INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the matter of

BLUE WATER WORLDWIDE LLC, BLUE WATER DUNAS LLC, AND THE YCP OWNERS

Claimants

v.

THE REPUBLIC OF PERU

Respondent

CLAIMANTS' NOTICE OF ARBITRATION

January 17, 2026

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Counsel for Claimants

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1. Pursuant to Article 10.16 of the United States-Peru Trade Promotion Agreement that was signed on April 12, 2006 and entered into force on February 1, 2009 (the "Treaty" or "TPA")[1] and Article 36 of the Convention on Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), Blue Water Worldwide LLC, Blue Water Dunas LLC, and the owners of YCP Peru Fund I, L.P., comprising individuals Charles P Coleman III, John Barry Purcell, Wesley Franklin Haynes, and Jon Ylvisaker and entities Cedar Hill Holdings, LLC, Kenneth Rainin Foundation, Maltese Capital, LLC, Next Egg Investments (Cheswold), LP, Next Egg Investments (JN), LP, and SV Booth Investment III, LLC (collectively, "Claimants") hereby initiate an arbitration proceeding against the Republic of Peru ("Peru" or "Respondent") for claims arising out of Claimants' sale of 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. This Notice of Arbitration is filed by Claimants after obtaining all requisite authorizations to do so and constitutes Claimants' consent to arbitrate in accordance with the procedures set out in the TPA.[2]

I. Parties

2. Blue Water Worldwide LLC ("BWW") and Blue Water Dunas LLC ("BWD") (collectively, "Blue Water") are legal entities organized under the laws of Delaware, United States of America. BWW owns 100% of BWD. Both entities are domiciled at:

One North Federal Highway, Suite 300
Boca Raton, FL 33432
United States
dayala@bwalp.com
(561) 302-0727

3. The owners of YCP Peru Fund I, L.P. are four (4) nationals of the United States of America and six (6) entities constituted under the laws of the United States of America ("YCP Owners"). On the date of consent to arbitrate under ICSID and the date of this Notice of Arbitration, the YCP Owners were not nationals of Peru. The individuals are Charles P Coleman III, John Barry

[1] **Exhibit C-1**, United States-Peru Trade Promotion Agreement, signed on April 12, 2006, and entered into force on February 1, 2009 (the "Treaty").

[2] **Exhibit C-2**, Authorization and POA from YCP owners; **Exhibit C-3**, Authorization and POA from BWW and BWD.

Purcell, Wesley Franklin Haynes, and Jon Ylvisaker.[3] The legal entities are Cedar Hill Holdings, LLC, Kenneth Rainin Foundation, Maltese Capital, LLC, Next Egg Investments (Cheswold), LP, Next Egg Investments (JN), LP, and SV Booth Investment III, LLC.[4] The YCP Owners are domiciled at:

1445 East Mountain Drive
Montecito, CA 93108
United States
jon@yieldcapitalpartners.com
(917)325-0009

4. Blue Water and the YCP Owners together own Electro Dunas Cayman Holding Ltd. ("EDCH"), an entity organized under the laws of the Cayman Islands. Blue Water owns 80% of EDCH, and the YCP Owners 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"),[5] a company listed on the Lima Stock Exchange ("LSE"). At the time that EDCH gained ownership and control over 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, constituting Claimants' "shares, stock, and other forms of equity participation in an enterprise."[6] Proceeds from the sale of DESAA and EDSAA, which is described in the following section, comprise part of Claimants' investment.

5. Claimants are represented by King & Spalding LLP. King & Spalding is fully empowered to represent Claimants in this arbitration. A copy of the relevant powers of attorney and internal authorizations are enclosed in this Notice of Arbitration.[7] All notifications and information arising out of these proceedings shall be directed and addressed to the following individuals:

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3 **Exhibit C-4,** Proof of Nationality for Individuals.

4 **Exhibit C-5,** Proof of Nationality for Entities.

5 DESAA is an entity organized under the laws of Peru.

6 **Exhibit C-1**, Treaty at Article 10.28.

7 **Exhibit C-2**, Authorization and POA from YCP owners; **Exhibit C-3**, Authorization and POA from BWW and BWD.

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Mr. Renzo Seminario Córdova: rseminariocordova@kslaw.com
Ms. Sophia Sepúlveda Harms: sharms@kslaw.com

6. The Republic of Peru is the constituted *de jure* government of the people and territory of Peru. For purposes of disputes arising under the TPA, notices and other documents must be served on Peru by delivery to:[8]

Dirección General de Asuntos de Economía Internacional
Competencia e Inversión Privada
Ministerio de Economía y Finanzas
Jirón Lampa 277, piso 5
Lima
Peru
Special Commission Representing the Republic of Peru in International Investment Disputes (SICRECI)
Ministry of Economy and Finance of Peru

and

Jr. Junín 319
Cercado – Lima
Perú
+511 311 5930
Jean Pierre Galván Ortiz
jgalvan@mef.gob.pe

II. Preliminary Statement

7. On August 7, 2019, EDCH – a wholly-owned subsidiary of the Claimants – sold 100% of its shares in the publicly-traded Peruvian company DESAA to Grupo Energía Bogotá S.A. ESP ("GEB") for a total of S/ 711,579,210. At that time, DESAA owned 99.41% of the shares of

8 **Exhibit C-1**, Treaty at Article 10.30, Annex 10-C.

EDSAA[9], which in turn held a concession for the distribution and commercialization of electricity in the southern-mid regions of Peru.

8. As a result of the transaction, EDCH paid S/ 27,747,538.44 to the Peruvian tax authority, the Superintendencia Nacional de Aduanas y de Administracion Tributaria ("SUNAT"), representing a 5% tax on the S/554,950,769 of capital gains on the transaction. Although the transaction was executed on the Lima Stock Exchange (resulting in application of the 5% rate), owing to both the legal uncertainty surrounding a new tax-avoidance regulation and the absence of a mechanism to confirm that the transaction was subject to a 5% tax on capital gains, as opposed to 30%, EDCH subsequently, out of an abundance of caution, paid SUNAT an additional S/ 142,011,902, which, together with the S/ 27,747,538.44 already paid, represents 30% of the capital gains. EDCH then promptly filed a tax refund request on November 29, 2019 to obtain a definitive determination that the transaction was indeed subject to a 5% capital gains tax rate, and to obtain a refund — with interest — for its overpayment of the additional S/ 142,011,902.

9. This request should have been ruled upon in forty-five (45) business days. Instead, in the time that has passed since this refund request was filed over six years ago, SUNAT has subjected Claimants to dilatory, arbitrary, procedurally unprecedented, and bad faith actions from which Claimants have been unable to seek or obtain adequate recourse. Indeed, SUNAT's dilatory, arbitrary, bad faith and abusive actions have strayed so far from the refund request procedure as contemplated by Peruvian law that they instead constitute violations of multiple protections afforded to investors under the TPA. As a result of these actions, Claimants have lost the entirety of their remaining investment in Peru and suffered egregious delays, uncertainties, and associated legal costs as SUNAT has forced them to navigate a pretextual, convoluted, improper, and legally baseless administrative process.

III. Factual Background

A. Claimants Sell DESAA's Shares on the Lima Stock Exchange and Pay Capital Gains Taxes in A Good Faith Effort to Navigate Tax Law Uncertainties

10. 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

[9] Thereafter, DESAA owned 99.96% of EDSAA.

the acquisition of DESAA. In accordance with Peruvian antitrust law, GEB applied to the antitrust authority, the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual ("INDECOPI"), to obtain approval for its prospective offer. It obtained INDECOPI's clearance to proceed with the acquisition on the LSE on June 26, 2019, and on July 5, 2019, GEB issued a public tender offer to acquire DESAA.[10] On August 7, 2019, GEB acquired 100% of DESAA on the LSE for a total of S/ 711,579,209.86.[11]

11. Following this transaction, the Central Register for Securities and Settlements in the Peruvian market ("CAVALI") withheld S/ 27,747,538.44, comprising 5% of capital gains.[12] CAVALI then paid this amount to the Peruvian tax authority, SUNAT.

