1, paras. 3-5, **C-0107**; Coria-Report2, paras. 6, 7, **C-0139**.
[312] Tr. Day 6, 1473:6-7.

circumstances are subjected to different treatment without a reasonable justification,"[313] the conduct is unlawful, and that "*discriminatory conduct is a violation of the standard of the fair and equitable treatment.*"[314]

236. The Claimant points to a case where a foreign investor's gold had been seized by SUNAT for the purpose of reviewing documentation, where the investor's requests were answered by the administrative authorities, where the investor had access to the courts, and where legal avenues were open to the investor to pursue its remedies, even though the determination was averse to the investor. Irrespective of the negative final result for the investor who might not have recovered its gold, it remains important that the investor "*was given options and legal avenues that Peru denied to KML by de facto ignoring KML.*"[315]

5) Good-faith Negotiations

237. The Claimant refers to Article 10.15 of the TPA, which provides:

> ***Article 10.15: Consultation and Negotiation***
>
> *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*.

238. The Claimant argues that the duty to negotiate is also implied in the principle of good faith "*which permeates the entirety of international legal order and process*," as well as in the cooling-off period of six months between the emergence of a claim and a request for arbitration as provided for in Article 10.16 of the TPA.[316]

[313] Cl. Mem., para. 120, Claimant quotes *Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award (07 October 2020), para. 51, **CL-0054**.
[314] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 287, **CL-0056**.
[315] Cl. Reply, paras. 345-355; Cl. Mem., paras. 121-123; Tr. Day 1, 97:4-22; 98:1-22; 99:1-17.
[316] Cl. Reply, paras. 366-368.

239. It relies on the Decision in *ConocoPhillips v. Venezuela*, which found that "*the failure to negotiate compensation in good faith represent[s] a breach of an international obligation.*"[317]

240. As to the circumstances of the case, the Claimant alleges that Peru "*only employed dilatory and distracting tactics to tire KML*." It was not willing to negotiate and made no offer of compensation.[318] Such conduct "*[f]ormed an indivisible part of the creeping breach of the fair and equitable treatment standard provided in Article 10.5 of the Treaty (as combined with the Treaty's MFN clause).*"[319]

6) Legitimate Expectations

241. In paragraphs 375 to 379 of its Reply, the Claimant introduces a claim based on its legitimate expectations. It alleges that before the seizures, Peru had created reasonable and justifiable expectations, by its internal laws and its conduct, that it would comply with its regulatory framework, that it was safe to deal with gold suppliers which were registered and in good standing, that it would respect the confidentiality of criminal investigations, that it would respond to legitimate petitions of investors, that it would conduct investigations in a timely manner. By failing to honour these expectations, Peru caused damage to the Claimant.[320]

b. Respondent's Position

242. The Respondent contends that the MST, as formulated in Article 10.5 and Annex 10-A of the TPA, is deliberately narrow in scope, "*in response to concerns about overly broad interpretations by some arbitration panels and creative claims brought by some private companies*" as confirmed by the legislative report of the U.S. Congress.[321] It excludes an autonomous FET standard, which is but an aspect of the MST. In that perspective, a

[317] Cl. Reply, para. 369, Claimant relies on *ConocoPhillips Petrozuata B.V. et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (September 3, 2013), paras. 362, 394, 401, **CL-0123**.
[318] Cl. Reply, para. 371.
[319] *Idem*, para. 373; Tr. Day 1, 101:1-22; 102:4-21.
[320] *Idem*. 375-378, 389; Tr. Day 1, 103:6-19.
[321] Resp. C-Mem., para. 468, Respondent quotes from U.S. Congress, House Report 110-421 on the United States-Peru Trade Promotion Agreement Implementation Act, dated 5 November 2007, p. 6, **RL-0052**.

tribunal's determination "*must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.*"[322]

243. The Respondent asserts that the Claimant's effort to import an autonomous FET provision into the proceeding must fail because (i) it is impermissibly belated, (ii) falls outside the scope of Article 10.4 of the TPA, and, in any event, (iii) lacks merit.[323]

244. It says that the Claimant introduced the idea to import autonomous FET Clauses from other treaties via Article 10.4 of the TPA, which implies the existence of an autonomous FET Clause in the Treaty, for the first time in its Reply, although both ICSID Arbitration Rule 31 and paragraph 14.4 of PO1 of the present case provide that all factual and legal arguments on which a party intends to rely must be introduced in the first submission, whereas the second submissions are only responsive to the previous arguments. The general invocation of Article 10.4 of the TPA in the Claimant's Memorial, stating that "*[a]ll breaches of the TPA specified in this memorial must be considered in conjunction with Article 10.4 thereof*,"[324] is no argument, and the Claimant's argument on the FET standard in paragraphs 101-104 of the Memorial does not mention the MFN Clause at all, nor does it refer to any of the treaties with a more favorable FET clause that were introduced with the Reply.[325]

245. As to the scope of the MFN Clause in the TPA, it is limited "*in like circumstances*" to "*treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*" (Article 10.4.1 and 2 of the TPA).

246. The Respondent argues that, first, "*substantive legal standards of protection (such as MST and autonomous FET obligations) do not amount to "treatment" under the MFN*

[322] Resp. C-Mem., para. 473, Respondent quotes *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award (13 November 2000), para. 263, **CL-0035**.
[323] Resp. Rej., paras. 555-556.
[324] Cl. Mem., para. 97.
[325] Resp. Rej. paras. 557-559.

Clause";[326] and that, second, "*a treaty provision agreed between Peru and a third State does not (and cannot) constitute treatment of a U.S. investor or a covered investment 'in the territory' of Peru.*"[327] The Claimant is in agreement, in the sense of Article 31.3 of the VCLT, with the United States that "*a Party does not accord treatment through the mere existence of provisions in its other international agreements such as procedural provisions, umbrella clauses, or clauses that impose autonomous fair and equitable treatment standards*."[328]

247. Further, the Respondent contends that the Claimant's reliance on an autonomous FET obligation as applied via a MFN Clause fails on the merits because it would have been the Claimant's duty to identify a third party investor who is "*in like circumstances*," as required by Article 10.4 of the TPA, which it has failed to do. Again, Peru is in agreement with the United States in the interpretation of Article 10.4.[329]

248. Since the Claimant has not shown a comparator that received more favorable treatment, his argument is not valid.

249. Finally, in the context of the MFN Clause, the Claimant's argument fails because Peru has reserved in 'Annex II – Peru 1' of the TPA "*the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement*."

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[326] Resp. Rej., paras. 563-565, Respondent relies on *Içkale Inşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016), para. 329, **RL-0263**, where the tribunal held that differences applicable legal standards do not amount to treatment accorded in similar situations.

[327] Resp. Rej., paras. 566-568, Respondent relies – among others – on *Daimler v. Argentina*, where the tribunal held that where "*an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that treatment outside the territory of the Host State does not fall within the scope of the clause*," since arbitral proceedings, almost without exception, take place outside the territory of the host State. *See Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), paras. 226, 228, **RL-0171**.

[328] U.S. Non-Disputing Party Submission, para. 16; Resp. Rej., para. 564.

[329] Resp. Rej., paras. 570-572; U.S. Non-Disputing Party Submission, para. 16, which reads: "If the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established. In other words, a claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party."

250. As both the Peru-Italy BIT and the Peru-United Kingdom BIT, that the Claimant tries to import by the MFN Clause, predate the TPA, Peru excludes from its scope measures under these treaties. The third invoked treaty, *i.e.*, the Peru-Australia FTA, is of no help to the Claimant, because it contains an identical MST standard under international customary law like the TPA.[330]

251. As a threshold matter, the Respondent refutes also the Claimant's allegation that the breaches of obligations under the TPA were caused by a composite act. It alleges that because the Claimant was unable to identify any individual act or omission amounting to a Treaty breach, it invented the theory of a composite act, mostly to overcome the jurisdictional objection *ratione temporis* but also to establish an MST claim.[331]

252. The Respondent refers to its arguments in the context of its jurisdictional objection and recalls that the "*[c]laimant must prove that Peru's individual acts and omissions are connected, forming part of a pattern or system.*"[332]

253. It contends that the Claimant has not even attempted to identify a pattern, a common purpose of the actions of several independent State agencies that all carry out their duties to address legitimate public objectives, as, indeed, there is no such pattern or system. Therefore, "*[c]laimant has failed to substantiate its claim of breach of the MST Provision on the basis of one or more composite acts, and such claim must therefore be dismissed.*"[333]

254. With respect to the different alleged variants of violations of MST, the Respondent argues as follows.

1) Denial of Justice/Due Process/Length of Investigations

255. The Respondent shares the Claimant's opinion that Article 10.5 of the TPA encompasses a duty not to deny justice, as explicitly provided in paragraph 2. It contends that the standard is stringent and subject to a high bar of scrutiny, because the universally recognized principle of the independence of the judiciary is at stake. The principle requires

[330] Resp. Rej., paras. 573, 575-576.
[331] Resp. C-Mem., paras. 475-476; Resp. Rej., para. 578.
[332] Resp. Rej., para. 579; Resp. C-Mem., para. 477.
[333] *Idem*, para. 582.

that decisions of national adjudicatory bodies (i) can only be subjected to an examination of a denial of justice and no other obligations under the MST,[334] (ii) benefit from a "*presumption of validity*";[335] (iii) must only be questioned in cases of serious deficiencies and failures to accord due process,[336] (iv) must not be scrutinized for "*mere errors or procedural irregularities*" or alleged "*wrong results*" but only for errors "*which no competent judge could reasonably have made.*"[337]

256. The concept of independence of the judiciary requires further, the Respondent says, that only systemic failures in the State's administration of justice as a whole may amount to a denial of justice, which implies, first, that parties must not re-litigate the case which had been decided by a national court, and arbitral tribunal do not sit in appeal, and, second, that investors must exhaust domestic remedies and test the judicial system as such before pursuing a denial of justice claim.[338]

257. The Respondent submits further that although justice can be denied by a wide range of adjudicatory bodies such as civil, criminal or administrative courts and authorities, the decision must be of an adjudicatory nature, and that the "*administrative due process requirement is lower than that of a judicial process.*"[339]

258. It adds that neither the TPA nor customary international law require that an investor be allowed to participate in "*any and all local proceedings in which they may wish to make an intervention*." As correctly held by the tribunal in *Krederi v. Ukraine*, the form of access

[334] Resp. C-Mem., paras. 484-485, Respondent relies on Z. Douglas, "*International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*," International and Comparative Law Quarterly (2014), p. 11, **RL-0154**.
[335] Resp. C-Mem., paras. 487-488, Respondent relies on *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014), para. 637, **RL-0156**.
[336] Resp. C-Mem., paras. 487-489, Respondent relies on *Krederi v. Ukraine*, para. 442, **CL-0049**.
[337] Resp. C-Mem., paras. 490, 493, 494, Respondent relies on *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 94, **RL-0159**.
[338] Resp. C-Mem., paras. 491-494, 497-499; Resp. Rej., paras. 589-591, Respondent relies – among others – on J. Paulsson, *Denial of Justice in International Law* (2005), pp. 98, **RL-0219**; *Apotex v. United States*, para. 282, **RL-0202**; *Reinhard v. Costa Rica*, para. 272, **CL-0047**; *Infinito v. Costa Rica*, Award (3 June 2021), para. 445, **CL-0053**.
[339] Resp. C-Mem., para. 495; Resp. Rej., paras. 587-588, Respondent relies on *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006), para. 194, **RL-0021**.

to justice "*does not necessarily have to be a right to be joined as a party to pending proceedings. Any legal remedy would suffice.*"[340]

259. The Respondent alleges that, in the present case, the Claimant has no claim for a denial of justice. The claim fails already at the outset because it is based on a deprivation of the Claimant's alleged property, which in reality it did not have, as the gold was illegally mined and it could not acquire ownership. "*Absent such property rights, Claimant's denial of justice claim is unfounded and must be dismissed*."[341]

260. The Respondent alleges further that it did not deny justice to the Claimant, as all adjudicatory bodies acted reasonably and lawfully.

