November 24, 2023

VIA COURIER AND EMAIL

Sr. José Alfredo La Rosa Basurco
Dirección General de Asuntos de Economía Internacional
Competencia e Inversión Privada
Ministerio de Economía y Finanzas
Jirón Lampa 277, piso 5
Lima, Perú

Re: ***Claimants' Notice of Intent to Commence Arbitration Under United States – Peru Trade Promotion Agreement***

Dear Mesdames, dear Sirs,

We write on behalf of Blue Water Worldwide LLC, Blue Water Dunas LLC, and the owners of YCP Peru Fund I, L.P. (collectively, "Claimants").

Pursuant to Article 10.16(2) of the United States-Peru Trade Promotion Agreement ("TPA") that was signed on April 12, 2006 and entered into force on February 1, 2009, we write to provide a Notice of Intent to submit to arbitration against the Republic of Peru ("Respondent") claims arising out of Claimants' investments in Dunas Energía S.A.A. and Electro Dunas S.A.A., the latter of which holds a concession for the distribution and commercialization of electricity in the southern-mid regions of Peru. The nature of Claimants' dispute with Peru is outlined below.

To the extent you have questions for the Claimants, we nominate King & Spalding LLP and Estudio Santivañez to act as our legal representatives in the matter from this point forward.

I. Investors and Investment

Blue Water Worldwide LLC ("BWW") and Blue Water Dunas LLC ("BWD") are domiciled at 150 East 52nd Street, 28th Floor, New York, NY 10022, United States. Both BWW and BWD are legal entities organized under the laws of Delaware and thus qualify as "enterprises" under the TPA. BWW owns 100% of BWD.

The owners of YCP Peru Fund I, L.P. are four (4) United States nationals and seven (7) entities constituted under the laws of the United States ("YCP Owners"). The individuals are Charles P Coleman III, John Barry Purcell, Wesley Franklin Haynes, and Jon Ylvisaker. The legal entities are Cedar Hill Holdings, LLC, Kenneth Rainin Charitable Lead Annuity Trust No. 3 dtd 3/26/90, Kenneth Rainin Foundation, Maltese Capital, LLC, Next Egg Investments (Cheswold), LP, Next Egg Investments (JN), LP, and SV Booth Investment III, LLC. The individuals are "nationals" and the entities are "enterprises" under the TPA. The YCP Owners are domiciled at 400 Park Avenue, 21st Floor, New York, NY 10022, United States.

BWD and the YCP Owners together own Electro Dunas Cayman Holding Ltd. ("EDCH"), an entity organized under the laws of the Cayman Islands. BWD owns 80% of EDCH, and the YCP Owners indirectly own the remaining 20% of EDCH. Claimants made an investment in Peru when, between December 2012 and April 2013, EDCH acquired Dunas Energía S.A.A. ("DESAA"),[1] a company listed on the Lima Stock Exchange ("LSE"). At the time that EDCH acquired DESAA, DESAA owned 99.41% of Electro Dunas S.A.A. ("EDSAA").[2] EDSAA held, and continues to hold, a concession for the distribution and commercialization of electricity in the southern-mid regions of Peru. Both DESAA and EDSAA qualify as "investments" under the TPA.

II. Factual Background

1. The 2019 Transaction and EDCH's Tax Refund Process

On February 19, 2019, EDCH and Grupo Energía Bogotá S.A. ESP ("GEB") entered into a Tender Offer Support Agreement ("TOSA"), in which GEB agreed to launch a tender offer for

[1] DESAA is an entity organized under the laws of Peru.
[2] And thereafter DESAA owned 99.96% of EDSAA.

the acquisition of DESAA.[3] On July 5, 2019, GEB issued an offer to acquire DESAA.[4] On August 7, 2019, GEB acquired 100% of DESAA for a total of S/ 711,579,220.[5]

Following this transaction, and in line with domestic regulations applying a 5% capital gains tax rate to non-resident taxpayers who conclude transactions on the LSE, the Central Register for Securities and Settlements in the Peruvian market ("CAVALI") withheld S/ 27,747,538.44, from the price paid by GEB.[6] CAVALI then paid this amount to the Peruvian tax authority, the Superintendencia Nacional de Aduanas y Administración Tributaria ("SUNAT").