12. CAVALI's actions were carried out in accordance with the Peruvian Income Tax Law, which is clear in its application of a 5% capital gains tax rate on non-resident taxpayers who conclude transactions within the country. The law imposes a 5% rate on income from the sale of securities when two conditions are met: (i) the securities are listed on the LSE, and (ii) the sale is negotiated through a centralized mechanism of negotiation in Peru. The applicable regulations clarify that a sale is "within the country" when the securities are listed in the Public Registry of the Securities Market and negotiated through such a centralized mechanism, which the Securities Market Law identifies as the Trading Session (*"Rueda de Bolsa"*) conducted by a stock exchange (the LSE). The 2019 transaction satisfied both requirements because DESAA's shares were listed on the LSE and the acquisition was consummated on the LSE's trading floor on August 7, 2019. As a result, the 5% capital gains tax applied.

13. While the Peruvian Income Tax Law is clear regarding the applicable rate for this type of transaction, shortly before the share sale occurred, Peru issued implementing regulations for the General Anti-Avoidance Rule ("GAAR"), establishing the criteria SUNAT would use to audit certain types of transactions.[13] At the time of the sale of DESAA's shares, there was uncertainty as to how the GAAR would apply to transactions of this nature.[14] In the absence of a binding

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[10] **Exhibit C-6**, GEB's takeover bid, July 5, 2019 as amended on July 17, 2019; **Exhibit C-7**, GEB's Information Leaflet, July 17, 2019.

[11] **Exhibit C-8**, Stock Exchange Agent's documents showing completion of transaction, August 7, 2019.

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

[13] **Exhibit C-10**, Decreto Supremo No. 145-2019-EF, May 6, 2019.

[14] The tax-avoidance regulation is a regulation that allows SUNAT to audit transactions to verify whether they were structured in way as to reduce or avoid taxation, by means of simulated acts or fraudulent evasion of the law. This

procedure to definitively determine the applicable tax rate before SUNAT, EDCH proceeded to pay the difference between the 5%- and 30%-income tax rates, amounting to S/ 142,011,902.[15] Two weeks later, on November 29, 2019, EDCH filed a tax refund request before SUNAT for S/ 142,011,902 in order to obtain a firm confirmation that EDCH was only obliged to pay a 5% capital gains tax, rather than a 30% capital gains tax.[16]

B. Claimants' Good Faith Engagement with Peru's Administrative Process is Met with Unprecedented Abusive Action and Egregious Delay

14. Despite the fact that the refund process should have only taken a maximum of 45 days pursuant to Peruvian law,[17] EDCH did not receive a timely response or decision from SUNAT related to its good faith overpayment and consequent refund entitlement. Instead, SUNAT's silence prompted EDCH to write to SUNAT to request a meeting to discuss the matter on January 13, 2020. This meeting was not scheduled and ultimately cancelled by SUNAT.

15. It was not until September 2020 that SUNAT took any action with respect to the matter by requesting a Spanish translation of the TOSA. On October 27, 2020, SUNAT issued an inadequately reasoned order rejecting EDCH's tax refund request because GEB's acquisition purportedly occurred upon execution of the TOSA, rather than on the LSE, thus failing a condition for application of the 5% tax rate.[18]

16. SUNAT's conclusion that the sale of DESAA was not negotiated on the LSE is flatly inconsistent with Peru's securities market framework. Indeed, the Superintendencia de Mercado de Valores ("SMV") – the competent regulator for interpreting securities rules – issued an opinion confirming in 2021 (which it reiterated in 2022 upon request for clarification from SUNAT itself) that agreements like TOSAs are permitted and often necessary to obtain antitrust clearance

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regulation became effective on May 7, 2019, right before GEB's takeover bid. At that time, the scope, rules and criteria to apply the regulation were unclear and did not afford any predictability to taxpayers. *See* **Exhibit C-11**, Peruvian Tax Code and related regulations (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).

[15] **Exhibit C-12**, Check and payment receipt of 25% additional taxes, November 15, 2019.

[16] **Exhibit C-13**, EDCH's tax refund request, November 29, 2019.

[17] *See* **Exhibit C-11**, 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…").

[18] *See supra*, ¶ 12.

from INDECOPI before launching a public offer, and consist merely of pre-agreements, not the negotiation or execution of a securities transaction itself.[19] Specifically, it stated,

> [C]oncerning the legal nature of the [TOSA] in the context of securities market regulations, it is our view that this Agreement could not, in any way, constitute an effective transfer operation of securities. As mentioned, the future execution of the ToB (takeover bid) outlined in such Agreement is contingent upon the prior authorization by INDECOPI . . .To assert that such agreement might include clauses implying an actual transfer of the shares of the target company would constitute a violation of both the regulations on the control of business concentrations and the securities market rules…[20]

17. Therefore, under the SMV's own interpretation, securities are negotiated through a centralized mechanism when they are offered and acquired in the LSE, and agreements like the TOSA are a prerequisite for this process under governing laws.

18. Consequently, in response to SUNAT's baseless rejection, EDCH challenged the decision in the second instance administrative court (the "second instance"). Following an internal administrative review, on May 27, 2021, the second instance declared SUNAT's 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.[21] It also ordered SUNAT to issue a new decision regarding EDCH's tax refund request.

19. Despite Claimants' efforts to engage with SUNAT and the administrative process to obtain a decision, SUNAT refused to cooperate. Instead, from May 2021 to March 2022, SUNAT did not reissue a decision on the matter, but rather engaged in ongoing arbitrary, inconsistent, nontransparent, and unreasonable behavior that appeared calculated to protract the proceedings for the longest period possible and was likely designed to avoid reaching a decision while retaining the S/ 142,011,902 belonging to Claimants. This behavior included, *inter alia*, (i) refusal to provide a clear procedural timetable delineating a timeline for an ultimate decision on the issue, (ii) failure to respond to requests to meet with representatives of EDCH, (iii) failure to respond to requests for information as to the status of the tax refund request; (iv) persistent revolving-door of members of SUNAT assigned to handle the proceeding, (v) unreasonable

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[19] **Exhibit C-30**, SMV Advisory Opinion 165-2021-SMV/06, February 9, 2021; **Exhibit C-31**, SMV Report, July 2022.

[20] **Exhibit C-30**, SMV Advisory Opinion 165-2021-SMV/06, February 9, 2021 ¶ 3.12.

[21] **Exhibit C-14**, SUNAT's decision on EDCH's appeal, May 27, 2021.

requests to EDCH and DESAA for massive amounts of documentation impossible to meet within the short timeframe allotted, and (vi) refusal to provide EDCH's legal representatives access to the tax refund file, to which they were clearly entitled.

20. The protracted and unreasonably long period during which SUNAT 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.[22] Indeed, the months during which SUNAT engaged in these actions far surpassed the 45 business days that the agency had to comply with the second instance's order. As a result, on March 16, 2022, EDCH challenged SUNAT's presumed denial to SUNAT's second instance, triggering the two-month time period during which SUNAT's second instance could respond and rule on the challenge. On May 11, 2022, a mere day before the expiration of this period, SUNAT initiated an audit of DESAA, the company that was sold to GEB almost *three years* prior to its audit decision.

21. Only one day later, on May 12, 2022, SUNAT's second instance issued an unprecedented decision in response to EDCH's challenge of March 16, 2022. 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 the result of a separate tax audit of DESAA.[23] In other words, SUNAT's second instance held that the presumed denial was void, even though the strict legal requirement for such a presumption to become effective is the passage of 45 business days, which unequivocally occurred here. Moreover, SUNAT held that the agency would only decide on EDCH's tax refund request once it issued a determination on its tax audit of DESAA, which had commenced *only one day before*.[24]

22. The short time span between SUNAT's commencement of the audit on DESAA and the second instance's ruling referencing such audit strongly suggested that, at best, the challenge was not seriously examined, and at worst, the second instance collaborated with SUNAT in drafting the

[22] **Exhibit C-11,** 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) 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.")