261. As to **SUNAT**, the Respondent alleges that it exercised the power conferred on it by Article 165 of the General Customs Law to execute "*preventive immobilizations and seizures over goods and means of transport*," after an analysis of risk factors indicating illegal mining and/or money laundering, which from 2012 to 2014 led to dozens of immobilizations, among which four of the five shipments bought by the Claimant. These immobilizations lasted less than five months (and not eight years, as falsely alleged by the Claimant), and were lifted on 14 May 2014, to be replaced by precautionary seizures, ordered by the courts upon request of the prosecutor's office. Shipment 5 was subject of a distinct attachment ordered by a court in favor of a private creditor of the supplier and was not immobilized by SUNAT.[342] The Claimant itself conceded that "*in and of themselves, these initial immobilizations did not raise to the level of a breach of the TPA by Peru.*"[343] SUNAT's acts were not arbitrary, overzealous and capricious, as mischaracterized by the Claimant but "*taken in the context Peru's efforts to tackle the serious and socially damaging crimes of illegal mining and money laundering.*"[344] They "*were not arbitrary or unfair, let alone*

[340] Resp. C-Mem., para. 500, Respondent relies on *Krederi v. Ukraine*, para. 566, **CL-0049**.
[341] Resp. Rej., 594; Resp. C-Mem., para. 503.
[342] Resp. C-Mem., paras. 107-110; 124-125; 508-510.
[343] Cl. Mem., para. 49; Cl. Reply, para. 125; Resp. C-Mem., para. 508.
[344] Resp. C-Mem., para. 511.

so manifestly arbitrary or unfair as to constitute a denial of justice, or otherwise violate the minimum standard of treatment."[345]

262. In any event, it says, the Claimant had filed an 'Amparo' claim in 2014 before the Superior Court of Justice in Lima thus exercising its option of a 'fork in the road' to national court adjudication. In accordance with Annex 10-G of the TPA, this election was "*definitive*" and precluded the Claimant "*to submit the claim to arbitration under Section B.*"[346]

263. As to the **prosecutorial authorities and the criminal courts**, the Respondent emphasizes that, in accordance with accepted practice, sovereign states have the prerogative to prosecute crimes, and claimants have a high burden to prove an illegitimate exercise of such prerogative, also in suspected money laundering situations where "*a suspicion […] alone may be enough to justify interlocutory measures in order to provide time for a thorough investigation*."[347]

264. Under the circumstances of the case, where significant indicia and evidence pointed to criminal activities, the prosecutor's offices rightfully requested and obtained precautionary seizures from the criminal courts, in accordance with Peruvian law. In fact, it says and relies on the Expert Report of Joaquin Missiego, Article 2.3 and 6 of the Preliminary Investigations Law – Law No. 27379[348] – as well as Article 94 of the Code of Criminal Procedure (CCP)[349] which provide that the temporal limitation of 90 plus 90 days in preliminary investigations is no longer valid once judicial criminal proceedings are initiated. Once this phase has begun, as was the case for the four seized shipments of gold,[350] precautionary measures may remain in place until the end of such criminal proceedings if necessary. The prosecutorial authorities have the duty to evaluate before a request for precautionary measures, addressed to the courts, and the courts will determine

[345] Resp. C-Mem., para. 507; Resp. Rej., paras. 597-598.
[346] Resp. C-Mem., para. 515; Resp. Rej., paras., 718-720.
[347] Resp. C-Mem., para. 517-518, Respondent relies on *Valeri Belokon v. Kyrgyz Republic,* PCA Case No. AA518, Award (24 October 2014), para. 161, **RL-0047**.
[348] Procedural law to adopt exceptional measures to limit rights in preliminary investigations, dated 20 December 2000, Arts. 2.3, 6, **R-0106** or **Cl-0004**.
[349] Code of Criminal Procedure, dated 23 November 1939, Art. 94, **R-0223** or **CL-0006**.
[350] The seizure of Shipment 5, ordered by the criminal court, was lifted after three months for reasons of a civil attachment by a private creditor of the Claimant, *see* Resp. C-Mem., paras. 538-539.

the necessity by appraising (i) the availability and conservation of evidence, (ii) the risk of dissipation of potential proceeds of a crime, and (iii) the facilitation of potential enforcements of confiscation orders. Thereby, three instances, including SUNAT, were charged with guaranteeing due process and reasonability of precautionary seizures.[351]

265. As observed by legal expert Mr. Missiego, the measures may extend to objects regardless of ownership and possession. They are *in rem* and not *in personam*, and thus do not imply a criminal sanction against anybody. At the same time, the measures are and remain only a temporary limitation of the ownership and do not extinguish it. It will depend on the final outcome of the criminal proceedings whether a loss of ownership will be declared through confiscation or whether it will be returned to the rightful owner.[352]

266. The Respondent alleges that the Claimant's complaints about the duration of the investigations and the criminal proceedings are misplaced, given the complexities of money laundering activities. As a threshold matter, the Claimant's reference to statutes of limitations for money laundering in other countries such as the United States or Germany, where they are only five years, are irrelevant in Peru, first because they are 15 to 20 years in Peru, and second because the criminal proceedings were initiated within a period of five years.[353]

267. Further, investigations are particularly complex, "*because, by its very nature, the objective of money laundering is to conceal or disguise the illicit origin of funds or other assets*," as recognized in international court practice.[354] Despite the complexity and difficulties of the case, "*the evidence shows that the Peruvian courts diligently advanced the Criminal*

[351] Resp. C-Mem., paras. 523-541; Resp. Rej., paras. 206-216, 605; Missiego-Report1, paras. 90-95, Missiego-Report2, paras. 36-46.
[352] Missiego-Report1, paras. 80-88, 92, 100-102; Missiego-Report2, paras. 51-53; Resp. C-Mem., paras. 522-524, 537; Resp. Rej., paras. 604-605, 621.
[353] Resp. Rej., paras. 251-258, 622.
[354] Resp. C-Mem., paras. 543-545, Respondent refers to a judgment of the Paris Court of Cassation, which held that "money laundering gives rise, by its own nature, to opaque and complex schemes involving multiple offshore companies": *Kyrgyz Republic v. Valeri Belokon*, Judgment No. 17-17.981 of the Paris Court of Cassation (23 March 2022), **RL-0166**.

Proceedings. The legal standard to move to each of the various stages in the criminal process has been met in all Criminal Proceedings."[355]

268. In addition, as legal expert Prof. Missiego stated, "*84% of the hearing scheduled in the first four months of the year 2023 before the Third Criminal Court of Appeals refer to cases that have had the same or longer duration than the cases against Kaloti's Suppliers*," which documents "*that, in practice, it is not unusual for criminal proceedings in Peru to last more than five years.*"[356]

269. For these reasons, the Claimant has failed "*to meet its burden of proving the existence of any irregularity in the criminal proceedings, let alone one that is serious enough to trigger State's liability under international law [… and] that there has been an extremely abnormal administration of justice, which (i) has led to an unreasonable irregularity that (ii) is attributable to inaction or negligence by the courts*," as put forward by the Claimant's own legal expert Professor Coria.[357]

270. The Respondent asserts that the precautionary seizures were entirely rational because they were based on "*legitimate concerns and evidence with respect to potential money laundering and illegal mining*" and pursued "*to safeguard public interests such as public health, personal safety, tax collection, and the development of sustainable economic activities.*"[358]

271. In recalling the tribunal's findings in *Krederi v. Ukraine* that access to justice and due process do not imply a right to participate in proceedings as a third party as long as efficient legal remedies are available,[359] the Respondent contends that, first, such remedies existed but were not pursued by the Claimant, and that, second, the remedies and requests that were pursued by it did not correspond to Peruvian law.[360] The Respondent refers to Mr. Missiego's Expert Reports, where he pointed out that the Claimant was entitled (i) to

[355] Resp. C-Mem., paras. 547, 235-239.
[356] Missiego-Report2, paras. 19, 77-79; Resp. C-Mem., para. 547; Resp. Rej., para. 623.
[357] Resp. Rej., 251, Respondent refers to Professor Coria's publication "*Las garantías constitucionales del proceso penal*," Anuario de Derecho Constitucional Latino American (2006), p. 8, **R-0333**.
[358] Resp. C-Mem., paras. 555, 525.
[359] *Krederi v. Ukraine*, para. 566, **CL-0049**.
[360] Resp. C-Mem., paras. 212-217, 532-534; Resp. Rej., paras. 221-224, 261.

request the re-examination of the court decisions on the seizures, (ii) to challenge the judicial rulings through an appeal, and (iii) to apply to the Constitutional Court through an Amparo Claim, which it did not pursue or which it withdrew after having introduced it. Further, the Claimant was entitled to file an administrative claim or *queja* against the prosecutors or judges to complain about due process violations due to disproportionate length of investigations. Again, it did not pursue such path.[361] At the same time, it introduced requests that did not comply with the requirements of Peruvian substantive and procedural law, and, therefore, actually "*at no time formally requested the re-examination of the precautionary measure, but simply submitted briefs as if it were part of the proceeding.*"[362]

272. "*In conclusion*," the Respondent submits, "*Peru has demonstrated in this Section that SUNAT, as well as the Peruvian prosecutorial and judicial authorities involved in the Precautionary Seizures acted reasonably, proportionally, and in accordance with their respective competencies under Peruvian law. Kaloti has not demonstrated any systemic failure of Peru's judicial system. Nor has Kaloti established that any of the measures, whether considered individually or in the aggregate, amount to a denial of justice*."[363]

2) Discrimination/ Different Treatment of Similarly Situated Investors

273. The Respondent argues that it is obvious and not disputed that a claim for discrimination requires the existence of a comparator in like circumstances who is treated more favorably than a claimant. In this regard, the Respondent refers to Claimant's argument about a foreign company that, like the Claimant, traded gold in Peru, and whose shipments of gold were partially seized by Peruvian authorities, that is SUNAT, but who, unlike the Claimant, was allowed to present its case before Peruvian authorities.

