

International Centre for Settlement of Investment Disputes  
(ICSID)

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**Latam Hydro LLC y CH Mamacocha S.R.L.**  
*Claimant,*

*v.*

**Republic of Peru,**  
*Respondent.*

ICSID Case No. ARB/19/28

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**Peru's Written Observations on the  
United States' Non-Disputing Party Submission**

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8 December 2021

**Arnold & Porter**

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## I. INTRODUCTION

1. On 19 November 2021, the United States of America (“**United States**”), the sole other State party to the Treaty,<sup>1</sup> filed its non-disputing party submission (“**US Submission**”) in this arbitration,<sup>2</sup> setting forth its interpretation of certain provisions of the Treaty. Such interpretations possess considerable authority as a means of interpretation under public international law, and must therefore be taken into account by the Tribunal, for the reasons explained herein.
2. The US Submission confirms Peru’s interpretations of the Treaty, and debunk Claimants’ arguments on Treaty provisions that govern essential aspects of Claimants’ case on jurisdiction, merits, and damages. The US Submission is thus devastating to Claimants’ arguments in this arbitration.
3. In the following sections, Peru will address the legal import of the agreement by the United States and Peru (collectively, “**Treaty Parties**”) with respect to the interpretation of the terms of the Treaty (**Section II**), and will demonstrate that the Treaty Parties share a common understanding of the Treaty provisions that are at issue in this particular arbitration (**Section III**).

## II. UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES, THE TREATY PARTIES’ COMMON INTERPRETATION IS AUTHORITATIVE AND MUST BE TAKEN INTO ACCOUNT

4. Pursuant to the Vienna Convention on the Law of Treaties (“**VCLT**”), any agreement between the Treaty Parties regarding the interpretation of the Treaty is authoritative, and must therefore be taken into account when interpreting such treaty.

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<sup>1</sup> Each capitalized term in this submission shall have the meaning set forth in Peru’s prior written submissions in this proceeding, unless otherwise stated.

<sup>2</sup> See Submission of the United States of America, 19 November 2021 (“**US Submission**”).

5. The VCLT sets forth the “[g]eneral rule of interpretation” of treaties, which is recognized as embodying customary international law. Article 31 thereof sets forth the primary means of treaty interpretation:

There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and]

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>3</sup>

6. Article 31.3(a) thus requires the interpreter of a treaty to take into account “any subsequent agreement between the parties [to the treaty] regarding the interpretation of the treaty.”<sup>4</sup> In establishing such an “agreement,” the question is one of substance, rather than of form. In particular, a “subsequent agreement” need not be a formal document jointly drafted or co-signed by the treaty parties.<sup>5</sup> Rather, such an “agreement” may consist of separate acts or statements by each party, so long as those acts (i) manifest an undertaking by all of the treaty parties to confirm the meaning of the treaty at issue,<sup>6</sup> and (ii) reflect a common understanding—i.e., that the parties are aware of and share a particular interpretation of one or more provisions of the treaty.<sup>7</sup>
7. Article 31.3(b) also requires the interpreter of a treaty to take into account the treaty parties’ subsequent practice in the application of the treaty. “Subsequent practice”

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<sup>3</sup> **RL-0078**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 (“VCLT”), Art. 31.3.

<sup>4</sup> **RL-0252**, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, ILC, 2018 (available at [https://legal.un.org/ilc/texts/instruments/word\\_files/english/commentaries/1\\_11\\_2018.doc](https://legal.un.org/ilc/texts/instruments/word_files/english/commentaries/1_11_2018.doc)), Conclusion 3, Cmt. 9, (“**ILC Draft Conclusions**”); *see also id.* at Conclusion 4, Cmt. 4.

<sup>5</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 10, Cmt. 7.

<sup>6</sup> *See* **RL-0252**, ILC Draft Conclusions, Conclusion 4, Cmt. 10.

<sup>7</sup> *See* **RL-0252**, ILC Draft Conclusions, Conclusion 10, Cmt. 1; *see also id.* Conclusion 10, Cmt. 11.

under Article 31.3(b) captures all other forms of conduct in the application of the treaty<sup>8</sup>—a broad category that includes formal statements made during the course of legal disputes.<sup>9</sup> For State practice to be relevant under Article 31.3(b), it must contribute to the identification of an agreement between the relevant treaty parties as to the interpretation of the treaty. In other words, the conduct must demonstrate that the parties share an understanding of the meaning of the treaty.<sup>10</sup> That is precisely what has occurred here; *see* **Section III** below.