Owing to both the legal uncertainty surrounding the scope and application of a new tax-avoidance regulation[7] and the absence of a mechanism to obtain a binding tax ruling[8] from SUNAT regarding the amount of capital gains taxes owed, EDCH, out of an abundance of caution, made an additional S/ 142,011,902 payment to SUNAT on November 15, 2019.[9] This amounted to an additional 25% tax on capital gains and brought the total of EDCH's paid tax rate to 30%, despite the fact that the actual applicable tax rate was 5%. Two weeks later, on November 29, 2019, EDCH filed a tax refund request before SUNAT for S/ 142,011,902 in order to force the start of an audit proceeding and obtain a firm confirmation that EDCH was only obliged to pay a 5% capital gains tax, rather than a 30% capital gains tax.[10]

Despite the fact the refund process should have only taken several weeks,[11] to date, *i.e.*, four years later, SUNAT has yet to rule on whether the transaction was subject to a 5% or 30% capital gains tax and has consequently failed to refund any overpayment that is clearly due.

---

[3] **Exhibit 1**: Tender Offer Support Agreement, February 19, 2019.

[4] **Exhibit 2**: GEB's takeover bid, July 5, 2019 as amended on July 17, 2019; **Exhibit 3**: GEB's Information Leaflet, July 17, 2019.

[5] **Exhibit 4**: Stock Exchange Agent's documents showing completion of transaction, August 7, 2019.

[6] **Exhibit 5**: CAVALI's certificate of 5% withholding, September 9, 2019.

[7] The tax-avoidance regulation is a norm that allows SUNAT to audit transactions to verify whether those were structured in way as to reduce taxation or avoid taxation at all, by means of simulated acts or fraudulent evasion of the law. This norm became in effect on May 7, 2019, right before GEB's takeover bid. At that time, the scope, rules and criteria to apply such a norm were defective, unclear and did not afford any predictability to taxpayers. *See* **Exhibit 6**: Norm XVI of Peruvian Tax Code and related regulations, including Decreto Supremo 145-2019-EF, May 6, 2019, Decreto Legislativo 1422, September 13, 2018, Ley 30320, July 11, 2014, Decreto Legislativo 1121, July 18, 2012.

[8] Similar to IRS's private letter ruling.

[9] **Exhibit 7**: Check and payment receipt of 25% additional taxes, November 15, 2019.

[10] **Exhibit 8**: EDCH's tax refund request, November 29, 2019.

[11] 45 days maximum pursuant to Peruvian law. *See* **Exhibit 9**: Peruvian Tax Code, Art.162. ("Non-contentious requests related to the determination of the tax obligation must be resolved and notified within a period of no more than forty-five (45) business days, as long as, in accordance with the pertinent provisions, an express decision of the Tax administration is required…")

2. <u>The 2019 Transaction is Subject to a 5% Tax Rate on Capital Gains, Rather than 30%</u>

SUNAT's delay is based on its failure to issue a definitive finding on whether the transaction met the two cumulative conditions necessary to qualify for the 5% tax rate. These two conditions are: (i) that the shares are listed on the LSE, and (ii) that the transaction was "negotiated" through a "centralized mechanism of negotiations" in Peru. The 2019 transaction clearly meets both requirements: (i) EDCH's shares were listed on the LSE; and (ii) the transaction was negotiated in a "centralized mechanism of negotiations" on the trading floor of the LSE.

Indeed, the Peruvian Income Tax Law, Article 56, provides that:

> The tax on non-resident juridical persons in the country will be determined applying the following rates: (…) h) Income from the sale of securities carried out within the country: five percent (5%).[12]

Article 30-B of the Peruvian Income Tax Regulations further develops the meaning of "within the country," stating that:

> For the purposes of paragraph h) of article 56 of the Law, it will be considered that the sale of securities has been carried out within the country, when the aforementioned securities are listed in the Public Registry of the Securities Market and are negotiated through a centralized mechanism of negotiation of Peru. [13]

Peruvian tax law is clear: income from the sale of securities is subject to a 5% tax rate if two cumulative conditions are met: (i) the shares to be sold must be listed on the LSE (the Peruvian Public Registry of the Securities Market) and (ii) the transaction on those shares must be "negotiated" through a "centralized mechanism of negotiation" on the trading floor of the LSE. As explained later, SUNAT only contested condition (ii), asserting that the securities were not negotiated within a "centralized mechanism of negotiation" of Peru because they were negotiated

[12] Income Tax Law, Art. 56.h. ("El impuesto a las personas jurídicas no domiciliadas en el país se determinará aplicando las siguientes tasas: (…) h) Rentas provenientes de la enajenación de valores mobiliarios realizada dentro del país: cinco por ciento (5%)."). *See* **Exhibit 10**: Income Tax Law.