274. Further, it contends that in order to qualify as a comparator, the compared entity must be in a similar situation, meaning "a *broad coincidence of similarities covering a range of*

[361] Resp. Rej., para. 628; Missiego-Report2, para. 91.
[362] Missiego-Report1, paras. 126-145; Missiego-Report2, paras. 81-96; Resp. C-Mem., paras. 531-535, 548-553.
[363] Resp. C-Mem., para. 557; Resp. Rej., 629.

factors,"[364] as for instance being "*subject to a comparable legal regime and regulatory requirements.*"[365] Identical activities such as the trading of gold are too simplistic and not sufficient to serve as a comparator.[366]

275. The Respondent alleges that in the circumstances of the present case the other foreign investor cited by the Claimant cannot serve as a comparator, because (i) its gold was seized for suspicions of tax evasions and not of money laundering, thus under a different legal regime, (ii) it was party to judicial proceedings and also raised objections in administrative procedures to which it was entitled under Article 120 of the Tax Code (for which there is no equivalent in this case), and (iii) it was not treated more favorably, as at the end of the proceeding, its gold was permanently confiscated.[367]

276. It alleges further, that the different treatment of the two companies was reasonably justified, as it was based on different legal regimes and different administrative powers. In the case of the Claimant, the investigation targeted illegal mining and money laundering, in the case of the other investor, it targeted tax evasion.

3) Good-faith Negotiations

277. The Respondent asserts that the TPA does not establish a duty for the state to enter into negotiations. Article 10.15 of the TPA recommends that the parties "*should initially seek to resolve the dispute through consultation and negotiation*," and Article 10.16 of the TPA allows the submission of a claim to arbitration if one disputing party "*considers that an investment dispute cannot be settled by consultation and negotiation*." Neither of the provisions contains an obligation to negotiate. This obvious consequence is clearly drawn by the tribunal in *Alps v. Slovak Republic*. It held that Slovakia could also enter into negotiations but when it believed that any negotiation was "*pointless*," it was "*perfectly*

[364] Resp. C-Mem., para. 560, Respondent quotes *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (26 June 2009), para. 415, **RL-0092**.
[365] Resp. Rej., para. 634, Respondent quotes *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014), para. 8.15, **RL-091**.
[366] Resp. C-Mem., paras. 560-564; Resp. Rej., paras. 633-634.
[367] Resp. C-Mem., paras. 568-579; Resp. Rej., paras. 635-641.

legitimate" to refrain from them because there was "*simply nothing to negotiate from the State's viewpoint.*"[368]

278. Further, the Respondent submits that the Claimant's efforts to construe an obligation to negotiate as based on the general principles of good faith and transparency fails, because, as both Peru and the United States agree, "*the concepts of […] transparency, and good faith are not component elements of 'fair and equitable treatment' under customary international law that give rise to independent host State obligations. […] Claims alleging breach of the good faith principle […] do not fall within the limited jurisdictional grant for investor-State disputes afforded in the Treaty*."[369]

279. At the same time, the Respondent asserts that it did engage in good faith negotiations, although it had no obligation to do so. As from 2017 and until June 2021, it has corresponded and met with the Claimant to evaluate the possibility of negotiations to try to solve the dispute, until it found that "*the Claimant's claims were baseless and that a negotiated solution would not be viable.*"[370]

4) Legitimate Expectations

280. The Respondent argues that Peru and the United States are in agreement that the "*concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation. […] An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.*"[371] This interpretation of general international law is confirmed by the International Court of Justice, which held that no principle in general international law

[368] *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (05 March 2011), para. 210, **RL-0235**; Resp. Rej., para. 678.
[369] Resp. C-Mem., paras. 586-588; Resp. Rej., paras. 682-686, citing to U.S. Non-Disputing Party Submission, dated 26 May 2023, paras. 38, 39, 41, 42.
[370] Resp. C-Mem., paras. 316, 589-595; Resp. Rej., paras. 689-692.
[371] Resp. Rej., paras. 651-657, citing to U.S. Non-Disputing Party Submission, dated 26 May 2023, paras. 38, 39.

exists "*that would give rise to an obligation on the basis of what could be considered a legitimate expectation.*"[372]

281. In any event, it submits, none of the expectations that the Claimant alleged to have had qualify as legitimate under international law. They are neither reasonable nor are they based on identified circumstances, commitments or representations made by the state before the beginning of the Claimant's operations in Peru.[373]

2. National Treatment

282. Article 10.3 of the TPA reads:

> ***Article 10.3: National Treatment***
>
> *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, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like*

[372] Resp. Rej., para. 654; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, International Court of Justice, Judgment (01 October 2018), para. 162, **RL-0273**.
[373] Resp. Rej., para. 658-670.

circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

a. Claimant's Position

283. The Claimant asserts that although all purchasers of gold were bought "*from the same Peruvian supplier base, Peru treated foreign purchasers much worse than it did the domestic buyers.*" Not a single domestic purchaser had its gold seized, only foreign companies such as KML were affected by the measures. Therefore, all Peruvian-national purchasers of mined and scraped gold in Peru in 2013 and 2014, in other words, all domestic companies that invested or operated in Peru, serve as comparators when establishing that foreign companies were treated less favorably than national ones.[374]

284. The Claimant argues that it is not appropriate to choose suppliers of gold as the comparator. First, all suppliers "*were, naturally, Peruvian companies operating in Peru*";[375] and, second, they "*were not selling-purchasing gold in Peru for purposes of re-sale and export to the United States […].*"[376]

285. The Claimant contends that "*[i]t is therefore clear that Peru breached Article 10.3 of the TPA.*"[377]

b. Respondent's Position

286. The Respondent asserts that it is generally accepted that three elements are required in the determination of a National Treatment claim, namely (i) the identification of one or more domestic comparators in "*like circumstances,*" (ii) the demonstration that a foreign investor is treated less favorably than such domestic comparator, and (iii) proof that such differential treatment has no objective, reasonable and legitimate justification. These elements, it says, are based in the rationality of the provision, which is articulated in the decision in *Total v. Argentina*, where the tribunal held that "*[u]nder international investment agreements, both national treatment and most favoured-nation treatment*

[374] Cl. Reply, paras. 356-359; Cl. Mem., para. 124; Tr. Day 1, 99:18-22; 100:1-14.
[375] Cl. Reply, para. 360.
[376] Tr. Day 1, 101:3-5.
[377] Cl. Mem., para. 125; Cl. Reply, para. 363.

require such a comparative analysis. Moreover, the national treatment obligation does not preclude all differential treatment that could affect a protected investment but is aimed at protecting foreign investors from de iure or de facto discrimination based on nationality". The rationality makes it "*necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation*," in other words, a fact-specific inquiry.[378]

287. At the outset, the Respondent asserts that the Claimant's factual premise, according to which the Peruvian authorities pursued asset seizures against foreign and not domestic purchasers is false, because the immobilization and seizure orders were directed against the Peruvian suppliers of the gold and not against a foreign buyer.[379]

288. The Respondent notes, further, that as to the above elements, the Claimant has not established any of the three.

289. *First*, it has not identified one or more domestic comparators. The vague reference to all Peruvian-national purchasers of gold in 2013 and 2014 does not suffice to identify, as the Claimant has the burden to do, comparators "*in like circumstances,*" which would allow a fact-specific inquiry into and a comparison of the different legal regimes and regulatory requirements, and the weighing of the different material circumstances.[380]

290. *Second*, the Claimant has not established any differential treatment of national and foreign purchasers of gold, as shipments for export of both foreign and domestic exporters were immobilized and has not "*provided any evidence that the Suppliers sold gold to domestic purchasers and that these sales were treated more favorably by Peru.*"[381]

291. *Third*, "*the national treatment obligation does not prohibit a State from adopting measures that result in a difference in treatment with respect to different investors, provided that such different treatment can be objectively justified.*" SUNAT had the authority to inquire about money laundering and illegal mining, and to immobilize shipments destined for

[378] Resp. C-Mem., paras. 684-685; Resp. C-mem., para. 684, Respondent quotes *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (27 December 2010), paras. 210, 211, **RL-0015**.
[379] Resp. Rej., para. 695; Resp. C-Mem., paras. 131-146.
[380] Resp. Rej., paras. 697-700.
[381] Resp. Rej., paras. 703-706.

export when indicia were sufficient to justify the suspicion of such criminal activities, as was the case with shipments 1 to 4. The Claimant would have had to establish that other shipments for export received more favorable treatment since they were not immobilized although similar indicia would have allowed their immobilization. The Claimant has not even tried to establish such facts.[382]

292. The Respondent asserts that in sum, the Claimant "*has failed to satisfy any of the requisite elements of a claim under the National Treatment Provision.*"[383]

3. Expropriation

293. The relevant provisions in the TPA read:

> ***Article 10.7: Expropriation and Compensation***
>
> *1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:*
>
> *(a) for a public 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.*

and Annex 10-B provides:

> ***Annex 10-B: Expropriation***
>
> *The Parties confirm their shared understanding that:*
>
> *1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.*

[382] Resp. Rej., paras. 708-710.
[383] *Idem*, para. 711; Resp. C-Mem., para. 697.

> *2. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.*
>
> *3. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*
>
> > *(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:*
> >
> > > *(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*
> > >
> > > *(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*
> > >
> > > *(iii) the character of the government action.*
> >
> > *(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*

and footnote 20 provides:

> *For greater certainty, the list of "legitimate public welfare objectives" in this subparagraph is not exhaustive.*

a. Claimant's Position

294. The Claimant contends that "*[i]ndirect expropriation can occur in the form of a creeping expropriation,*" as explained by the tribunal in *Siemens v. Argentina*:

> *[C]reeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may*

not have had a perceptible effect but are part of the process that led to the break.[384]

295. Relying on *Teinver v. Argentina*, it asserts that the focus of the inquiry should be on the effect of the measures, and that, therefore, the entirety of the measures must be reviewed in the aggregate.[385]

296. Further, the Claimant refers to a case that, it claims, is "*very, very similar to what Kaloti Metals has submitted,*" the *Tza Yap Shum v. Peru* case, where the tribunal had found that prolonged measures of seizure and freezing of assets were expropriatory.[386]

1) The Five Shipments of Gold (Inventory)

297. The Claimant enumerates a sequence of Peru's actions and omissions over more than eight years that support the conclusion that the Respondent will not return the seized gold to its legitimate owner. This composite act fulfils the requirements of an indirect expropriation as defined in Annex 10-B of Article 10.7 of the TPA. These are the individual measures and omissions:

- Peru seized the five shipments of gold in 2013 and 2014 under the pretext of verification of documents and origin and maintained the seizure during eight years by changing the pretext justification to an investigation of money laundering;

- Peru included the Claimant in the money-laundering investigation without specifying any wrong-doing, rationale or a legal basis and without formally notifying the Claimant, and it failed to initiate an eminent domain proceeding or to put prosecutors on notice of any alleged crimes;

- Peru did not react to the Claimant's warnings or numerous formal recourses against the seizures as from 2015, which were aimed to recover the gold, without questioning the

[384] Cl. Mem., para. 135, Claimant refers to *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (06 February 2007), para. 263, **CL-0018**.
[385] Cl. Reply, para. 384, Claimant relies on *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICISID Case No. ARB/09/1, Award (July 21, 2017), para. 948, **CL-00125**.
[386] Tr. Day 1, 105:12-26; 106:1-3; Cl. Reply, para. 382; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (7 July 2011), **CL-0080** or **RL-0267** *(*"*Tza Yap Shum v. Peru*").