[23] **Exhibit C-15**, SUNAT's decision on EDCH's challenge against first tacit denial, May 12, 2022.

[24] **Exhibit C-16**, SUNAT's Letter N° 220021822586-01-SUNAT, May 11, 2022.

reasoning of its decision. These concerns were exacerbated by SUNAT's apparent haste in purporting to commence the audit of DESAA, which was evinced by the agency's obvious mischaracterization of DESAA as a tax withholding agent, even though the entity was not a buyer or seller in the relevant transaction but, rather, was the target company. In addition, SUNAT 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, and its initial onerous and unduly burdensome information requests were based on this incorrect assumption. This mistake ultimately forced SUNAT to declare the audit null and void and to restart the audit process on June 17, 2022. Six months after initiating the second DESAA audit, SUNAT unreasonably delayed the proceedings even further by determining that the tax audit period of one year had not yet been triggered because DESAA had not provided certain information that was never in its possession.

23. DESAA attempted in good faith to respond to SUNAT's numerous document requests over the months following the agency's announcement of the audit. It did so despite the fact that SUNAT's requests were inconsistent with DESAA's corporate features; for example, despite the initiation of the second, corrected audit, SUNAT continued to ask for documents related to a withholding tax on dividends distributed by a branch to its parent company. DESAA is not a branch, and the audit should have been focused on capital gains taxes. During this time, SUNAT perpetuated the arbitrary and inconsistent behavior that contributed to further delay, including requesting documents that it had already requested and received a few months earlier, and threatening sanctions if DESAA failed to produce them - again.

C. SUNAT Manipulates the Proceedings with an Intent to Deprive Claimants of Their Investment

24. Given the protracted nature of the audit process and the consequent delay to EDCH's tax refund process, on November 17, 2022, EDCH challenged for a second time SUNAT's presumed denial of EDCH's request.

25. In an act devoid of any precedent or reasonable basis under Peruvian law, on January 18, 2023 EDCH received notice that SUNAT's second instance had rejected the challenge as inadmissible, asserting that EDCH had no tax refund process in place at all.[25] Instead, due to the alleged non-existence of EDCH's tax refund process, the notice stated that SUNAT needed to initiate an *ex-*

[25] **Exhibit C-17,** SUNAT Resolution N. º 4060140014002, January 18, 2023.

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 when EDCH had already initiated a refund proceeding four years ago.

26. In other words, by issuing this decision, 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 had been excessively delayed by the irregularities explained above; and (iv) curtailed the right, that every taxpayer has according to Peruvian law, to obtain a decision from a second instance executive body when the office in charge fails to comply with legal deadlines. EDCH appealed SUNAT's January 18, 2023 ruling that its challenge was "inadmissible" to the administrative Tax Court on May 4, 2023.[26]

27. Amid these developments, Claimants, through EDCH, requested numerous meetings with SUNAT, during which SUNAT committed to providing a date for resolution but never did. Regarding the DESAA audit on which the new refund proceeding purportedly relied, SUNAT continued to make baseless and repetitive document requests directed at both DESAA and EDCH, using these requests as an excuse to prolong the audit process, and to argue that the audit period had not formally commenced to date.

28. On December 2, 2024, the Administrative Tax Court issued its decision on the procedural aspects of EDCH's May 4, 2023 appeal.[27] It determined that SUNAT's resolution of January 18, 2023 was null and void, and that SUNAT could not condition the resolution of EDCH's refund request on completion of the DESAA audit. Consequently, the Tax Court returned the case to SUNAT's second instance, which unsurprisingly failed to take any action, forcing EDCH to – for a third time – challenge SUNAT's presumed denial of their case. EDCH filed this challenge with the Administrative Tax Court on February 24, 2025.[28]

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[26] **Exhibit C-18**, EDCH's appeal against second tacit denial, May 4, 2023.

[27] *See* **Exhibit C-19**, Tax Court's Decision on Procedural Aspects of the Case, December 2, 2024.

[28] *See* **Exhibit C-20**, EDCH's Challenge to Tacit Denial, February 24, 2025.

29. After this filing, the persistent and severe irregularities that have come to characterize this Claimants' experience with SUNAT's administrative processes continued and became even more egregious.

30. On May 4, 2025, EDCH's lawyer and representative, Mr. Roberto Santivañez, received a phone call to his personal cell phone number from an individual named "Mauricio Clas," who professed to know important details of the confidential files of EDCH proceedings and offered his services as a "consultant" to assist EDCH to obtain expedited recovery of the S/ 142,011,902, plus interest, refund. On May 6 and 14, 2025, Mr. Santivañez and Blue Water's Managing Partner, Mr. Benjamin Hufty Griswold, received WhatsApp and email communications, respectively, in which the same individual advised that "the Tax Court ruled in EDCH's favor, ordering SUNAT to proceed with the refund. However, we have learned that SUNAT has filed a lawsuit seeking to annul the resolution, along with a precautionary measure to prevent its enforcement." Mr. Clas again offered to "assist [EDCH] in securing not only a secure refund but also a swift recovery, working under a success-fee model." A screen capture of the May 14 email is provided below.

MC Mauricio Clas 2:10 PM
To You and José Miguel Uchuya

EXTERNAL

Dear Mr. Benjamin Hufty,
It was a pleasure attempting to connect with you. On May 4th, we spoke briefly with attorney Roberto Jesús Santivañez Seminario, whom we understand to be the legal representative for Electro Dunas Cayman Holding.
Mr. Santivañez Seminario advised us to contact him the following Monday. Unfortunately, we were unable to reach him at that time.
We are writing regarding the tax refund request dated November 29, 2019, for S/ 112 million submitted by Electro Dunas Cayman Holding. We understand that the Tax Court ruled in your favor, ordering SUNAT to proceed with the refund. However, we have learned that SUNAT has filed a lawsuit seeking to annul the resolution, along with a precautionary measure to prevent its enforcement.

At ULAbogados, we have a team specialized in tax recovery and are confident in our ability to assist you in securing not only a secure refund but also a swift recovery, working under a success-based fee model.
We would be pleased to coordinate a meeting or call at your earliest convenience to present our proposal in further detail.

Kind regards,
Mauricio Clas

31. These communications raise significant concerns. *First*, the law firm "ULAbogados" does not appear to exist, it does not have corporate existence nor a tax identification number (RUC), and its webpage contains stock images of its purported team and founder as well as images of "clients" pulled from testimonials on unrelated webpages. *Second*, the reference to SUNAT's filing of "a lawsuit seeking to annul the resolution, along with a precautionary measure to prevent its enforcement" served to inform EDCH's representatives and Blue Water's CEO of judicial filings of which it had not previously been aware; it was not until May 16, 2025 that EDCH was formally provided notice of SUNAT's contentious administrative action before Peru's Judiciary,

which it had filed on February 23, 2025.[29] *Third*, all information on taxpayer proceedings is confidential under Peruvian law,[30] meaning that only the taxpayer and personnel within SUNAT have access to details on recent filings, including the identity and contact information of representatives.