[13] Income Tax Regulations, Article 30-B, 3. ("Para efecto del inciso h) del artículo 56º de la Ley, se considerará que la enajenación de valores mobiliarios se ha realizado dentro del país, cuando los citados valores estén inscritos en el Registro Público del Mercado de Valores y sean negociados a través de un mecanismo centralizado de negociación del Perú.). *See* **Exhibit 11**: Income Tax Regulations.

in February 2019, when EDCH and GEB entered into the TOSA, rather than August 7, 2019, when the acquisition was finalized. This is fundamentally incorrect.

While Peruvian tax law is silent on the meaning of "centralized mechanism of negotiation," the Peruvian Securities Market Law provides a definition. Article 117 states that the Trading Day or Trading Session (*"Rueda de Bolsa"*), is the "centralized mechanism" of negotiation of securities:

> The Trading Session ("*Rueda de Bolsa*") is the centralized mechanism in which stock exchange agents, in accordance with the provisions of the respective internal regulations of the Stock Exchanges, carry out transactions with securities listed in the Registry, when applicable, and derivative instruments that CONASEV previously authorizes.[14]

The Trading Session is conducted by a Stock Exchange.[15] The Lima Stock Exchange ("Bolsa de Valores de Lima") or LSE is the only stock agent in Peru. Here, DESAA's shares were listed on the LSE, GEB issued an offer to acquire DESAA on the LSE, and the transaction was subsequently completed on August 7, 2019 on the LSE. As a result, there can be no doubt that DESAA's shares were negotiated in a "centralized mechanism of negotiations" of Peru.

This interpretation was confirmed by the Superintendencia de Mercado de Valores ("SMV") in a February 2021 report issued in response to questions posed on the facts of this case.[16] The SMV is the state agency in charge of supervising the securities market regulations and promulgating regulations concerning the securities market.[17] Importantly, the SMV issues

[14] **Exhibit 12**: Securities Market Law, Art. 117. ("Rueda de Bolsa es el mecanismo centralizado en el que las sociedades agentes, de conformidad con lo dispuesto en los respectivos reglamentos internos de las Bolsas, realizan transacciones con valores inscritos en el Registro, cuando corresponda e instrumentos derivados que CONASEV previamente autorice.") *See* also **Exhibit 12**: Securities Market Law, Art. 110. ("Centralized mechanisms of negotiation regulated by this Law are those that bring together or simultaneously interconnect several buyers and sellers for the purpose of negotiating securities, derivative instruments and instruments that are not subject to mass issuance. The negotiation of securities carried out on the trading session ("*rueda de bolsa*") and in other centralized mechanisms under the respective regulations and with compliance with the information and transparency requirements constitutes a public offer.")

[15] **Exhibit 12**: Securities Market Law, Art. 130. ("Stock Exchanges are legal entities with special characteristics that can adopt the legal structure of civil associations or public limited companies. Their purpose is to facilitate the negotiation of registered securities, providing the appropriate services, systems and mechanisms for the fair, competitive, orderly, continuous and transparent intermediation of publicly offered securities, derivative instruments and instruments that are not subject to mass issuance that are negotiated in centralized mechanisms of negotiations other than the stock market that operate under the direction of the stock exchange…")

[16] **Exhibit 13**: SMV's Report N°165-2021-SMV, February 9, 2021.

[17] **Exhibit 14**: Decreto Ley 26126, Art. 1 (Functions of the SMV).

opinions on the interpretation and scope of the securities market regulations.[18] While the SMV did not adjudicate the specific case of EDCH, based on questions posed to the agency, the SMV reached the following conclusions in its February 2021 report:

- There are no regulations in Peru that prohibit the signing of tender offer support agreements.[19]

  In fact, the securities regulation confirms that this type of agreements can be executed, as it requires that the board of directors of the target company (DESAA, in our case) disclose the existence of any agreements between offerors and shareholders of the target company.[20]

  Furthermore, before launching a public offer on the LSE, the acquiring entity (here, GEB) must obtain approval from the Peruvian antitrust authority, INDECOPI, so as to ensure the transaction does not constitute an impermissible concentration of economic activities in the electricity sector. Notably, to seek INDECOPI's approval, a binding agreement between seller and buyer is required.[21] In other words, an agreement like the TOSA is necessary to obtain required approvals.