Claimant's ownership of the gold until 2022, although Peruvian courts have recognized the ownership of other investors operating in similar circumstances;

- Peru never notified the Claimant when and under what circumstances it would restore the gold before it had lost all economic value;

- Peru breached its legal obligation of confidentiality of criminal investigations by leaking reports to the press, thus encouraging publications that tarnished the Claimant's reputation;

- Peru failed to react to the Claimant's notice of intent to arbitration in 2019 and to the Request for Arbitration in 2021, and did not initiate legally prescribed consultations and negotiations.[387]

298. The actions and omissions from 2014 onwards represent "*a paradigmatic case of creeping expropriation*," and "*resemble a direct expropriation*," which has deprived the Claimant entirely of the use and enjoyment of its property during these eight years.[388]

299. Moreover, the Claimant contends, the conduct interferes "*with distinct, reasonable investment-backed expectations*" (Annex 10-B, 3.a(ii) of the TPA), because it had the reasonable expectation that Peru's investigations would be conducted transparently and in a reasonable period of time, given that the Claimant had operated with reasonable care and diligence, executing hundreds of transactions before the seizures and transacting with duly registered suppliers.[389]

300. Finally, Peru's actions do not qualify as "*non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives*" (Annex 10-B, 3(b) of the TPA). "*To the contrary, [Peru's actions] represent discriminatory conduct against one company completely contrary to the rule of law, and without a rational basis.*"[390]

[387] Cl. Mem., para. 136; Cl. Reply, para. 385.
[388] Cl. Mem., paras. 137-138; Cl. Reply, paras. 386, 388.
[389] Cl. Mem., para. 139; Cl. Reply, paras. 389-391.
[390] Cl. Mem., para. 140; Cl. Reply, para. 392.

2) The Going Concern Enterprise

301. The Claimant alleges that Peru's measures, in their aggregate, "*torpedoed*" its business model in Peru, led to complete loss of economic value of the going concern enterprise and to the collapse of the company in November 2018.[391]

302. In particular, its strategy to buy gold in Peru in substantial volumes at very competitive prices at the moment of the delivery with money borrowed for this purpose, and selling it on to predetermined buyers outside Peru, relied on long-term relations of mutual trust and swift transactions. This balance was destroyed by the measures, and especially by negative and reckless national and international press reports that are attributable to Peru because they relied on leaks by government authorities. Although it was able to continue its business until 2018, it never reached the volumes of 2013 again. While business partners outside Peru did not express concern about investigations against KML, suppliers in Peru did, and desisted or decreased the volume of transactions. In addition, banks closed KML's accounts after the press reports, further affecting its ability to do business with Peru. KML was thus handicapped to sell large quantities on to its buyers, which added to its lack of funds due to the seizure of the five shipments.[392]

303. This deterioration of its business in general and the unavailability of the five shipments of gold for on-sale and financing purposes in particular created an overwhelming debt burden, which was aggravated by Kaloti Jewellery's (Dubai) decision to stop financing the Claimant's operations "*due to the large outstanding balances, liquidity blockage and the big reduction in gold supply from your firm.*"[393]

304. The Claimant asserts that "*the gold seizures triggered a downward spiral in KML's Peruvian and worldwide business operations — all directly attributable to Peru's actions and omissions — from which the company never recovered. As a result, Peru's measures constitute an indirect expropriation of KML's going concern business enterprise.*"[394]

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[391] Cl. Mem., para. 147; Cl. Reply, para. 398.
[392] *Idem*, paras. 148-151, 65; Cl. Reply, paras. 399-405, 455; Ramírez-WS, paras. 17-19, 23, **C-0146**.
[393] Kaloti Jewellery letter to Mr. Awni Kaloti, General Manager KML, dated 14 November 2018, **C-0137**; Cl. Mem., paras. 152-154; Cl. Reply, paras. 117, 406-410.
[394] Cl. Mem., para. 130; Cl. Reply, para. 380.

b. Respondent's Position

305. The Respondent contends that the Claimant has the burden to prove that the measures taken by different Peruvian public authorities – the tax and customs office SUNAT, prosecutorial offices, criminal courts – caused the destruction of the economic value of property rights either directly or through composite acts, that the Claimant had distinct, reasonable investment-backed expectations, and that the regulatory measures were discriminatory and not designed and applied to protect legitimate public welfare objectives, and that it has failed to do so. Peru is in agreement with the United States that decisions of domestic courts may be challenged for a denial of justice but, as "*acting in the role of neutral and independent arbiters of the legal rights of litigants do not […] give rise to a claim for expropriation.*"[395]

306. In any event, the Claimant's claim for shipments 2 and 3 are inadmissible, in accordance with the fork in the road Provision of Annex 10-G of the TPA, because for these two shipments it had introduced an Amparo Claim asserting a violation of Article 10.7 (Expropriation) of the TPA in 2014. Even if this claim was withdrawn and even if the claim was not for damages but for restitution, the requirement of Annex 10-G of the TPA is met, as only an alleged breach of an obligation under Article 10.7 of the TPA is required.[396]

307. The Respondent reiterates its position that the Claimant had not acquired ownership of the five shipments of seized gold because they were, and are, under criminal investigations and procedures for illegal mining, and because the Claimant has failed to conduct due diligence on the suppliers and on the gold;[397] and it had no covered investment with respect to its going concern business because its potential property rights and investment are not located in the territory of Peru, as required by Article 1.3 of the TPA.[398]

308. Further, it reiterates its position that the different alleged acts and omissions by different state bodies over a period of more than five years do not form a composite act and thus a

[395] Resp. C-Mem., paras. 597- 608; Resp. Rej., paras. 714-716, referring to U.S. Non-Disputing Party Submission, dated 26 May 2023, para. 54.
[396] Resp. Rej., 718-720; Amparo Request, Constitutional Court of Lima, dated 11 March 2014, **R-0230**.
[397] Resp. C-Mem., paras. 610-620; Resp. Rej., paras. 721-724.
[398] *Idem*, paras. 623-625; Resp. Rej., para. 728.

progressive or creeping expropriation, where "*not one action*" – as admitted by the Claimant – "*constitutes the expropriation, but taken together*,"[399] because there was no system or pattern behind the different acts.

309. The Respondent submits that the Claimant has not established any of the elements required in Annex 10-B of the TPA for the determination of an indirect expropriation.[400]

310. As to the economic impact, which must go beyond an adverse effect on the economic value of an investment to amount to an expropriation (Annex 10-B paragraph 3(a)(i) of the TPA), the Respondent asserts that the Claimant must show that "*it has suffered a complete or nearly complete deprivation of the value of its investment*" as an unavoidable consequence of the measures, *i.e.*, that the measures alone caused the loss of value,[401] or – as formulated in the U.S. Non-Disputing Party Submission – "*that the government measure at issue destroyed all, or virtually all, of the economic value of the investment.*"[402] It is apparent from the text of Annex 10-B paragraph 3(a)(i) that the economic impact must be severe, substantial, devastating, an annihilation, as held by *Electrabel v. Hungary*, that even an important loss in value is not an indirect expropriation, as explained in *El Paso v. Argentina*, and that the loss must be permanent and irreversible, as found in *Infinito v. Costa Rica*.[403]

311. The Respondent alleges that for the five shipments no permanent loss of value has been established, as, according to the Claimant, the gold has gained in value during the last years, the seizures are still temporary and might be lifted at the end of the procedures, and the Claimant has not proven that it is the owner of the gold of any or all loads. As to the value of the going concern business, the Claimant itself affirms that it continued to trade in gold until 2018, *i.e.*, more than four years after the measures and until the incorporation of its

[399] Resp. Rej., para. 730-734, Respondent quotes Cl. Mem., para. 137; Resp. C-Mem., paras. 598-600.
[400] Resp. C-Mem., paras. 626-672; Resp. Rej., 735-781.
[401] *Idem*, paras. 642-643.
[402] U.S. Non-Disputing Party Submission, para. 49.
[403] Resp. C-Mem., paras. 644-650; Resp. Rej., paras. 748-750, Respondent relies on *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 6.62, **RL-0124**; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 233, **CL-0063**; *Infinito v. Costa Rica*, Award (03 June 2021), para. 239, **CL-0053**.

new U.S. based company 'Global American'. Further, the Claimant did not establish that Peru's actions caused suppliers in Peru or other countries to decrease or stop selling gold to it, that banks ceased their relations with it as a result of Peru's actions, that supervening causes such as widespread negative press reports about the dubious business practices of the Kaloti Group were not the real cause for its decline.[404]

312. As to the alleged interference with "*distinct, reasonable investment-backed expectations*" (Annex 10-B paragraph 3(a)(ii) of the TPA), the Respondent contends that "*an objective inquiry of the reasonableness of the claimant's investment-backed expectations*" is required, as confirmed by the U.S. Non-Disputing Party Submission[405] as well as by case law. The Respondent relies on the award in *Carlos Ríos v. Chile*, where the tribunal found that the claimant must identify unequivocal, reasonable, and investment-backed expectations, meaning firm assurances and representations, which have served as a basis for the investment.[406]

313. The Respondent alleges that the Claimant has failed to establish such objective expectations for any of its expropriation claims. With respect of shipments one to four, it failed to produce assurances from Peruvian authorities that it would be allowed to purchase gold form suppliers involved in illegal mining and money laundering or any representations at all, and it did not establish that it has based its operations on such assurances; and with respect to shipment five, it could not expect that it would be immune from private pursuit of claims. With respect to the going business concern, it failed to establish or at least argue that the expectations served as basis for its investments.[407]