32. Owing to the irregularity and gravity of this extortionate communication, and the dangerous implications for the Claimants' and EDCH's confidentiality and the integrity of the SUNAT proceedings, Mr. Santivañez wrote to SUNAT on May 19, 2025, requesting an urgent meeting with the National Superintendent of SUNAT and the initiation of an investigation by the Office of Institutional Integrity ("OII").[31] SUNAT did not schedule a meeting with the Superintendent and instead referred EDCH directly to the OII.[32] The OII, however, failed to provide any new information; instead, despite the fact that its primary, if not sole function, is to address such irregularities, it claimed that it had limited resources and would not investigate or take any action to identify who could have leaked the information. OII instead told EDCH to conduct its own

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29 **Exhibit C-21**, Contentious Administrative Lawsuit, Superior Court of Justice of Lima, February 23, 2025; **Exhibit C-21**, Contentious Administrative Lawsuit Exhibits 1-A to 1-G. EDCH has not yet received formal notice of the precautionary measure.

30 *See, e.g.*, **Exhibit C-22**, Political Constitution of Peru, Art. 2(5) (providing that every person has the right to request information from any public entity without needing to state a reason, and to receive the information within the legal timeframe and at the cost incurred by the request, <u>except</u> for information that affects personal privacy or that is expressly excluded by law or for reasons of national security. It also provides that every person has the right to banking secrecy and tax confidentiality, which may be lifted only when requested by certain authorities, such as a judge, the Attorney General, a congressional investigative committee, the Comptroller General of the Republic (in cases involving public officials or servants), or the Superintendent of Banking, Insurance and Private Pension Fund Administrators.) (emphasis added); Art. 2(6) (providing that every person has the right to ensure that computerized or non-computerized information services, whether public or private, does not disclose information that affects personal or family privacy.); **Exhibit C-11**, Peru's Tax Code, Art. 85 (stating that tax information shall be considered confidential and may only be used by the Tax Administration for its own purposes. This includes the amount and source of income, expenses, taxable base, or any other related data, when contained in tax returns or information obtained by any means, whether from the taxpayer, liable parties, third parties, or through complaints.); **Exhibit C-23**, Transparency Law, Art. 17 (providing that all information held by the Peruvian State is presumed to be public, except for information protected by banking secrecy or by tax, commercial, industrial, technological, or stock market confidentiality, as well as personal data, where its disclosure would constitute an invasion of personal and family privacy.); **Exhibit C-24**, Personal Data Protection Law (stating that personal data—such as a mobile phone number—is considered personal information that cannot be shared by any authority, except through the applicable legal procedure.) This interpretation is supported by the Directorate General for Transparency, Access to Public Information and Protection of Personal Data of the Ministry of Justice which has expressed this view in Advisory Opinions 026-2019-JUS/DGTAIPD, 046-2021-JUS/DGTAIPD, and 002-2024-JUS/DGTAIPD, as well as by the Constitutional Court itself in Ruling 84-2025.

31 **Exhibit C-25**, Letter from EDCH to Marilu Llerena Aybar, National Superintendent of SUNAT, May 19, 2025. The OII is a body under the National Superintendent that is responsible for promoting and developing actions related to strengthening the integrity and ethical behavior of the institution's personnel and detecting corruption risks in order to propose improvements or controls in institutional processes. It is also responsible for monitoring the implementation of the Institutional Internal Control System in accordance with Article 31 of the first section of the Organization and Functions Regulations (ROF) of SUNAT approved by Supreme Decree No. 040-2023-EF.

32 **Exhibit C-26**, SUNAT's email referring the case to the OII, May 26, 2025.

investigation into the matter. This highly unusual and unsatisfactory response to a taxpayer's request for assistance with investigation into possible corruption raises grave concerns over EDCH's and the Claimants' persistent and egregious mistreatment by SUNAT.

D. SUNAT Misapplies Laws and Manipulates Proceedings to Reach a Determination in its Own Favor

33. In addition to the irregular means by which EDCH was informed of SUNAT's contentious administrative action before the Judiciary, SUNAT's appeal is also procedurally and patently improper as a matter of Peruvian law. Article 148 of the Political Constitution of Peru states that "Administrative resolutions that *cause status* are subject to challenge through contentious administrative action."[33] Applicable case law issued by Peru's Supreme Court defines the term "cause status" as not only requiring "the exhaustion of administrative remedies, but also the final decision of the Administration, therefore, for an administrative resolution to *cause status*, it is required that it issues a ruling with a pronouncement on the merits, exhausts administrative remedies and is not subject to challenge in its jurisdiction."[34] This requirement is supported by applicable law and judicial decisions, including the General Administrative Procedure Law, which provides that "Administrative acts *that exhaust administrative remedies* may be challenged before the Judiciary through the contentious-administrative procedure referred to in article 148 of the Political Constitution of the State."[35]

34. Accordingly, an appeal of an administrative decision to the judiciary must follow 1) the exhaustion of all administrative remedies such that it is not subject to further administrative challenge; and 2) the issuance of a decision on the merits.[36] The Tax Court decision satisfied neither requirement. Instead, as noted above, the decision reflected merely a *procedural* determination that SUNAT's resolution of January 18, 2023 was null and void, that SUNAT

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[33] **Exhibit C-22**, Political Constitution of Peru, Art. 148.

[34] **Exhibit C-27**, Third Constitutional and Transitory Social Chamber of the Supreme Court, in Cassation 366-2016 (emphasis added) https://img.lpderecho.pe/wp-content/uploads/2021/08/Casacion-366-2016-Lima-LP.pdf

[35] **Exhibit C-28**, General Administrative Procedure Law (LPAG), Art. 228.1 (emphasis added). *See also* **Exhibit C-29**, Law of Contentious Administrative Procedure (LCPA), Art. 19 ("It is a requirement for the admissibility of the claim to be exhausted through administrative remedies in accordance with the rules established in the General Administrative Procedure Law or by special rules.").

[36] **Exhibit C-27**, Third Constitutional and Transitory Social Chamber of the Supreme Court, in Cassation 366-2016. https://img.lpderecho.pe/wp-content/uploads/2021/08/Casacion-366-2016-Lima-LP.pdf.

could not condition resolution of EDCH's refund request on completion of the DESAA audit, and that SUNAT's second instance should resume the tax refund proceedings.

35. EDCH noted all these irregularities in its briefs responding to SUNAT's administrative contentious action before the Judiciary. On May 23, 2025, EDCH filed a motion before the Judiciary asserting that SUNAT's appeal was defective for failing to exhaust administrative remedies.[37] On May 30, 2025, EDCH responded to SUNAT's appeal in full, with repeated emphasis on SUNAT's failure to exhaust remedies and its lack of legal standing to bring the action.[38]

36. The latest development in the saga of dilatory, irregular, heavy-handed and incoherent actions that have come to characterize the tax refund and audit proceedings have the potential to render the Tax Court's decision moot, and constitutes a new, significant blow to EDCH's attempts to obtain fair recourse in Peru. On August 21, 2025, after years of SUNAT's tactics to delay the conclusion of the DESAA audit on which it had predicated commencement of the refund proceedings,[39] SUNAT issued a 160-page letter containing its opinion on the tax rate applicable to EDCH's 2019 sale of DESAA.

37. The letter, to which SUNAT gave DESAA a mere 16 business days to respond, purported to determine three main points: i) that DESAA is jointly and severally liable for the income tax payable by Claimants, through EDCH; ii) that the transfer of DESAA's shares on the LSE in 2019 was "simulated" because, contrary to the two opinions from the SMV confirming the transfer of shares took place on the LSE, the transfer actually took place upon execution of the TOSA, requiring application of a 30% versus 5% tax rate; and most critically iii) that the 30% tax rate was applicable to the total sale price of the shares, S/711,579,210 rather than the capital gains amount of S/554,950,769, resulting in additional tax liabilities on EDCH and DESAA of S/ 48 million, plus interest and penalties. In other words, SUNAT's determination will have the

[37] **Exhibit C-32**, EDCH's Motion for Exceptions, May 23, 2025.

[38] **Exhibit C-34**, EDCH's Response to SUNAT's Administrative Contentious Action Brief, May 30, 2025.