- The Trading Session ("*Rueda de Bolsa*") is the centralized mechanism in which stock exchange agents conduct transactions with securities listed in the Registry. As a result, securities are "negotiated" through a "centralized mechanism of negotiation" if they are offered and acquired in the LSE.[22]

- Agreements like the TOSA are not considered "negotiation" of securities in the securities market regulation because (i) they do not constitute a negotiation of securities or a concrete operation over those securities, and (ii) they are

---

[18] **Exhibit 14**: Reglamento de Organización y Funciones de la SMV, Art. 20. (The Legal Advice Office's functions include: "8. Submit to the consideration of the Board of Directors the resolutions that interpret the regulations under the jurisdiction of the SMV… 13. Issue an opinion when it is necessary to establish a uniform legal criterion on the scope of the laws or regulations under the jurisdiction of the SMV, other applicable regulations and internal regulations of the SMV.") **Exhibit 12**: Securities Market Law, Art. 7. (Control and Supervision.- The National Commission of Companies and Securities (CONASEV) [now, the SMV] is the public institution in charge of supervision and compliance with this law. The aforementioned institution is empowered to, in accordance with the rules of the common law and general principles of law, interpret administratively the scope of the legal provisions relating to the matters addressed in this Law. It is also to dictate the corresponding regulations. Unless there is express indication to the contrary, the powers that this law grants to CONASEV, are exercised by its Board of Directors.")

[19] **Exhibit 13**: SMV's Report N°165-2021-SMV, February 9, 2021, paragraphs 3.6 – 3.9.

[20] Here, DESAA issued a report informing about GEB's offer. *See* **Exhibit 16**: DESAA's report on GEB's offer, July 23, 2019.

[21] Here, on March 26, 2019, GEB sought approval from INDECOPI. On June 26, 2019, INDECOPI declared inadmissible GEB's request as it concluded that the transaction would not constitute concentration of economic activities. *See* **Exhibit 17**: INDECOPI's resolution on the transaction, June 26, 2019.

[22] **Exhibit 13**: SMV's Report N°165-2021-SMV, February 9, 2021, paragraphs 3.10 – 3.11.

> commitments or pre-agreements for a potential acquisition of securities that will materialize in the takeover bid in the LSE. [23]

In a clear acknowledgement the SMV is the state agency in charge of interpreting the securities market regulation, SUNAT requested that the SMV confirm the scope and interpretation of its February 2021 report. The SMV did so in a January 2022 report.[24]

The SMV's opinions leave no doubt that this transaction was "negotiated" through a "centralized mechanism" of negotiation in Peru and, therefore, is subject to a 5% tax rate on capital gains. The SMV's opinion confirms that the TOSA is nothing but a valid pre-agreement under Peruvian law that is necessary for purposes other than the ultimate negotiation of securities. Indeed, between years 2008 and 2020, there were at least 23 transactions over securities in the LSE that were preceded by agreements similar to the TOSA.[25] Therefore, the execution of preparatory agreements is both a valid and common practice in this type of transaction and does not preclude application of the 5% tax rate.

3. <u>The Unjustified Delay and Serious Irregularities of the EDCH's Tax Refund Process</u>

Amazingly, almost one year after EDCH filed its tax refund request in November 2019, on October 27, 2020, SUNAT[26] rejected EDCH's request on the basis that the transaction was not "negotiated" through a "centralized mechanism of negotiations" as required to qualify for the 5% rate.[27] Following an internal administrative review, on May 27, 2021, SUNAT's second instance[28] declared its October 2020 decision "null and void" for failure to provide reasons (*indebida motivación*) for its conclusion that the transaction constituted a negotiation outside of the LSE.[29] It also ordered SUNAT's first instance adjudicatory review body to issue a new decision regarding EDCH's tax refund request.