314. As to Annex 10-B paragraph 3(b) that excludes "*non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment*" from the realm of indirect expropriation, the Respondent contends that this provision is in line with the "*police powers exception*" of customary international law. "*[F]reezing orders under legislation directed at combatting*

[404] Resp. C-Mem., paras. 651-654; Resp. Rej., paras. 756-765.
[405] U.S. Non-Disputing Party Submission, para. 50.
[406] Resp. C-Mem., paras. 627-632; Resp. Rej., paras. 736-739, Respondent relies on *Carlos Ríos v. Chile*, paras. 254-256, **RL-0108**.
[407] Resp. C-Mem., paras. 633-641; Resp. Rej., paras. 741-745.

money laundering" and precautionary measures in the exercise of regulatory powers fall within the police powers and are not expropriatory.[408]

315. Peru is in agreement with the U.S. Non-Disputing Party Submission that: "*[u]nder international law, where an action is a bona fide, non-discriminatory regulation, or application of such a regulation, it will not ordinarily be deemed expropriatory*". In its Submission, the United States quotes *Glamis v. United States* where the tribunal found, echoing the 'Restatement (Third) of Foreign Relations' that a "*state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.*"[409]

316. The Respondent alleges that in the present case all government bodies and administrative agencies acted in full compliance with Peruvian law and in the exercise of the State's police powers that were bestowed upon them by law to combat illegal mining and money laundering and protect public welfare objectives. They did not target the Claimant but the four suppliers, as they have targeted "*multiple companies (unrelated to Kaloti).*"[410] The Respondent reiterates that they were not discriminatory and, therefore, "*do not constitute indirect expropriations,*" as provided in Annex 10-B paragraph 3(b). In any event, the seizures ordered by the courts cannot be expropriatory, because – as said – judicial decisions do not give rise to a claim for expropriation.[411]

317. Finally, the Respondent asserts that the Claimant's reliance on and "*cursory comparison*" with the award in *Tza Yap Shum v. Peru*[412] is misleading, because, first, the applicable treaty in that case, the China-Peru BIT, does not include a clause like Annex 10-B paragraph 3(b), and, second, because in *Tza Yap Shum* SUNAT acted under the Tax Code while in the present case it exercised Peru's police powers and its statutory authority under

[408] Resp. C-Mem., paras. 659-663; Resp. Rej., paras. 768-772, Respondent relies on *WNC Factoring Ltd (WNC) v. The Czech Republic*, PCA Case No. 2014-34, Award (22 February 2017), paras. 394–395, **RL-0132**; *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award (04 May 2021), para. 906, **RL-0121**.
[409] Resp. Rej., para. 769; U.S. Non-Disputing Party Submission, dated 26 May 2023, para. 47 and footnote 85.
[410] Resp. C-Mem., para. 671.
[411] *Idem*, paras. 675-677; Resp. Rej., para. 772.
[412] *Tza Yap Shum v. Peru*, **CL-0080** or **RL-0267** excerpts.

the customs law to prevent the export of gold by companies involved in illegal mining and money laundering.[413]

318. In any event, the Respondent contends, even if an expropriation were deemed established, it would have been lawful because the requirements for a lawful expropriation in accordance with Article 10.7.1 of the TPA are met: Peru's measures were taken for a public purpose, they were not discriminatory, and the MST and due process of law were respected. As to the claim for prompt, adequate and effective compensation, the Claimant "*has manifestly failed to establish causation, and its quantification analysis is riddled with inaccuracies, flawed assumptions and inconsistencies. Accordingly, even if an expropriation had taken place (quod non), no damages would be payable to Kaloti*."[414]

VII. ANALYSIS OF THE TRIBUNAL

319. There is no dispute between the parties that the Claimant, as a company incorporated under the laws of Florida in the United States, is "*an investor of a Party*" (the United States) within the meaning of Article 10.28 of the TPA. However, the Respondent argues that the Claimant does not have an "*investment*" as defined in the TPA Article 10.28, in Peru, and thus the Tribunal does not have jurisdiction *ratione materiae*. The Respondent also argues that the Claimant has not brought its claims within the 3-year limitation period under Article 10.18 of the TPA and hence the Tribunal lacks jurisdiction *ratione temporis*.

A. JURISDICTION *RATIONE MATERIAE*

320. The Respondent challenges the jurisdiction of the Tribunal *ratione materiae* on four grounds:[415] (i) that the Claimant has failed to establish that its alleged investments have the characteristics of an investment; (ii) that the Claimant has failed to establish that it "*owns or controls*" the alleged investments; (iii) that the alleged investment were not acquired in accordance with Peruvian law; and (iv) that, even if Kaloti did have investments in Peru,

[413] Resp. Rej., para. 773.
[414] Resp. C-Mem., paras. 673-678.
[415] Resp. C-Mem., para. 328.

the Tribunal would have no jurisdiction over the alleged "*indirect expropriation*" of Kaloti because Kaloti itself is not a "*covered investment*" within Peru.

321. In respect of the first ground, the Respondent argues that the assets that the Claimant alleges to constitute an investment do not have the characteristics necessary to qualify them as an investment under the TPA or the ICSID Convention.

322. Article 10.28 of the TPA provides:

> *investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*

323. According to this definition, the Respondent argues, in order to qualify as an investment an asset must have at least the characteristics of commitment of capital, expectation of profit and assumption of risk.[416]

324. The Respondent points out that although the ICSID Convention does not itself provide a definition of "*investment*," the criteria in Article 10.28 are generally regarded as applicable to determining an investment under the ICSID Convention including also a need for duration of the investment.[417]

325. The Claimant argues that its investments, primarily tangible objects such as gold and the infrastructure it has in Peru for testing and selling that gold, meet the requirements of an investment in Article 10.28.[418] The Claimant does not deny that the criteria set out by the Respondent are relevant to determining whether there is an investment, but it does not accept that all of the characteristics set out in Article 10.28 must be established. However, in any event, the Claimant argues, not only do its investments meet the requirements of commitment of capital, expectation of profit and assumption of risk, but they also meet all the requirements of the *Salini* test.[419]

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[416] Resp. C-Mem., para. 332. That position is supported by the U.S. in its Non-Disputing Party Submissions in other cases, Resp. C-Mem., para. 321.
[417] Resp. C-Mem., para. 333.
[418] Cl. Mem., para. 80.
[419] Cl. Reply, para. 158. *See Salini v. Morocco*.

326. The Claimant's assertion that it has investments in Peru is based on its claim to ownership of the five shipments of gold which themselves constitute an investment as well as on its claim that its "*going concern enterprise*" in Peru is also an investment. The Tribunal will accordingly assess the existence of an investment on the basis of these two alleged investments, recognizing that to some extent, as the Claimant argues, the two are linked.[420]

1) The Five Shipments of Gold as an Investment

327. The Respondent argues that the purchase of gold by Kaloti did not constitute a commitment of capital to an investment. Gold was purchased for onward sale and not as an investment. Relying on cases such as *Poštová v. Hellenic Republic*, the Respondent distinguishes between an investment which is a process of creating value and a sale which is a process of exchange in values.[421] Rather than being an investment in Peru, the Respondent argues, the Claimant's purchase of gold was "*no more than the conduct of a business for the export and sale of goods.*"[422]

328. The Respondent further argues that in any event, the Claimant could not establish that it had ownership of the five shipments of gold. Since it had not paid for all the shipments at the time of the seizure, title to the gold remained with the suppliers.[423] Moreover, the Respondent claims, since waybills for the shipping of the gold and customs declarations when the gold arrived in the United States were in the names of the suppliers, possession, control or ownership of the gold could not have occurred until after the gold arrived in Miami.

329. The Claimant argues that it is "*hard to fathom how gold (a physical asset) owned by KML and seized by Peru inside its territory, would not qualify as an investment for purposes of the Treaty.*"[424] It also argues that between 2012 and 2018 it had bought worldwide 344,421 kg of gold "*from which 161,168 kg of that gold was in Peru (alone).*"[425] The Claimant distinguishes cases such as *Apotex* on the ground that unlike the claimant in *Apotex*, which

[420] Cl. Reply, paras. 162-163.
[421] Resp. C-Mem., paras. 337, 340.
[422] Resp. C-Mem., paras. 338, 340, relying on *Apotex v. United States.*
[423] Resp. Rej., para. 411.
[424] Cl. Reply, para. 156.
[425] *Idem*, para. 158.

simply entered into commercial contracts in the United States albeit over a long period of time, Kaloti had a physical presence in Peru.[426]

330. The Claimant argues that it did have ownership of the gold in the five shipments, stating that "*KML effectively paid for at least three of the five shipments of gold*"[427] and that "*in the commercial world property changes hands in accordance with the agreed upon terms*" not on the basis of whether there has been a transfer of cash and that "*[a]ctual payment of the purchase price is not a requisite for the conveyance of legal title regarding movable assets in Peru.*"[428]

331. In the view of the Tribunal, before considering whether a commitment of capital to purchase gold was a contribution to an investment, an initial question is whether applying Article 10.28, the Claimant "*owned or controlled*" the gold in question.

332. In this regard, the Claimant's argument that "*between 2012 and 2018 it had bought worldwide 344,421 kg of gold 'from which 161,168 kg of that gold was in Peru'*" is not relevant. Whatever the status of those volumes of gold at the time of their purchase they were in fact resold. Claimant by its own admission was in the business of "*buying, processing (assaying) and selling gold.*"[429] It did not retain the gold that it purchased. Thus, at the time it brought the claim in this case, the Claimant did not own or control that gold. The question of ownership or control of gold, therefore, has to be determined with respect to the five shipments of gold which at the time of their seizure certainly had not been resold and remain so.

333. While the Respondent argues that Kaloti had not paid for all of the shipments and thus could not claim ownership, the Claimant argues that ownership or title to movable property depends not on payment but on the terms of sale. In the Request for Arbitration it is stated, "*Kaloti Metals executed a series of purchase and sales agreements with [the Suppliers] pursuant to which they delivered the metals to Kaloti Metals' facilities.*"[430] And in its

[426] Cl. Reply, paras. 162-163.
[427] *Idem*, para. 30.
[428] *Idem*, para. 31; citing to Coria-Report2, para. 2.2, **C-0139**.
[429] *Idem*, para. 170.
[430] Request, para. 14.

Reply, the Claimant stated, "*[t]he actual deal between the relevant parties, and Peruvian law, did not require actual payment of the price in order for ownership of the gold to be transferred to KML.*"[431]

334. However, no documents evidencing this "*actual deal*" were produced in evidence. The "*Terms and Conditions for Bullion Trading and Related Transactions*" between Kaloti and its suppliers,[432] which were placed in evidence, do not constitute sale and purchase agreements. They thus throw no light on the questions if and when the title to ownership of the gold moved from the suppliers to Kaloti. The Claimant refers to a statement by one of the suppliers, San Serafin, which claimed to the Peruvian government that the shipment seized belonged to Kaloti.[433] The Tribunal notes this statement but given that the statement was made by a party seeking to exculpate itself from an allegation of money laundering, the Tribunal is not inclined to give it much weight.