8. Subsequent agreements and practice are of comparable importance and effect under Article 31.3; there is no difference concerning the legal effect of subsequent agreement, on the one hand, and subsequent practice, on the other.<sup>11</sup> Consistent with the text of Article 31, a subsequent agreement and/or subsequent practice shall be taken into account by an interpreter.<sup>12</sup>
9. The interpretation of the parties established under Article 31.3(a) or (b) is authoritative. Given that a treaty is the embodiment of the common will of the States that concluded that treaty, the International Law Commission (“ILC”) has recognized that “‘objective evidence’ of the ‘understanding of the parties’ possesses considerable authority as a means of interpretation.”<sup>13</sup> The precise

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<sup>8</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 4, Cmt. 11.

<sup>9</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 4, Cmt. 18.

<sup>10</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 6, Cmt. 4.

<sup>11</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 3, Cmt. 10 (“The distinction between any “subsequent agreement” (Article 31, paragraph 3 (a)) and “subsequent practice . . . which establishes the agreement of the parties” (Article 31, paragraph 3 (b)) does not denote a difference concerning their authentic character.”); *see also id.* Conclusion 4, Cmt. 9 (“Indeed, by distinguishing between ‘any subsequent agreement’ under article 31, paragraph 3 (a), and ‘subsequent practice . . . which establishes the understanding of the parties’ under article 31, paragraph 3 (b), of the 1969 Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect.”).

<sup>12</sup> *See* **RL-0078**, VCLT, Art. 31.3 (“There **shall** be taken into account . . .”) (emphasis added); **RL-0252**, ILC Draft Conclusions, Conclusion 2, Cmt. 6 (“All means of interpretation in article 31 . . . are part of a single integrated rule.”).

<sup>13</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 3, Cmt. 9; *see also id.* Conclusion 3, Cmt. 3.

weight to be ascribed to a particular agreement or practice will depend upon the clarity and specificity in relation to the treaty at issue;<sup>14</sup> the clearer the link to the interpretation of the treaty, the greater the weight to be ascribed.<sup>15</sup>

10. Here, it is clear that the Treaty Parties (i.e., Peru and the United States) have reached a “subsequent agreement regarding the interpretation of” several provisions of the Treaty, within the meaning of VCLT Article 31.3(a).<sup>16</sup> Specifically, through their public written submissions, the Treaty Parties have expressed their common understanding as to the meaning of specific provisions of the Treaty. The fact that the Treaty Parties have not executed a formal joint document expressing this agreement is without consequence for interpretation purposes, as Article 31.3(a) imposes no requirement as to form. What is relevant here is simply that the Treaty Parties have together undertaken to confirm in formal written documents the meaning of certain provisions of the Treaty, and that they have manifested a common or shared interpretation of such provisions (*see Section III* below).
11. In addition to constituting a “subsequent agreement,” the Treaty Parties’ respective written submissions also constitute “subsequent practice in the application of the [Treaty] which establishes the agreement of the [P]arties regarding its interpretation,”<sup>17</sup> within the meaning of VCLT Article 31.3(b). Indeed, as noted above, submissions during the course of a legal dispute may qualify as “subsequent practice” under VCLT Article 31.3(b).<sup>18</sup> Here, the Treaty Parties’ written submissions are explicitly designed to affirm the common interpretation of the relevant provisions of the Treaty, and (as discussed in *Section III* below) they establish agreement with respect to those provisions. These submissions therefore constitute “subsequent practice” within the meaning of Article 31.3(b),

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<sup>14</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 9(1).

<sup>15</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 6, Cmt. 10.

<sup>16</sup> **RL-0078**, VCLT, Art. 31.3(a).

<sup>17</sup> **RL-0078**, VCLT, Art. 31.3(b).

<sup>18</sup> *See* **RL-0252**, ILC Draft Conclusions, Conclusion 4, Cmt. 18.

and accordingly establish the agreement of the Treaty Parties regarding a proper interpretation of the Treaty provisions at issue.

12. Whether understood as a “subsequent agreement” or as “subsequent practice,” the Treaty Parties’ joint interpretation is an unequivocal manifestation of their will and intention as the sole parties to the Treaty, and as such are authoritative.
13. The Treaty Parties’ interpretation of the relevant provisions of the Treaty in this case is entitled to even greater weight given the clarity, forcefulness, and specificity of the Treaty Parties’ submissions. As noted above, the clearer and more specific the link between the Parties’ agreement or practice and the aim of interpreting the treaty, the greater the weight to be ascribed to such interpretation.<sup>19</sup>
14. In the Counter-Memorial and Rejoinder, Peru explicitly undertook an interpretation of the relevant provisions of the Treaty.<sup>20</sup> After having had an opportunity to review Peru’s interpretation of the Treaty, as well as that of Claimants, the United States decided to exercise its right to file a non-disputing party submission pursuant to Treaty Article 10.20.2. The United States described the US Submission as a submission “on questions of interpretation of the Agreement [(i.e., the Treaty)].”<sup>21</sup> Thus, there can be no doubt that the Treaty Parties have specifically sought to confirm their shared understanding of the Treaty through their interpretation. Given that the Treaty Parties have established a common understanding with respect to the relevant provisions of the Treaty, the Treaty Parties’ agreed interpretation must be taken into account, and should be given deference.