From the date of SUNAT's May 2021 reversal and through March 2022, SUNAT[30] did not reissue a decision on the matter. Instead, SUNAT engaged in arbitrary, inconsistent,

---

[23] **Exhibit 13**: SMV's Report N°165-2021-SMV, February 9, 2021, paragraphs 3.12 – 3.15.
[24] **Exhibit 18**: SMV's Report N° 7-2022-SMV/11.1, January 25, 2022.
[25] **Exhibit 19**: Table with transactions including agreements similar to the TOSA.
[26] Intendencia Lima (Gerencia de Fiscalización).
[27] **Exhibit 20**: SUNAT's first instance decision on EDCH's tax refund request, October 27, 2020.
[28] Intendencia Lima (Superintendencia Nacional Adjunta de Tributos Internos) - Gerencia de Reclamación I.
[29] **Exhibit 21**: SUNAT's decision on EDCH's appeal, May 27, 2021.
[30] Intendencia Lima (Gerencia de Fiscalización).

nontransparent, and unreasonable behavior. This included, *inter alia*, (i) a refusal to provide a clear procedural timetable delineating a timeline for an ultimate decision on the issue, (ii) a failure to respond to requests to meet with representatives of EDCH, (iii) a persistent revolving-door of members of SUNAT assigned to handle the proceeding, (iv) requests to EDCH for massive amounts of documentation impossible to meet within the short timeframe allotted and which had nothing to do with the determination to be made, and (v) a refusal to provide EDCH's legal representatives access to the tax refund file, to which they were clearly entitled.

The protracted and unreasonably long period during which SUNAT[31] engaged in this behavior and failed to reissue a decision gave rise to the presumption under Peruvian law that the agency had denied the tax refund.[32] As a result, on March 16, 2022, EDCH challenged SUNAT's denial. On May 12, 2022, SUNAT's second instance[33] issued an ambiguous and incoherent decision lacking any modicum of due process in response to EDCH's challenge that lacked any known precedent. In the decision, the agency not only failed to issue a decision on the merits, but also concluded that (i) the presumed denial of EDCH's refund request was void, (ii) EDCH's challenge to this allegedly "void" presumption was only "partially" valid, and (iii) the refund proceeding would be predicated on a separate tax audit of DESAA, the target company itself.[34] In other words, SUNAT[35] held that the presumed denial was void, even though the strict legal requirement for such a presumption to be effective is the passage of time, which unequivocally occurred here. Moreoever, SUNAT[36] held that the agency would only decide on EDCH's tax refund request once it issued a determination on its tax audit of DESAA (the company that EDCH had sold to GEB back in August 2019), which commenced only on May 11, 2022 (just one day before) and has still not been completed.[37]

[31] Intendencia Lima (Gerencia de Fiscalización).
[32] **Exhibit 9**: Peruvian Tax Code, Art. 163. ("Resolutions that resolve the requests referred to in the first paragraph of the article above will be appealable before the Tax Court, with the exception of those that resolve the refund requests, which will be claimable. If said requests are not resolved within a maximum period of forty-five (45) days business days or within the period established to resolve provided for in other regulations, the tax debtor can file an appeal, considering their request denied.")
[33] Intendencia Lima (Superintendencia Nacional Adjunta de Tributos Internos) - Gerencia de Reclamación I.
[34] **Exhibit 22**: SUNAT's decision on EDCH's challenge against first tacit denial, May 12, 2022.
[35] Intendencia Lima (Superintendencia Nacional Adjunta de Tributos Internos) - Gerencia de Reclamación I.
[36] Intendencia Lima (Superintendencia Nacional Adjunta de Tributos Internos) - Gerencia de Reclamación I.
[37] **Exhibit 23**: SUNAT's Letter N° 220021822586-01-SUNAT, May 11, 2022.

SUNAT's[38] decision to audit DESAA was similarly arbitrary and the proceedings unreasonably protracted. This was exacerbated by the agency's incorrect characterization of DESAA as a tax withholding agent, even though the entity was not a buyer or a seller in the relevant transaction, nor did it pay any funds to a non-domiciled entity. In addition, SUNAT[39] commenced the DESAA audit as if it were an audit on the entity's presumptive tax on dividends paid by a branch to its parent company; therefore, SUNAT's initial onerous and burdensome information requests were based on this incorrect assumption, ultimately forcing SUNAT to declare the audit null and void and to restart the audit process. Six months after initiating the second DESAA audit process, SUNAT[40] unreasonably delayed the proceedings even further by determining that the tax audit deadline had not yet started because DESAA did not provide certain information that had never been in its possession.