335. More importantly, however, the only evidence before the Tribunal relating to the transactions between Kaloti and the suppliers, rather than showing the title to the gold had passed to Kaloti when the gold reached its facilities in Lima, appears to indicate that in fact property in the shipments of gold would not have passed, or that Kaloti would not have obtained possession of the gold, until the gold was delivered in Miami.

336. In his First Witness Statement, Mr. Awni Kaloti said that "*[a]fter receiving the metals in Lima, KML employees would then process, test the weight and purity of the metals, package them, and export them to the United States.*"[434] However, as the Respondent points out,[435] the waybills for the transport of gold from Kaloti's facilities in Peru to the airport for shipment to Miami were in the names of the suppliers, not of Kaloti. Similarly, the waybills

[431] Cl. Reply, para. 468.
[432] *See i.e.* Terms and Conditions for Bullion Trading and Related Transactions between KML and Koenig, **C-0165**, **R-0307**.
[433] Cl. Reply, para. 32.
[434] Kaloti-WS1, para. 31, **C-0103**.
[435] Resp. Reply, 77; Tr. Day 1, 176:16-22-; 177:1-22; 178:1-11.

for the transit of gold by air from Lima to Miami were also in the names of the suppliers, not of Kaloti.[436] Payment for the shipment was also by the supplier, not Kaloti.[437]

337. Yet, according to the Respondent, under Peruvian law waybills are issued either by the owner or possessor of goods. This suggests that at the time of transit, the gold was neither owned nor possessed by Kaloti. Further, the customs declarations for the gold when it arrived in Miami were in the names of the suppliers, not of Kaloti.[438] All of this carries the implication that it was not Kaloti that was exporting the gold to Miami, but rather it was the suppliers. And, thus, the gold was not in Kaloti's possession or control, nor was Kaloti exercising ownership functions in respect of the gold,[439] and could not have done so until, at the earliest, the gold reached Miami.

338. Furthermore, other evidence on the record throws doubt on whether Kaloti ever took title to the gold at all. In his Second Witness Statement, Mr. Awni Kaloti stated that some of the gold purchased by Kaloti was "*purchased on margin*" which he described as "*somewhat similar to when stocks are traded on margin in Wall Street.*"[440] This is elaborated on in the "*Terms and Conditions for Bullion Trading and Related Transactions between KML and Koenig*"[441] which provides that "*KML [Kaloti] will be providing gold bullion margin trading services for hedging purposes where the Client [the Supplier] agrees to borrow … currency against its [Metal] position at the prevailing market rates in addition to the margin set by KML [Kaloti] and subject to revision as necessary.*"[442] It further provides

[436] Shipment 1 Air Waybills, dated 27 November 2013, **R-0245**; Shipment 2 Air Waybills, dated 9 January 2014, **R-0246**; Shipment 3 Air Waybill, dated 8 January 2014, **R-0247**; Shipment 4 Air Waybills, dated 8 January 2014, **R-0248**, and on Oxford Gold Corporation S.A.C. document package, **C-0007**; Compañía Minera Sumaj Orkro S.A.C. document package, **C-0008**; Compañía Minera San Serafín S.A.C. document package, **C-0009**; Koenig Shipping Guides (including in Koenig Criminal Proceedings) dated 27 November 2013, **R-0170**.
[437] Resp. Reply, para. 77; Tr. Day 1, 177:15-19; Email from KML to Sumaj, dated 4 November 2013, **R-312**.
[438] Customs Declaration No. 235-2013-40-116367-01-9-00, dated 27 November 2013, **R-0070**; Customs Declaration No. 235-2013-40-116370-01-1-00, dated 27 November 2013, **R-0071**; Customs Declaration No. 235-2014-40-002241-01-5-00, dated 9 January 2014, **R-0072**; Customs Declaration No. 235-2014-40-001919-01-8-00, dated 8 January 2014, **R-0074**; Customs Declaration No. 235-2014-40-001920-01-6-00, dated 8 January 2014, **R-0075**.
[439] Tr. Day 1, 176:23-15.
[440] Kaloti-WS2, para. 30, **C-0147**.
[441] Terms and Conditions for Bullion Trading and Related Transactions between KML and Koenig, dated 13 May 2013, **C-0165** or **R-0307**. Similar provisions are found in the "Terms and Conditions" with other suppliers.
[442] Terms and Conditions for Bullion Trading and Related Transactions between KML and Koenig, dated 13 May 2013, p. 6, **C-0165** or **R-0307**.

that Kaloti would trade the precious metals for the Customer "*either on a spot, forward or option basis.*"[443]

339. The inference that the Respondent draws from this is that Kaloti essentially acted as a broker. It would finance the purchases of gold made by the suppliers through loans to them and then arrange the sale of the gold to purchasers. None of this involved Kaloti purchasing the gold itself. The inference is also consistent with the fact that it was the suppliers, not Kaloti, that were to ship the gold from Kaloti's premises in Lima to the airport and then by air to Florida.[444] And it is consistent with the fact it was the suppliers who made the relevant customs declarations when the gold entered the United States.[445]

340. In the view of the Tribunal, the above facts and inferences cast serious doubt on the Claimant's unsubstantiated claim that it had ownership or even control of the gold at the time of seizure or that it had ownership of the gold once it reached its premises in Lima. They all suggest that even if it could be established that Kaloti ever had ownership of the gold, that could not have happened before the gold arrived in Miami. That is inconsistent with a claim that Kaloti owned the gold in the five shipments, and that those shipments could therefore constitute an asset that was an investment in Peru.

341. Thus, in the view of the Tribunal, serious questions were raised that cast doubt on Kaloti's claim that it owned the gold that was in the five seized shipments. At the very least, the Claimant had the burden to rebut the clear implication from the facts set out above. But the sale and purchase agreements whose terms may have rebutted the Respondent's arguments were not produced, a response to the arguments relating to the signature of the waybills

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[443] Terms and Conditions for Bullion Trading and Related Transactions between KML and Koenig, dated 13 May 2013, p. 2, **C-0165** or **R-0307**.

[444] Tr. Day 1, 176:10-20, Respondent relies on Exhibits: Shipment 1 Air Waybills, dated 27 November 2013, **R-0245**; Shipment 2 Air Waybills, dated 9 January 2014, **R-0246**; Shipment 3 Air Waybill, dated 8 January 2014, **R-0247**; Shipment 4 Air Waybills, dated 8 January 2014, **R-0248**, and on Oxford Gold Corporation S.A.C. document package, **C-0007**; Compañía Minera Sumaj Orkro S.A.C. document package, **C-0008**; Compañía Minera San Serafín S.A.C. document package, **C-0009**; Koenig Shipping Guides (including in Koenig Criminal Proceedings) dated 27 November 2013, **R-0170**; Respondent's Opening Presentation of 24 July 2023, Slides 34-35.

[445] Tr. Day 1, 177:15-19, Respondent relies on Exhibits: Customs Declaration No. 235-2013-40-116367-01-9-00, dated 27 November 2013, **R-0070**; Customs Declaration No. 235-2013-40-116370-01-1-00, dated 27 November 2013, **R-0071**; Customs Declaration No. 235-2014-40-002241-01-5-00, dated 9 January 2014, **R-0072**; Customs Declaration No. 235-2014-40-001919-01-8-00, dated 8 January 2014, **R-0074**; Customs Declaration No. 235-2014-40-001920-01-6-00, dated 8 January 2014, **R-0075**, Respondent's Opening Presentation of 24 July 2023, Slide 214.

and the customs declarations was not provided in the Claimant's written pleadings or by the Claimants' legal expert Dr. Dino Carlos Caro Coria in his reports. And the Claimant did not address these matters at the Hearing; rather, it continued simply to assert that it had ownership and control of the gold, or, if not ownership, then at least "*physical possession and control.*"[446]

342. The Tribunal concludes that the Claimant has failed to establish that at the relevant time Kaloti had ownership or possession of the gold in the five shipments and thus, it has been unable to establish that the gold in those shipments on their own constituted an asset that could be an investment by the Claimant in Peru.

343. In light of this conclusion, the Tribunal need not consider whether the other elements that are necessary to claim that the purchase of the gold in the five shipments constituted an investment have been met. Also, the Tribunal does not have to address the question whether Kaloti – even if acting in good faith – was able to acquire the gold of the five shipments despite serious allegations of illegal and criminal acquisitions by the suppliers.

344. The conclusion that the Claimant has not established that the purchase of gold constitutes an investment does not, however, rule out the possibility that the Claimant's activities with respect to its trading in gold are relevant to the question of whether it had an investment in a "*going concern enterprise*" in Peru. That matter will be dealt with next.

2) The "Going Concern Enterprise" as an Investment

(i) ***The relevant test***

345. The Parties differ on what has to be established in order to constitute an investment. While both agree that Article 10.28 establishes the standard under the TPA, the Respondent takes the view that the designation of something as a particular type of asset in Article 10.28 does not obviate the need to establish that the asset in question has the characteristics of an investment, in particular that it has the three characteristics identified in Article 10.28, namely a commitment of capital, expectation of profit, or assumption of risk. These requirements, in the Respondent's view, are cumulative, not alternative. The Respondent

[446] Tr. Day 1, 66:14-22; 67:1-5; Tr. Day 6, 1430:11-15.

notes that the United States has also taken this position in its capacity of Non-Disputing Party in other disputes.[447]

346. The Claimant argues, however, that the position of Peru and the United States is contrary to the actual words of the Treaty. In the Claimant's view, the use of the words "*including*" and "*or*" in Article 10.28 of the US-Peru TPA imply that these characteristics are not all imperative … requirements.[448] They are, according to the Claimant, alternatives. Accordingly, in the view of the Claimant, "*by having met one characteristic KML has already met its burden.*"[449]

347. The Respondent rejects this interpretation of Article 10.28, arguing that the treaty refers to the "*characteristics*" of an investment in plural form and thus it could not have meant only a single characteristic. Further, the use of the word "*including*" was simply an indication that the list of characteristics in Article 10.28 was not exhaustive.

348. The Tribunal does not accept that the existence of an investment can be established simply by showing that one characteristic of an investment exists. A commitment of capital, for example, has to be towards something that is capable of constituting an investment. A commitment of capital to an asset does not alone turn that asset into an investment.

349. This is consistent with the actual wording of Article 10.28 which, as the Respondent points out, requires that an asset that a claimant owns or controls must have the "*characteristics*" of an investment, not just a single characteristic. The use of the term "*or*" following "*including*" serves to keep the category of characteristics open. If the wording had been "*including such characteristics as the commitment of capital or other resources, the expectation of gain or profit,* ***and*** *the assumption of risk*" the implication might have been that the category of characteristics was closed.