[39] Prevalent among these tactics included SUNAT's repeated requests for documents and information that EDCH had already provided on DESAA's behalf, with the apparent goal of indefinitely delaying the formal start of the audit period. Indeed, as the Tax Court confirmed in response to a complaint filed by DESAA, SUNAT's actions had the effect of allowing the agency to indefinitely delay the formal start of the one-year audit period, as each request for information renewed the four-year statute of limitations period governing the audit process. This allowed SUNAT to prevent resolution of the refund case by keeping the audit open for an indefinite time period.

patently unjust result of requiring Claimants to pay taxes on the total income of the sale and not just on the capital gains.

38. Notwithstanding the baseless imposition of new, and outrageously high, taxes and penalties, SUNAT's determination that the sale of DESAA's shares was "simulated" – denoting that the legal act of transferring DESAA's shares on the LSE was a fabricated transaction hiding the "real" transaction of executing the TOSA – is independently egregious, as not even SUNAT contests that a share transaction did in fact occur on the LSE and that the transfer of shares was the transaction's intended legal purpose. In other words, the transfer of DESAA's shares did not comprise "hidden" legal acts carried out to avoid proper payment of taxes; to the contrary, EDCH followed the recommended procedure for the sale of DESAA's shares – which included obtaining approvals to proceed with the sale from a number of State authorities – resulting in the ultimate commercial transaction on the LSE.

39. SUNAT's ultimate determination that the transaction was a "simulation" is even more absurd and irregular for its issuance in the context of the DESAA audit, rather than the tax refund proceeding. Indeed, the timing and context in which SUNAT issued this letter demonstrates an effort by SUNAT to circumvent its obligations under the December 2, 2024 Tax Court decision, as well as its due process obligations to EDCH as a jointly liable taxpayer. This is evidenced most clearly by the fact that SUNAT chose to characterize the share transfer as a "simulation", meaning in effect a fraud, rather than a "tax avoidance" transaction, which is defined in the Tax Code as an improper legal act carried out for the purpose of obtaining a tax benefit that would not have been obtained through application of the proper legal procedure. Despite the absence of any factual basis whatsoever to justify that the sale of DESAA's shares was a "simulated" transaction or was carried out through an "avoidance" structure, SUNAT's decision to characterize the transaction as a "simulation" rather than a violation of the general anti-avoidance clause appears aimed at preventing EDCH from presenting its position before an independent review committee and exercising its right of defense.

40. SUNAT recently indicated that it evaluated DESAA's response and reaffirmed its decision and the extraordinary determinations on liability contained within. Under the decision, SUNAT will not only improperly retain Claimants' investment, but it has ordered DESAA and EDCH to jointly pay an additional S/ 48 million in tax liabilities plus approximately S/ 33 million in

interest, bringing the total to S/ 81 million.[40] Adding insult to injury, SUNAT's decision also imposes fines on the parties to the audit.

41. As demonstrated by these developments, efforts to engage with Peru's administrative process have been met with actions by SUNAT to deprive Claimants of due process in pursuit of its aim to unlawfully retain Claimants' investment. In doing so, SUNAT has acted contrary to all legal precedent, deliberately misinterpreted and misapplied laws, made legal proceedings "disappear" that were not progressing in its favor, and initiated parallel audit actions to obtain its preferred result, all while delaying resolution of the original request egregiously past any reasonable timeline. In the meantime, Claimants not only continue to be deprived of their remaining investment in Peru totaling well over S/200,000,000, but now also face the prospect of having to pay an additional S/ 81,000,000 (including interest) plus penalties arising from SUNAT's position adopted in the DESAA audit.

IV. <u>SUNAT's Actions Do Not Constitute "Taxation Measures"</u>

42. Article 22.3 of the TPA contains a general carve-out for "taxation measures" stating that "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."[41] While "taxation measures" is not expressly defined in the TPA, it is evident from Peru's outrageous behavior that the carve-out does not apply here. The actions described in the preceding sections have little to do with Peru's sovereign power to tax and therefore do not constitute "taxation measures". On the contrary, they implicate, among other things, an administrative agency's exploitation of administrative procedures, its deliberate refusal to comply with laws of general application, and the deprivation of a protected investor's right to due process.

43. In any event, even if considered a taxation measure, which it is not, the TPA's carve-out of taxation measures only applies to tax measures that are *bona fide.* As articulated by the *Yukos* tribunal in the ECT, "actions that are taken only under the guise of taxation, but in reality aim to achieve an entirely unrelated purpose . . . cannot qualify for exemption from the protection standards of the [treaty] under the taxation carve-out."[42] Here, SUNAT's actions were calculated to deprive Claimants of receiving the remainder of their investment in the country, and violated

[40] **Exhibit C-35**, SUNAT Resolución de Determinación No. 022-003-0107405.

[41] **Exhibit C-1**, US-Peru TPA, Article 22.3.

[42] **CLA-5,** *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, July 18, 2014, ¶ 1407.

multiple protections under the TPA to do so. Peru cannot subsequently hide behind the taxation measure carve-out as a means to avoid responsibility for SUNAT's egregious and improper conduct and circumvent TPA protections.

44. Claimants note that Article 22.3(6) of the TPA requires that an investor seeking to invoke the protections of Article 10.7, related to a tax measure, must refer the issue of whether that taxation measure involves an expropriation to the "competent authorities of the Parties" at the time the investor files its Notice of Intent. Annex 22.3 defines "competent authorities" as the Ministerio de Economía y Finanzas ("MEF") for Peru and the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury for the United States.[43]

45. Out of an abundance of caution, Claimants followed these procedures on November 24, 2023 when they filed their Notice of Intent asserting breaches of multiple protections under the TPA and, at the same time, simultaneously sent letters informing the U.S. Department of the Treasury and Peru's MEF of the dispute.[44] As part of this process, Claimants requested input from the U.S. Department of Treasury and MEF on whether SUNAT's actions constituted an expropriation. In May 2024, both entities concluded they did not at that time believe an expropriation had occurred, but correspondence from the Treasury indicated this decision was without prejudice to any future developments in the dispute.[45] Indeed, as explained above, in the two years that have passed since Claimants first notified the competent authorities of this dispute, SUNAT has subjected Claimants to continued and increasingly dilatory, arbitrary, procedurally unprecedented, and bad faith actions, including indicia of potential criminal wrongdoing within SUNAT, which have snowballed to such an extent that Peru's actions cannot possibly be considered "taxation measures" and, even if they were, they cannot be considered *bona fide*.

V. <u>Peru's Conduct Breaches its Obligations under the TPA</u>

46. SUNAT's conduct constitutes serious and material violations of the protections accorded to Claimants and their investment under the TPA. Peru is responsible for these violations, as SUNAT is an agency under the Peruvian Ministry of Economy and Finance, which, in turn, is an

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43 **Exhibit C-1**, Treaty, Annex 22.3.

44 **Exhibit C-36**, Letter from YCP, BWW, and BWD to MEF, November 24, 2023; **Exhibit C-37,** Letter from YCP, BWW, and BWD to U.S. Department of Treasury, November 24, 2023; **Exhibit C-38**, Notice of Intent, November 24, 2023.

45 **Exhibit C-39**, Email from Jim Wang, U.S. Department of Treasury, May 23, 2024.

organ of Peru's executive branch. SUNAT's conduct is consequently attributable to Peru under international law.[46]

47. Chapter 10 of the TPA applies to measures adopted or maintained by a Party relating to a covered investment.[47] The Treaty defines the term "investment" broadly and non-exhaustively as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include . . . (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges; . . . ."[48] Claimants' ownership of DESAA through their 100% ownership of EDCH, and the legal and property rights arising from Claimants' ownership interests, qualify as covered investments under the TPA. Claimants' expectation of gain or profit also qualifies as covered investment.