Given SUNAT's substantial delay in determining EDCH's tax refund matter, on November 17, 2022, EDCH challenged for a second time SUNAT's presumed denial of EDCH's request. SUNAT's second instance[41] rejected this challenge on January 18, 2023, stating that SUNAT needed to initiate an *ex-officio* refund proceeding following completion of the DESAA tax audit. An *ex-officio* proceeding is one commenced on the tax administration's own initiative. SUNAT provided no justification as to why it needed to initiate an *ex-officio* proceeding, separate from the proceeding that EDCH initiated four years ago. This decision is unprecedented as it implies that SUNAT (i) cancelled EDCH's refund process despite failing to issue a decision on the merits; (ii) substituted EDCH's refund process with an *ex-officio* refund process to be initiated at SUNAT's sole discretion; (iii) predicated the *ex-officio* refund process on the conclusion of the DESAA tax audit, which has been excessively delayed by a series of irregularities as explained above, and (iv) curtailed the right, that every taxpayer has according to Peruvian law, to get a decision from a second instance when the office in charge fails to comply with legal deadlines.

EDCH appealed SUNAT's January 18, 2023 decision on May 4, 2023.[42] EDCH also filed complaints before the Peruvian Taxpayer's Ombudsman and various offices within SUNAT.

[38] Intendencia Lima (División de Fiscalización de Principales Contribuyentes - I Lima).
[39] Intendencia Lima (División de Fiscalización de Principales Contribuyentes - I Lima).
[40] Intendencia Lima (Gerencia de fiscalización I) – División de Auditoría II.
[41] Intendencia Nacional de Impugnaciones (Gerencia de Análisis de Fondo de Tributos II) – División de Reclamaciones III.
[42] **Exhibit 24**: EDCH's appeal against second tacit denial, May 4, 2023.

Despite EDCH's formal complaints, SUNAT, as recently as October 2023,[43] has responded by reaffirming that the DESAA audit is still underway and stating that there is no date for its completion. Therefore, as of the date of this Notice, the issue has yet to be resolved and Claimants remain without this sizeable portion of their remaining investment in Peru and Peru remains illegally in possession of S/ 142,011,902 that belongs to Claimants.

III. The Republic's Violations of the TPA

SUNAT's conduct constitutes serious and material violations of the protections accorded to Claimants and their investments under the Trade Promotion Agreement. Peru is responsible for these violations, as SUNAT is an agency under the Peruvian Ministry of Economy and Finance, which, in turn, is an organ of Peru's executive branch. SUNAT's conduct is consequently attributable to Peru under international law.[44]

Without prejudice to any other legal theory or claim that may be asserted in an arbitral proceeding, Claimants maintain that Peru violated its obligations to provide them and their investments with (1) protection against any unlawful expropriation, whether direct or indirect (Article 10.7); (2) fair and equitable treatment (Article 10.5); and (3) protection against denial of justice (Article 10.5).

1. <u>SUNAT's Treatment of EDCH's Tax Refund Request and Consequent Deprivation of Claimants' Remaining Investment Constitutes Expropriation</u>

By refusing to complete the tax refund proceedings for the past four years, despite EDCH's clear entitlement to a refund of S/ 142,011,902, plus interest, SUNAT's treatment of EDCH constitutes an indirect expropriation of Claimants' investments in Peru. The sale of DESAA to GEB constituted a sale of Claimants' investments in Peru; therefore, the totality of Claimants' investments remaining in Peru following this transaction comprises the monies owed to EDCH (and therefore to Claimants) for the refund of tax payments. In other words, Claimants have been

[43] **Exhibit 25**: SUNAT's letter regarding DESAA audit, October 24, 2023.
[44] ILC Art. 4 ("“[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions…”).

completely deprived of their remaining investment in Peru through SUNAT's refusal to refund the monies, or issue a decision on the refund of monies, for four years and counting.

SUNAT's unlawful actions constitute breaches of Article 10.7 of the TPA, which prohibits Peru from expropriating or nationalizing a covered investment either directly or indirectly, unless four cumulative conditions are met: (i) the expropriation is for a public purpose, (ii) the expropriation is non-discriminatory, (iii) the expropriation is made on payment of "prompt, adequate, and effective compensation, and (iv) the expropriation is made in accordance with due process of law and Article 10.5. As demonstrated in this Notice letter, Peru did not satisfy any of the four cumulative conditions set forth above and, therefore, Peru has violated Article 10.7 of the TPA.