350. The Tribunal notes that, in view of the Claimant's argument that its alleged investments in fact meet all of the requirements for an investment, the matter is of less significance. However, in assessing the Claimant's claim that it has an investment in Peru on the basis

[447] Resp. C-Mem., para. 331.
[448] Cl. Reply, para. 161.
[449] *Idem*, para. 161.

of its "*ongoing concern business enterprise,*" the Tribunal will look at all of the relevant characteristics to establish an investment and not limit itself to a single characteristic if compliance is found with that characteristic.

(ii) *The "going concern business enterprise"*

351. In considering the claim that Kaloti's "*ongoing concern business enterprise*" is an investment in Peru, the Tribunal observes first, that Kaloti itself as a legal entity is a limited liability company registered in Florida and as such carries on business in the United States. It is not incorporated in Peru. Kaloti claims that it is registered in Peru with the SUNARP with registration number 13174025.[450] However, the Respondent points out, without contradiction from the Claimant, that such registration simply permits a foreign company to register a power of attorney with SUNARP which Kaloti did on 4 April 2014. It says nothing about whether the foreign company is doing business or has an investment in Peru.[451]

352. The Respondent further challenges the Claimant's argument that its operations in Peru were a "*going concern business enterprise*" that constituted an investment, by arguing that there is no evidence of a commitment of capital or other resources, an assumption of an investment risk or a sufficient duration of the alleged investment.

353. The Claimant by contrast argues that its investments in Peru, apart from the gold, included "*its infrastructure for testing and selling gold*",[452] and that it met all the requirements of the *Salini* test.[453]

(a) Commitment of capital or other resources

354. There is no dispute between the Parties that in order to establish an investment it must be shown that there is a commitment of capital that is "*substantial*". That position was

[450] Cl. Reply, para. 155.
[451] Resp. Rej., para. 477.
[452] Cl. Mem., para. 81.
[453] Cl. Reply, para. 158.

affirmed clearly in *Bayindir*[454] as well as in the *Poštová* case referred to earlier[455] and *Apotex*.[456]

355. The Claimant argues that the substantial commitment of capital it made in this case included the rent it paid for its office in Lima and the apartment it rented for "*expatriate and travelling personnel.*" It included the salaries paid to its local employees in Peru.[457] It included the infrastructure costs of its facilities to weigh and assay gold,[458] as well as the amounts it spent in the purchase of that gold. It also refers to plans for the development of a refinery.[459] In short, KML argues that it had a "*real operation on the ground in Peru.*"[460]

356. As an initial point, the Tribunal does not see the purchase of gold as constituting a substantial investment. Apart from the fact already determined that the Claimant has failed to establish that it "*owned or controlled*" the five seized shipments, other purchases of gold were made as part of Kaloti's buying and selling of gold. Moreover, the activities of Kaloti in Peru that the Claimant refers to, such as identifying suppliers, testing, weighing, assaying, storing and finally shipping gold are attributes of commercial transactions. The costs incurred in such transactions are normal commercial costs incidental to an exchange of values; they do not of themselves create value. It is well-established that a contribution of money in a commercial exchange of values through a sale and purchase of goods or services is distinct from a contribution of money to an economic venture that creates value and can constitute an investment.[461]

357. Further, as has already been pointed out, at least part of Kaloti's involvement in the purchase of gold was that of a broker with no independent acquisition or ownership.[462] As a result, Kaloti's claim that it contributed money through the purchase of gold cannot of itself establish that there was an investment in Peru. However, the fact that gold was

[454] *Bayindir v. Pakistan*, para. 131, **RL-0196**.
[455] *Poštová v. Hellenic Republic*, **RL-0194**.
[456] *Apotex v. United States*, **RL-0202**.
[457] Cl. Mem., para. 21.
[458] *Idem*, para. 19.
[459] Cl. Reply, para. 163.
[460] *Idem*, para. 164.
[461] *Poštová v. Hellenic Republic*, para. 361. *See* also *Apotex v. United States*.
[462] *See supra* paras. 84, 339, 357.

purchased and sold as part of a business of trading in gold would be relevant to determining whether the business was an investment in Peru. The Claimant itself states that the *Apotex* case can be distinguished from the situation in this case because *Apotex*, unlike Kaloti, "*did not have offices or a physical presence in the host country.*" All it did was to enter into commercial contracts for the sale of goods.[463] Kaloti does not deny that *Apotex's* purchases involved the expenditure of significant sums of money over a long period of time.

358. In the view of the Tribunal, whether or not Kaloti made a commitment of capital to an investment in Peru turns not on whether it bought and sold gold, but on whether it had sufficient elements of a business operation in Peru to which it committed capital. Accordingly, the Tribunal will now turn to what Kaloti claims to constitute its "*going concern business enterprise.*"

359. As the Tribunal already pointed out, this consists of rent for an office and for an apartment, salaries of local employees and an infrastructure to weigh and assay gold. The Claimant also refers to plans for the creation of a refinery in Peru. However, there is no evidence of any capital commitment to a refinery; the matter was simply being discussed and thus this could not be an element of an actual investment in Peru.

360. Regarding the rent paid for an office, the Respondent states that what Kaloti had was a one-year service agreement with the transportation company Hermes for the "*transportation and storage of Kaloti's precious metals*"[464] which provided Kaloti with a facility that included storage space within Hermes' premises. The rented apartment was in fact an apartment leased for one year by Kaloti's operational manager in Peru as a private residence, which in fact prohibited sub-letting of the apartment.[465]

361. Further, Kaloti's "*employees*" in Peru rather than being employees were independent contractors[466] hired to carry out the tasks relating to the weighing and assaying of gold. They operated under service contracts terminable on 30-day's notice, without any

[463] Cl. Reply, para. 162.
[464] Resp. C-Mem., para. 342.
[465] *Idem*, para. 343.
[466] Cl. Reply, para. 165.

employment relationship being established.[467] The infrastructure for weighing and assaying gold consisted of the fact that Kaloti had the facilities in the premises they rented from Hermes to weigh and assay gold, and this was done by local individuals hired for that purpose.

362. The Claimant asserts that the staff in Lima had a further role in meeting with customers, closing transactions and purchasing and sourcing gold. The Claimant's witness, Mariela Llivina, who worked as Head Trader for Kaloti, based in Florida, said in her oral testimony that the staff in Lima:

> *could also take closings, but I entered those in the system. They could determine whether a transaction was conducted or not, they could negotiate the rates up to a certain limit. They had the capabilities of a regular office […] If they took a closing, they could take it and pass it on. They could decide to increase the rates. After an account was opened, they could close it. And they could make decisions*.[468]

363. In sum, the business in Peru that Kaloti claims to be a "*going concern business enterprise*" consisted of some rented office space with the company that provided transportation and storage for gold purchased from suppliers in Peru in which the gold was weighed and assayed by local hired individuals before it was exported to the United States, and some involvement of staff in Peru in contracting for the purchase of gold. The commitment of capital to that investment consisted of the rent paid for the office space and the salaries of the staff in Lima. In the view of the Tribunal, the apartment rented by Kaloti's operational manager as a private residence does not constitute a contribution of capital by Kaloti.

364. Although the Claimant also argues that it had "*fixed infrastructure costs and advertisement investments*"[469] it does not explain what those fixed infrastructure costs were apart from the rent for office space and the service contracts for the individuals weighing and assaying the gold, nor does it elaborate on the "*advertisement investments.*" Presumably the equipment shown in the images of Kaloti's office in Lima[470] were included in the "*fixed infrastructure costs.*" Two of the items shown (X-Ray machines and scales) were said to

[467] Resp. C-Mem, para. 344.
[468] Tr. Day 3, 693:21-22; 694:1-9.
[469] Cl. Reply, para. 158.
[470] Cl. Mem., para. 19.

have been "*sent to Peru for gold processing purposes.*"[471] Although these may have been intended to indicate a "*commitment of other resources*" no specific value was attached to them.

365. The Tribunal has difficulty in seeing that the payment of rent for office space and payments under service contracts can of themselves establish a commitment of capital to a "*going concern business enterprise*". The unspecified value of equipment in the office in Lima adds little to the claim and while the staff in Lima had a role in the contracting process, it was still subject to approval in Miami whether to open an account, and approval was required by the compliance officer Pacco Llano. As explained by the Claimant's witness Mariela Llivina,[472] decisions on closing transactions were ultimately made by her as the "*head trader*," and contracts were signed on behalf of Kaloti by Awni Kaloti. Pacco Llano, Mariela Llivina, and Awni Kaloti were all based in Miami. Further, the Claimant states that it paid for all of the gold by transfers from bank accounts in the United States to Peruvian banks.[473]

366. A further argument in support of the view that Kaloti was operating a business enterprise in Peru is the assertion by Mr. Kaloti in his Second Witness Statement that some of the gold purchased by Kaloti was "*purchased on margin*" which he described as "*somewhat similar to when stocks are traded on margin in Wall Street.*"[474] The Respondent itself concludes from this that Kaloti was not buying gold but acting as a broker. Although the Claimant never articulated such a claim fully, the question is whether this brokerage element in the operations of Kaloti lends support to the idea that there was a business enterprise in Peru.

367. There is little evidence on the record to substantiate such a claim. Indeed, it appears that all of the decision-making took place in Miami not Lima. And the claimed enterprise lacks other indicia of a business operation in Peru. Apart from Kaloti registering a power of attorney with SUNARP as a foreign company, there was no business of Kaloti formally

[471] *See* Llivina-WS, para. 24, **C-0105**.
[472] Tr. Day 3, pp. 693-700.
[473] Cl. Reply, para. 47; Tr. Day 1, 36:3-6.
[474] Kaloti-WS2, para. 30, **C-0147**.

recognized as operating in Peru. Kaloti had not registered its enterprise nor a branch in the Peruvian Single Taxpayers' Registry (RUC), which, the Respondent points out, foreign corporations with a permanent establishment in Peru are required to do.[475]

368. There is no evidence that Kaloti ever paid income tax in Peru which, the Respondent asserts, foreign companies with a permanent establishment in Peru are required to do.[476] The Claimant argues that payment of income tax was not a relevant consideration because tax is only owed if there is a profit of income over expenses.[477] Indeed, according to the Claimant, Kaloti's income came largely from payments into its bank account in Miami from Kaloti Jewellery (Dubai).[478] Inside Peru, the Claimant states, Kaloti had "*mostly expenses*"[479] which were exclusively covered by bank transfers from its bank accounts in Miami to bank accounts of contracting partners in Peru.[480]

369. In the view of the Tribunal what emerges is that the alleged "*commitment of capital or other resources*" within the meaning of Article 10.28 of the TPA consisted in paying the expenses of an office and salaries of an "*enterprise*" that generated no income in Peru and was not meant to do so. The activities in Peru were ancillary to the commercial buying and selling of gold, an operation based in Miami. There was no independent "*enterprise*" in Peru. There was, thus, no substantial commitment of capital or other resources to an investment in a going concern business enterprise in Peru.