48. Section A of Chapter 10 sets out various substantive protections that Peru is obligated to afford to U.S. investments. The TPA provides, *inter alia*, that Peru must (i) accord U.S. investments fair and equitable treatment and full protection and security,[49] (ii) "permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory" including transfers of "profits, dividends, capital gains, and proceeds from the sale of all or part of the covered investment..."[50]; (iii) treat U.S. investors and investments no less favorably than it treats its own investors and investments,[51] and (iv) not expropriate or nationalize U.S. investments, either directly or indirectly, through measures equivalent to expropriation or nationalization,

[46] **CLA-6**, ILC Draft Articles on State Responsibility, 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…").

[47] **Exhibit C-1**, Treaty at Article 10.1.

[48] *Id.* at Article 10.28 at 10-24 and 10-25.

[49] *Id.* at Article 10.5(1).

[50] *Id*. at Article 10.8.

[51] *Id.* at Article 10.3.

except for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate, and effective compensation, and in accordance with due process of law.[52]

49. Section B of Chapter 10 of the TPA grants a U.S. investor the right to submit to arbitration any investment dispute between an investor and Peru for breach of the obligations contained in Section A of Chapter 10 of the TPA.[53]

50. For the reasons set forth below, Peru's misconduct violates international law and the TPA. 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) fair and equitable treatment, including the obligation not to deny justice and full protection and security (Article 10.5); (2) protection against any unlawful expropriation (Article 10.7); and (3) the free transfer of proceeds from the sale of the investment (Article 10.8).

A. SUNAT's Arbitrary and Non-Transparent Manipulation of Administrative Proceedings Constitutes Violation of the Fair and Equitable Treatment Protection

51. As described above, Peru has engaged in a pattern of unfair and inequitable treatment of Claimants and their investment, in violation of Article 10.5 of the TPA, by, *inter alia*, extending the timeline of the proceedings by repeatedly moving the goal posts until its decision to deprive Claimants of a means to reach an adjudicated resolution of its request altogether. Simultaneously, SUNAT's actions have made the process more onerous, unpredictable, costly, and time intensive on EDCH.

52. *First*, SUNAT's replacement of EDCH's refund process with an *ex-officio* refund proceeding predicated on the tax audit of DESAA was completely arbitrary. By cancelling EDCH's refund process, SUNAT curtailed EDCH's right to appeal to a second adjudicatory review body. As a result, SUNAT deprived EDCH of any insight into the processing of its tax refund request and stripped it of its due process rights to present a defense of its overpayment. This lack of transparency, arbitrary misuse of the administrative process, and failure to afford due process constitute breaches of Article 10.5 of the TPA.

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52 *Id.* at Article 10.7(1).

53 *Id.* at Articles 10.16(1)(a)(i)(A).

53. *Second*, in violation of Claimants' legitimate expectations that SUNAT would act consistently with determinations issued by related government bodies and would comply with its own legal framework, SUNAT ignored contemporaneous reports issued by the SMV regarding the characterization of a TOSA as a pre-agreement that does not constitute the negotiation or execution of a securities transaction itself. In addition, SUNAT repeatedly ignored laws with general application to the administrative process, such as i) the 45 day time limit within which it was obligated to decide on the refund request; ii) the legal effect of its failure to comply with directives issues by the second instance and the Tax Court; iii) the legal requirements that must be satisfied in order to appeal a Tax Court decision to the Judiciary; iv) and the legal elements of a "simulated" transaction versus one of general tax avoidance, among others.

54. *Third*, SUNAT acted unreasonably by taking actions that caused inordinate delay and associated expense to Claimants in their good faith pursuit of a relatively straightforward determination.

55. These actions are unequivocally sufficient to constitute breach of FET, as they reflect inherently unfair treatment of an investment that the TPA was designed to protect against.

B. Peru's Failure to Legitimately Engage with and Resolve EDCH's Tax Refund Request After More Than Six Years Constitutes a Denial of Justice

56. 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.

57. 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, and the agency's refusal to provide a reasonable timeline for resolution; (iii) SUNAT's unjustifiable refusal on three occasions 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; (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; (v) SUNAT's legally improper appeal of the Tax Court's December 2024 decision stating that SUNAT's January 18, 2023 resolution was null and void, and the irregular means by which Claimants were informed of the appeal, and (vi) SUNAT's determination of liability, issued unilaterally in the context of the audit procedure where Claimants had no ability to defend their position, among others.

C. SUNAT's Deprivation of Claimants' Remaining Investment Constitutes Expropriation

58. Chapter 10, Section A of the TPA includes an obligation not to "expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization." Annex 10-B describes direct expropriation as encompassing those actions "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure." Regarding indirect expropriation, Annex 10-B provides that this occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."

59. In accordance with the TPA, the "determination of whether an action or series of actions . . . constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry…"[54] The TPA sets out several factors to consider, including the economic impact of the government action, the extent to which the government action interferes with distinct, reasonable investment-backed expectations, and the character of the government action. Investment tribunals have applied these and other factors to determine if a State's imposition of a taxation measure is legitimate, including (a) whether the taxation measure qualifies as a good faith exercise of the State's police powers;[55]

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[54] **Exhibit C-1**. US-Peru TPA, Annex 10-B(3)(a).

[55] **CLA-1**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 106 ("A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory... 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.").

(b) the confiscatory, arbitrary, abusive or discriminatory effect of the measure;[56] and (c) sufficient factual and legal justification for the measures taken by the tax authorities.[57]

60. SUNAT's acts and omissions in the refund proceedings constitute an indirect expropriation, having an effect equivalent to direct expropriation, for two reasons: (i) SUNAT's deliberate misapplication of the law in order to make "disappear" the refund proceedings in favor of an audit procedure depriving Claimants of the ability to defend their investment affects the totality of the Claimants' remaining investment in Peru, and (ii) Peru has not met the requirements to demonstrate its expropriation was lawful.

1. *Peru's Actions Affect the Totality of Claimants' Remaining Investment*

61. The effect of SUNAT's actions in the tax refund proceedings is that Peru is effectively withholding over S/ 200 M (comprising S/ 142,011,902 plus interest) from EDCH, constituting the totality of the Claimants' remaining investment in the country. By withholding taxes at a rate 6 times that which EDCH legitimately owed to the agency, SUNAT has confiscated the remaining portion of the Claimants' investment in Peru.

2. *Peru's Expropriation is Unlawful*

62. The parties to the TPA may not expropriate an investment unless such expropriation is carried out "(a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt,

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56 **CLA-2**, *Señor Tza Yap Shum v. La República del Perú*, ICSID Case No. Arb/07/6, Award, July 7, 2011, ¶ 181 ("El examen de un número de laudos arbitrales que han considerado argumentos sobre expropiación indirecta resultante de la conducta de autoridades Tributarias, evidencia que frecuentemente han sido desestimados. Estos laudos sin embargo también revelan un consenso considerable entorno a que la imposición y la aplicación de medidas tributarias puede adquirir un carácter expropiatorio si es confiscatoria, arbitraria, abusiva, o discriminatoria."). **CLA-3**, *Ryan and others v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, November 24, 2015, ¶ 472 ("The guise of taxation will not save the Host State from liability for actions, based on an abuse of tax laws, if these resulted in the total loss or substantial impairment of the investment tantamount to expropriation."); **CLA-4**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012, ¶¶ 165-66 ("The most important factor to distinguish permissible from confiscatory taxation is the effect of the tax. The effects required for a tax to be deemed confiscatory do not appear to be different from those required to assess the existence of an indirect expropriation. In other words, confiscatory taxation constitutes an expropriation without compensation and is unlawful. (…) When assessing the evidence of an expropriation, international tribunals have generally applied the sole effects test and focused on substantial deprivation.").