2. <u>SUNAT's Arbitrary, Inconsistent Rulings in connection with EDCH's Tax Refund and DESAA's Tax Audit Proceedings Violate Peru's Fair and Equitable Treatment Obligation</u>

As described above, Peru has engaged in a pattern of conduct of unfair treatment of Claimants and their investments, in violation of Article 10.5 of the TPA, by, *inter alia*, repeatedly extending the timeline of the proceedings without providing a definitive answer on the tax refund request, while simultaneously making the process more onerous, costly, and time-intensive on EDCH through unrealistic information requests and restricted access to the tax refund request file. Moreover, SUNAT's determination that it will replace EDCH's refund process with an *ex-officio* refund proceeding once it completes a tax audit of DESAA is completely arbitrary, and appears to suggest to Claimants that EDCH's tax refund request, commenced four (4) years ago, is of no relevance. By cancelling EDCH's refund process, SUNAT is in effect curtailing EDCH's right to appeal to a second adjudicatory review body. As a result, EDCH has no insight into the processing of its tax refund request and there appears to be no timeline for a resolution. This uncertainty and lack of transparency both constitute breaches of Article 10.5 of the TPA.

3. <u>Peru's Failure to Resolve EDCH's Tax Refund Request After Four Years Constitutes a Denial of Justice</u>

Subsection 2(a) of Article 10.5 of the TPA provides that ""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." Such "principal legal systems" prescribe that judicial administrative bodies like SUNAT must comport with due process and avoid undue delay, among other components of this treaty protection.

Acting contrary to these obligations, SUNAT's acts and omissions constitute a denial of justice, as demonstrated by (i) SUNAT's failure to recognize what constitutes "negotiations through a centralized mechanism of negotiations" under Peruvian law; (ii) the inordinate amount of time it has taken for Claimants to reach resolution on this issue; (iii) SUNAT's unjustifiable refusal to recognize the presumption, as provided for under Peruvian law, that the agency effectively denied EDCH's request after the passing of a significant amount of time; and (iv) SUNAT's arbitrary imposition of additional conditions in connection with the tax refund request, such as improperly replacing EDCH´s refund with an *ex-officio* refund proceeding to be initiated at SUNAT's sole discretion; among others.

In addition to the above breaches of the TPA, Claimants contend that Peru breached its national treatment obligation (Article 10.3), its most-favored-nation treatment obligation (Article 10.4), and its full protection and security obligation (Article 10.5). Peru's many breaches of the TPA have harmed Claimants' ability to recover the significant amount of capital gains taxes that EDCH paid on the sale of DESAA's shares.

IV. Damages Suffered by Claimants and Relief Sought

Peru's unlawful conduct has deprived Claimants of access to and use of the funds held by SUNAT for four years while proceedings remain unjustifiably and improperly stalled. As a result, Claimants request that Peru pay S/ 142,011,902 plus applicable interest and other amounts to fully compensate Claimants for the four years of unjustifiable, arbitrary and abusive conduct of SUNAT.

V. Intent to Arbitrate

Claimants wish to resolve their dispute with Peru amicably. Under the TPA, if no agreement is reached, Claimants notify Peru of their intention to submit the claim to arbitration pursuant to Article 10.16.

Claimants also are attempting to resolve the dispute in accordance with the process established in Article 22.3(6) of the TPA. In doing so, Claimants have, simultaneous to the submission of this Notice of Intent, referred the details of their expropriation claim to the competent authorities set out in Annex 22.3.

Claimants reserve their right to supplement or amend their requested relief at the time that it may institute formal arbitration proceedings against Peru.

Dated: November 24, 2023

Respectfully submitted,

Benjamin H. Griswold,
On behalf of BWW and BWD

Jon Ylvisaker,
On behalf of the YCP Owners

cc.:

Señora Vanessa Rivas Plata Saldarriaga
Presidente de la Comisión Especial del Sistema de
Coordinación y Respuesta des Estado en Controversias Internacionales de Inversión
Ministerio de Economía y Finanzas
Jr. Junín 319
Cercado de Lima, Lima
Perú

Luis Enrique Vera Castillo
Superintendente Nacional
Superintendencia Nacional de Aduanas y de Administración Tributaria
Av. Garcilaso de la Vega 1472
Lima
Perú