(b) Duration of investment

370. The Claimant's argument that it met the test of the need for a certain duration of the investment is based on its having been in Peru since 2012 and engaging in contracting for gold throughout that period. Its business was not a few specific contracts, although its dispute relates to five specific shipments of gold and the consequences of their seizure. Moreover, Kaloti had intended to remain in Peru and open a refinery.

[475] Resp. Rej., para. 473.
[476] *Idem*, para. 474.
[477] Tr. Day 6, 1428:1-7.
[478] Tr. Day 1, 23:8-11.
[479] Tr. Day 1, 23:13-14.
[480] Tr. Day 1, 23:13-14.

371. However, although Kaloti did in fact purchase gold throughout this period, the office space and service contracts which are relied on to establish the "*going concern business enterprise*" were all short-term – one-year rental terms in the case of the office space and service contracts for the individuals weighing and assaying the gold terminable at any time on 30-day notice.[481] While certainly Kaloti intended to keep purchasing gold in Peru and entering into sales agreements to do so, the Tribunal sees nothing that suggests an actual business enterprise that involves a long-term commitment to operating and creating value in Peru. There is nothing that suggests an investment of a long-term duration rather than an operation to support Kaloti's purchase and sale of gold, an operation based in Miami.

(c) Expectation of Gain or Profit

372. An expectation of gain or profit is one of the characteristics of an investment specifically identified in Article 10.28 of the TPA. The Claimant argues that its business enterprise in Peru meets this requirement. It was "*financially cash-flow positive in 2012, 2013, 2016 and 2017.*"[482] And it would have remained profitable if not for Peru's measures.

373. However, what the Claimant appears to be asserting is that Kaloti's sale and purchase of gold was profitable, not that its going concern business enterprise in Peru – the investment at issue in this case – was profitable. The profit was the margin between the purchase price and the onward sale price of the gold. There was no additional creation of value by, for example, refining the gold. Indeed, the Claimant argues that Kaloti's profits were made in Miami from revenues from Kaloti Jewellery (Dubai). There was no revenue in Peru, just the payment of expenses for the execution of commercial transactions. It was on this basis, the Claimant alleges, it was not liable for income tax in Peru.[483]

374. Thus, in the view of the Tribunal, the Claimant has failed to establish that its investment in Peru, its going concern business enterprise, had an expectation of gain or profit. It certainly had an expectation that it would contribute to the profitability of Kaloti as an entity based in Miami, but the Miami-based limited liability company is not the investment in this case.

[481] Resp. C-Mem., para. 344. *See* Employment agreements between KML and Ms. Josefina Boza Celi, Mr. Dante Joaquín Cornejo Pérez and Mr. Carlos Enrique Blume Dibos, **C-0037**.
[482] Cl. Reply, para. 158.
[483] *Supra*, para. 368.

This reinforces the conclusion that Kaloti's operations in Peru, rather than being an investment, were simply facilitating the gold buying and selling operations of KML, the gold trading company based in Miami.

(d) Assumption of Risk

375. It is generally accepted that risk must be assumed with an investment and that the risk must be more than the risk that may be present in the purchase of any asset.[484] In this way, investment risk is distinguished from the "*risk that arises in an ordinary commercial transaction.*"[485]

376. The Claimant argues that it did assume operational risk since it "*established on-the-ground operations without knowing with certainty what would happen with such operations.*"[486] It includes leasing property and hiring personnel as part of that risk and the risks involved in sourcing gold and perhaps losing that gold.[487]

377. In the view of the Tribunal, it is clear that Kaloti took some risks in its gold trading operations in Peru. The question, however, is whether those risks were investment risks or whether they were just risks inherent in any commercial operation. Investment risk is about the uncertainty of how much will have to be put into the investment and the uncertainty over what the return may be. As the tribunal in *Romak v. Uzbekistan* put it, "*[w]here there is 'risk' of this sort, the investor simply cannot predict the outcome of the transaction.*"[488]

378. However, risks involved in sourcing gold and the possibility of losing that gold would be common to all gold trading operations regardless of whether the gold trader had an investment in Peru. The other risks relating to the office and the personnel hired in Peru were limited. As pointed out, the commitment by Kaloti was to the rent of an office and the salaries of the personnel engaged in weighing and assaying gold before it was exported.

[484] *Seo Jin Hae v. Korea*, para. 130.
[485] *Nova Scotia v. Venezuela.*
[486] Cl. Reply, para.158.
[487] Tr. Day 1, 67:6-17.
[488] *Romak v. Uzbekistan*, para. 230, **RL-0198**.

However, the lease was short-term, and the service contracts could be terminated on 30-days' notice.

379. The Claimant argues that taking these factors into account effectively punishes Kaloti for being frugal. But the requirement that in order to have an investment there must be an assumption of risk is a treaty requirement. And it cannot be a risk that is common to any commercial transaction. A commercial transaction is not an investment. Accordingly, the Tribunal is not convinced that the risk involved in the lease of the office and the remuneration of those weighing and assaying gold is sufficient to transform Kaloti's operations in Peru into an investment.

(e) Contribution to the development of the host state

380. A more controversial requirement for an investment, set out in *Salini*, is that the investment must contribute to the economic development of the host state. Both parties present arguments on this issue. The Claimant refers to hiring personnel in Peru and the purchase of gold contributing to the development of the mining sector.[489] The Respondent refers to the fact that the five gold shipments had been held as a result of allegations of money laundering and that Kaloti paid no taxes in Peru as an indication of a lack of any contribution to the development of Peru.

381. The Tribunal observes that the payment of rent and hiring personnel in Peru can be viewed as minor contributions to the Peruvian economy. However, in view of the fact that none of the other criteria for an investment have been met, the Tribunal sees no need to consider whether these minor contributions to the Peruvian economy would meet the threshold for a contribution to the development of the Peru as the host state.

(f) Conclusion on the "going concern business enterprise" as an investment

[489] Cl. Reply, para. 158.

382. In light of the above, the Tribunal concludes that the Claimant has not established that it has an investment in Peru through a "*going concern business enterprise.*"

B. CONCLUSION ON JURISDICTION *RATIONE MATERIAE*

383. In the view of the Tribunal, the Claimant has failed to establish that it has an investment in the territory of Peru within the meaning of Article 10.28 of the TPA. It has been unable to demonstrate that it owned and/or controlled the gold in the five seized shipments, and it has been unable to substantiate its claim that it had an investment constituted by a "*going concern business enterprise*" in Peru. The Claimant did have some operations in Peru; it leased an office there and weighed and assayed gold before the gold was exported to the United States. But all of this was to support the business of the Claimant in buying gold in Peru and exporting it to the United States.

384. The Claimant's business of buying and selling gold is a business that operates out of Miami and the Claimant has not established that it had a business in Peru, separate from its Miami-based operation, that could constitute an investment in Peru.

385. Accordingly, the Tribunal upholds the objection of the Respondent that the Tribunal has no jurisdiction *ratione materiae*.

386. As a result, it is unnecessary for the Tribunal to consider the further objection of the Respondent relating to jurisdiction *ratione temporis*.

387. It follows from the above that the Tribunal has no jurisdiction to consider the questions of liability and damages raised by the parties.

VIII. COSTS

A. CLAIMANT'S COST SUBMISSIONS

388. In its Reply Memorial, the Claimant requests that "*Peru to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the tribunal, and the cost of*

legal representation (counsel's fees)."[490]

389. In its costs submission the Claimant listed its costs of legal representation as totalling USD 2,090,730.44, broken down as follows:

Legal Fees	1,105,966.00
Expenses (including advances made to ICSID)	579,622.44
Experts' Fees	405,142.00

B. RESPONDENT'S COST SUBMISSIONS

390. In its Rejoinder on the Merits, the Respondent asks the Tribunal to, "*order Claimant to pay all costs of the arbitration, including the totality of Peru's legal fees and expenses, expert fees and expenses, arbitrator and institutional fees and expenses, and any other expenses incurred in connection with Peru's defense in this arbitration*".[491]

391. In its costs submission the Respondent's legal fees and expert fees and expenses totalled USD 3,959,234.41 broken down as follows:

Legal Fees and Expenses	2,991,234.41
Advances made to ICSID	450,000.00
Expert's Fees	518,000.00

C. THE TRIBUNAL'S DECISION ON COSTS

392. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the*

[490] Cl. Reply, para. 522.
[491] Resp. Rej., para. 840.

charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

393. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

394. The Tribunal has concluded that it has no jurisdiction in this case. In doing so, the Tribunal found that the Claimant had failed to provide the evidentiary basis that would support its claim that it had an investment in Peru. In the absence of such evidence there was no reasonable basis for litigating this claim. In light of this, the Tribunal concludes that the Claimant should be responsible for both the costs of the arbitration and the reasonable costs of representation of the other Party to these proceedings.

395. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Donald McRae, President	98,675.12
José Carlos Fernández Rozas Co-arbitrator	165,894.45
Rolf Knieper, Co-arbitrator	151,897.24
ICSID's administrative fees	126,000
Direct expenses	193,432.45
Total	**735,899.26**

396. The above costs have been paid out of the advances made by the Parties in equal parts.[492]

397. The Tribunal considers that these costs and expenses are reasonable.

398. Accordingly, the Tribunal orders the Claimant to pay the Respondent USD 367,949.63 for the expended portion of the Respondent's advances to ICSID and USD 3,509,234.41 for the Respondent's legal fees and expenses.

[492] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

IX. AWARD

399. For the reasons set out above the Tribunal:

(1) DECIDES to uphold the objection to jurisdiction *ratione materiae* raised by the Respondent;

(2) DECLARES that it has no jurisdiction in this dispute;

(3) DISMISSES the claim of Kaloti Metals and Logistics, LLC; and

(4) AWARDS costs to the Respondent in the amount of USD 3,509,234.41 and USD 367,949.63 in ICSID costs.

Prof. Dr. José Carlos Fernández Rozas
Arbitrator
Date: May 2, 2024

Prof. Dr. Rolf Knieper
Arbitrator
Date:

Prof. Donald McRae
President of the Tribunal
Date:

Prof. Dr. José Carlos Fernández Rozas
Arbitrator
Date:

Rolf Knieper

Prof. Dr. Rolf Knieper
Arbitrator
Date: 1 May 2024

Prof. Donald McRae
President of the Tribunal
Date:

Prof. Dr. José Carlos Fernández Rozas
Arbitrator
Date:

Prof. Dr. Rolf Knieper
Arbitrator
Date:

Prof. Donald McRae
President of the Tribunal
Date: 6 May 2024