57 **CLA-2**, *Señor Tza Yap Shum v. La República del Perú*, ¶ 181 ("Tras haber analizado en detalle la evidencia presentada, el Tribunal considera que las explicaciones dadas por la SUNAT respecto a la justificación fáctica y legal por las que se impusieron las medidas son insuficientes. A modo de ejemplo, el Tribunal no está convencido de la alegación de la SUNAT respecto al ocultamiento de ingresos por TSG. Además de la cooperación prestada por TSG durante el procedimiento de fiscalización y de su declaración voluntaria de un inventario de más de harina de pescado, los contratos con los fabricantes proporcionados no permitían que subsistiera ninguna confusión respecto de lo pactado.").

adequate, and effective compensation; and (d) in accordance with due process of law and Article 10.5."[58]

63. SUNAT's actions in the refund request proceedings fail to comport with a single one of these cumulative factors: (a) there is no explicit or implicit public purpose for taking more taxes than are owed from the sale of the investment; (b) the refund request proceedings specifically involve only one foreign-owned party; there is no indication that other claimants or parties have faced similarly protracted proceedings concerning the return of a tax overpayment; (c) SUNAT has not paid any compensation to EDCH; and (d) the proceeding has been riddled with procedural and substantive improprieties with the direct effect of depriving Claimants of the due process to which they are entitled.

64. Regarding factor (d), and as detailed above, SUNAT has persistently deployed a series of bad faith actions on both procedural and substantive grounds to the detriment of the Claimants and all the while maintaining possession of S/ 142,011,902 to which it is not entitled.

65. Substantively, SUNAT has failed to properly engage with Claimants, or with the reams of evidence presented, in its analysis of the applicability of the 5% capital gains tax. This is demonstrated most visibly by SUNAT's January 18, 2023 determination that no refund proceeding existed, rather than address the merits of Claimants' refund request in favor of initiating an audit on DESAA and predicating initiation of the refund proceedings on completion of such audit. This followed years of SUNAT's failed compliance with the second instance decision of May 27, 2021, in which the agency declared the first instance decision of October 2020 "null and void" for failure to provide reasons for its conclusion that the transaction constituted a negotiation outside of the LSE. Indeed, SUNAT's unreasoned October 2020 rejection of the refund request is directly contrary to governing law and authoritative interpretation on the topic.

66. As explained above, SMV's February 2021 report and January 2022 confirmation report 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. Nonetheless, in direct contravention of the good faith exercise of its powers, SUNAT decided to ignore this

[58] **Exhibit C-1**, Treaty, Art. 10.7.

confirmation in favor of manipulating the audit system to deprive Claimants of due process to enable it to reach the conclusion that the sale was subject to a 30% tax rate. This conclusion was predicated on a deliberate mischaracterization of the applicable law, which allowed SUNAT to declare that the transfer of DESAA's shares was "simulated" because the transfer actually took place upon execution of the TOSA.

67. Procedurally, SUNAT has abused its power to adjudicate tax refund requests by, *inter alia*, repeatedly extending the timeline of the proceedings without providing a definitive answer on the refund request, while simultaneously making the process more onerous on EDCH through unrealistic and abusive information requests, restricted access to the refund request file, and refusing to meet with representatives of EDCH. The passage of a significant amount of time without a decision on the refund request gave rise to a presumption that SUNAT had rejected the request, which EDCH subsequently challenged. Without any precedent for doing so, SUNAT's second instance declared that such tacit denial was void, even though the only legal requirement for such a presumption to arise is the passage of time. As noted above, this holding – and the timing of its issuance one day after SUNAT launched an audit of DESAA – was not only without legal precedent but also suggested improper collaboration between the two administrative bodies.

68. Most egregiously, SUNAT's January 18, 2023 decision stating that no refund proceeding was in place and that it would have to bring an *ex-officio* proceeding in order to determine the refund issue deprived EDCH of access to proceedings on its request altogether. In other words, SUNAT manipulated administrative procedures to remove all means of recourse from EDCH by predicating resolution on a procedure over which SUNAT maintained sole discretion.

69. Indeed, the dilatory tactics applied during SUNAT's audit of DESAA on which the refund request was predicated suggest that they were intended to prolong the audit's conclusion until SUNAT could determine a way to manipulate existing laws to justify the retention of Claimants' overpayment. These dilatory acts and measures include: (i) initiating the proceeding three years after receiving the tax refund request, when it could have done so immediately; (ii) incorrectly naming DESAA as a withholding agent when it was neither the seller nor the buyer in the transaction, prompting SUNAT to correct the error by re-starting the audit six months later; (iii) requesting information that only a party to the transaction, like seller EDCH or buyer GEB, would possibly have in its possession, and threatening sanctions for failure to produce; (iv) requesting information pertinent to audits of the withholding tax on dividends rather than the tax on capital

gains; and (v) refusing to initiate the formal audit procedure absent the provision of documents outside of DESAA's control or that it had already provided.

70. In light of the aforementioned facts, Peru cannot justify its expropriation of Claimants' investment with reference to its sovereign power to tax. The proceedings surrounding EDCH's tax refund request, extending for six years and counting, are riddled with procedural and substantive improprieties completely contrary to the TPA's requirements governing the provision of due process for lawful expropriations.

D. The Improper Withholding of Claimants' Overpayment Violates Peru's Obligation to Permit Free Transfer of Proceeds

71. The TPA expressly provides that Peru "shall permit all transfers relating to a covered investment to be made freely and without delay" including "proceeds from the sale of all or any part of the covered investment."[59] Prevention of such transfers is permitted only through "equitable, non-discriminatory, and good faith application of its laws" related to "issuing, trading, or dealing in securities."[60] As evidenced by the facts detailed above, SUNAT's patently improper withholding of Claimants' overpayment of capital gains taxes does not reflect an equitable or good faith application of its laws and undeniably prohibits the transfer of S/ 142,011,902, plus interest; consequently, Peru has breached Article 10.8 of the TPA.

E. SUNAT's Actions Constitute Breach of Additional Protections in the TPA

72. 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 and put to use the significant amount of capital gains taxes that EDCH paid on the sale of DESAA's shares. Claimants will further develop these breaches in subsequent submissions over the course of the arbitration.

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[59] **Exhibit C-1**, Treaty, Art. 10.8.

[60] *Id.*

VI. Claimants Meet the Jurisdictional Requirements for Submitting their Claims to International Arbitration under the TPA and the ICSID Convention

73. Section B of the TPA and Article 25 of the ICSID Convention set out the jurisdictional requirements, which extend to (a) "any legal dispute" (b) "between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)" and (c) "a national of another Contracting State" (d) "arising out of an investment," which (e) "the parties to the dispute consent in writing to submit to the Centre."[61] As described below, all such requirements are plainly satisfied here.

A. There is a Legal Dispute between Claimants and Peru

74. A legal dispute generally concerns the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation. Here, the TPA imposes legally binding obligations on Peru, including those outlined in **Section V**. As detailed above, Peru violated each of the foregoing standards of protection through its mistreatment of Claimants and their investments. Peru has not provided Claimants with any remedy for its misconduct, for which Claimants seek relief in **Section VIII**, below. Therefore, there is a pending dispute between the parties.

B. Peru is a Contracting Party to the TPA and a Contracting State of the ICSID Convention

75. Peru and the United States are Contracting Parties to the TPA, which entered into force on February 1, 2009.[62] Peru is also a Contracting State of the ICSID Convention. Peru signed the ICSID Convention on September 4, 1991, and the ICSID Convention entered into force for Peru on September 8, 1993.

C. Claimants are Covered "Investors" of a Contracting Party to the TPA and a Contracting State of the ICSID Convention

76. Claimants are protected investors of the United States and thus qualify for the protection of the TPA.[63] The Treaty contains a broad definition of "investor" and includes "a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an

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61 ICSID Convention Art. 25(1).

62 **Exhibit C-1**, United States-Peru Trade Promotion Agreement, signed on April 12, 2006, and entered into force on February 1, 2009 (the "Treaty").

63 **Exhibit C-4**, Proof of Nationality for Individuals**; Exhibit C-5**, Proof of Nationality for Individuals**.**

investment in the territory of another Party."[64] Claimants are and at all times have been nationals of the United States and therefore qualify as "investors" within the meaning of the TPA. At no time have any of the Claimants been nationals of Peru. Claimants are accordingly entitled to the substantive protections of the TPA, including the right to initiate arbitration against Peru.

D. Claimants Made Covered "Investments" in Peru under the TPA and the ICSID Convention

77. Claimants made covered investments under the TPA which are the subject of this dispute. Specifically, Claimants sold 100% of their shares in the publicly traded Peruvian company DESAA to GEB, and the proceeds from that sale form part of the Claimants' investment. In violation of the substantive protections of the TPA, Peru has withheld and continues to withhold the original amount of S/ 142,011,902 that forms part of the Claimants' investment. Claimants are and at all relevant times have been entitled to receive this with interest.

78. The TPA defines the term "investment" broadly as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[65] The TPA further refers to several broad categories of "investments," including: "(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."[66] In addition, the TPA defines the term "covered investment" as "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."[67]

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[64] **Exhibit C-1**, Treaty at Article 10.28; *see also* ICSID Convention at Article 25(1) and (2).

[65] **Exhibit C-1**, Treaty at Article 10.28; *see also* ICSID Convention at Article 25(1).

[66] **Exhibit C-1**, Treaty at Article 10.28.

[67] **Exhibit C-1**, Treaty at Article 1.3.

79. Claimants' ownership of DESAA through their 100% ownership of EDCH, and the legal and property rights arising from Claimants' ownership interests, qualify as covered investments under the TPA. Claimants' expectations of gain or profit also qualify as covered investment under the TPA. Accordingly, Claimants are entitled to the substantive protections of the TPA, including the right to initiate arbitration against Peru.

E. Consent to ICSID Arbitration and Agreement to Arbitrate

80. In the event "that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation," Article 10.16(1) of the TPA provides that:

> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
> (i) that the respondent has breached
> (A) an obligation under Section A,
> (B) an investment authorization, or
> (C) an investment agreement;
> and
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of that breach…

81. The investor concerned may submit such a claim to arbitration under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings.[68]

82. The TPA sets out additional requirements and suggestions before an arbitration can be brought, all of which have been met here.

83. In Article 10.17 of the TPA, Peru "consents to the submission of a claim to arbitration under this Section in accordance with this Agreement." Under the Treaty, a party may pursue arbitration if (a) it has provided written notice of its intention to submit the claim to arbitration ("notice of intent") at least 90 days before submitting any claim to arbitration,[69] and (2) six months have elapsed since the events giving rise to the claim.[70] The TPA also suggests that the parties should initially seek a resolution through consultation and negotiation.[71]

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68 **Exhibit C-1**, Treaty at Articles 10.16(3)(a) and 10.16(4); *see also* ICSID Convention at Article 25(1).

69 *Id.* at Article 10.16(2).

70 *Id.* at Article 10.16(3).

71 *Id.* at Article 10.15.

84. Claimants have met these requirements. On November 24, 2023, Claimants submitted its Notice of Intent to file an arbitration.[72] According to Article 10.16.2 of the TPA, Peru had 90 days from the November 24, 2023 filing date to respond to Claimants' Notice of Intent before Claimants were permitted to submit claims to arbitration under the TPA. However, representatives of the Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión, ("SICRECI"), waited five (5) months before issuing a letter to Claimants, well beyond the 90-day period delineated in the TPA. In this communication, SICRECI scheduled a meeting to take place only a few days after it contacted Claimants, unaccompanied by any information as to the purpose or agenda of the meeting. When Claimants requested an agenda, SICRECI informed – only two days prior to the scheduled meeting date – that Claimants should present their legal arguments and settlement proposal. After rescheduling the meeting in order to adequately prepare the materials requested by SICRECI, representatives of Claimants flew to Lima for the presentation. During and after this meeting, SICRECI made no effort to negotiate and instead sent a letter informing Claimants that they had not found a technically or legally viable alternative solution.[73]

85. This history, along with the details of the dispute outlined above, demonstrates that Claimants have attempted to amicably resolve this dispute with Peru before initiating this arbitration; that the 90-day notice period is satisfied; and that more than six months have lapsed since the events giving rise to Claimants' claims.

86. Article 10.16(3) of the TPA further provides that an investor may elect to submit its claim to arbitration under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules. Pursuant to Article 10.16(3)(a), Claimants accordingly submit their claim to arbitration under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings.

87. Claimants consented to arbitrate this dispute pursuant to Article 10.16 of the TPA through their November 24, 2023 Notice of Intent to file an arbitration. Claimants further confirm their consent to settle this dispute through arbitration under the ICSID Convention through this Notice of

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[72] **Exhibit C-38**, Notice of Intent, November 24, 2023.

[73] **Exhibit C-33**, Letter from Vanessa Rivas to Benjamin H. Griswold, Jon Ilvisaker and Henry Burnett, May 31, 2024.

Arbitration. Therefore, Claimants have satisfied the "consent" requirement under the ICSID Convention.

88. Pursuant to Article 10.17 of the TPA, Peru's consent under Article 10.16 and the submission by Claimants of this Request for Arbitration satisfies the requirements of "(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; (b) Article II of the New York Convention for an 'agreement in writing;' and (c) Article I of the Inter-American Convention for an 'agreement.'"

89. Claimants are asserting claims on their behalf under Article 10.16.1(a). As required by Article 10.18(2)(b)(i) of the TPA, Claimants hereby waive any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

90. Article 10.18 of the TPA provides, "[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 (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage." This Request for Arbitration falls within the three-year period set out in Article 10.18 of the TPA.

VII. <u>Number of Arbitrators; Claimants' Party-Appointed Arbitrator; Proposed Language and Place of Arbitration</u>

91. Article 10.19(1) of the TPA provides that the tribunal shall be comprised of three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

92. Claimants hereby appoint Mr. Andrés Jana as its party-appointed arbitrator. Mr. Jana may be contacted at:

Address: Av. Andrés Bello 2711, piso 9
Santiago, Chile | 7550611
Phone: +56 227 577 605
Email: ajana@janagil.com

93. Claimants propose that the arbitral proceedings be conducted in English and Spanish, and that the place of arbitration be fixed in Washington, D.C.

VIII. <u>Request for Relief</u>

94. In view of the foregoing, Claimants respectfully request that the Arbitral Tribunal grant the following relief:

a. DECLARE that this dispute and the claims asserted by Claimants fall within the jurisdiction of the Tribunal;

b. DECLARE that the facts giving rise to the claims asserted by Claimants do not constitute "taxation measures" or, alternatively, do not constitute *bona fide* tax measures, and are therefore not subject the TPA's carve-out for such measures;

c. DECLARE that Peru has violated the TPA and international law in connection with its treatment of Claimants and Claimants' investment;

d. ORDER Peru to pay Claimants full compensation for all losses and damages suffered by the Claimants, in amounts to be determined, but no less than S/ 200,000,000, plus pre- and post-award interest with appropriate rests calculated at a commercial rate to be determined from an appropriate start date until to the date of payment;

e. ORDER Peru to pay to Claimants all other damages caused to Claimants as a result of Peru's breaches of the TPA;

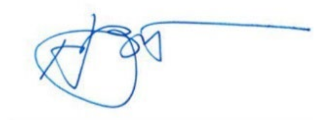
f. ORDER Peru to pay to Claimants all costs associated with this proceeding, including without limitation attorneys' fees and the expenses and fees of the arbitrators and of any administering arbitral institution; and

g. GRANT any other relief the Tribunal deems just and proper.

95. Claimants reserve the right to amend or supplement the present Notice of Arbitration, to make additional claims, and to request such additional or different relief as may be appropriate.

Dated: January 17, 2026

Respectfully submitted,



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