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<sup>19</sup> **RL-0252**, ILC Draft Conclusions, Conclusion 6, Cmt. 10.

<sup>20</sup> See Peru’s Counter-Memorial, ¶¶ 484–864; Peru’s Rejoinder, ¶¶ 411–921

<sup>21</sup> US Submission, ¶ 1.

### III. THE TREATY PARTIES AGREE ON THE INTERPRETATION OF THE TREATY

#### A. The Treaty Parties agree that, under Treaty Article 10.22.1, Claimants have the burden to prove the necessary and relevant facts to establish the jurisdiction of the Tribunal

15. In the US Submission, the United States explained an important point on the allocation of the burden of proof under Treaty Article 10.22.1, in the context of jurisdictional arguments. The US Submission confirmed the position of Peru and refuted arguments by Claimants on this point.
16. Claimants assert that, in the context of jurisdiction, neither Claimants nor Peru has a burden of proof.<sup>22</sup> Peru, however, showed that the international law principle of *actori incumbit onus probandi* places on Claimants the burden of proof for demonstrating facts sufficient to establish jurisdiction.<sup>23</sup>
17. In its submission, the United States recognized that Treaty Article 10.22.1 requires a tribunal to decide disputed issues in accordance with the Treaty and “applicable rules of international law,”<sup>24</sup> and noted in that context that under general principles of international law, “a claimant has the burden of proving its claims.”<sup>25</sup> The United States then affirmed that, “[i]n the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim.”<sup>26</sup> The Treaty Parties thus agree, in accordance with the international law principle of *actori incumbit onus probandi*, that Claimants have a burden to prove facts that are necessary or

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<sup>22</sup> Claimants’ Reply, ¶¶ 320–322.

<sup>23</sup> Peru’s Rejoinder, ¶ 413–424.

<sup>24</sup> US Submission, ¶ 2.

<sup>25</sup> US Submission, ¶ 3.

<sup>26</sup> US Submission, ¶ 4.



relevant to establish jurisdiction. Having failed to do so in this case,<sup>27</sup> Claimants' claims should be dismissed.

**B. The Treaty Parties agree that the Waiver Requirement in Treaty Article 10.18.2(b) prevents Claimants from submitting to international arbitration parallel or duplicative claims that are not based on the Treaty**

18. The United States made two main observations on the Waiver Requirement, in each case supporting Peru's interpretation and contradicting Claimants' arguments.<sup>28</sup>
19. *First*, Claimants argue that "the waiver provision does not encompass [parallel and/or duplicative] claims brought before **international arbitration tribunals**"<sup>29</sup> (emphasis added), but rather precludes only the submission of parallel and/or duplicative claims before *national courts*.<sup>30</sup> However, Peru has demonstrated that, by requiring a claimant to waive the right to initiate or continue "any proceeding," "before any administrative tribunal or court under the law of any Party, **or other dispute settlement procedures**"<sup>31</sup> (emphasis added), the Waiver Requirement also encompasses parallel and/or duplicative *international arbitration procedures* initiated or continued in a dispute resolution proceeding like the present arbitration.<sup>32</sup>

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<sup>27</sup> See, e.g., Peru's Rejoinder, ¶ 424.

<sup>28</sup> **RL-0051**, Treaty, art. 10.18.2 ("No claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied . . . by the claimant's and enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.").

<sup>29</sup> Claimants' Reply, ¶ 337; see also *id.*, ¶ 345 (arguing that the Waiver Requirement "does not apply to an international arbitration"); ¶ 346 (arguing that the Waiver Requirement is designed merely "to avoid a duplication of proceedings between the international arbitration and proceedings in domestic courts").

<sup>30</sup> Claimants' Reply, ¶¶ 336, 344–346.

<sup>31</sup> **RL-0051**, Treaty, art. 10.18.2.

<sup>32</sup> Peru's Rejoinder, ¶¶ 433–436.

20. *Supporting Peru's arguments and contradicting Claimants' position*, the US Submission states that the Waiver Requirement "is concerned with parallel proceedings before administrative tribunals or courts under the law of any Party . . . or under any *other* binding dispute settlement procedure" (emphasis in original).<sup>33</sup> As Peru has explained,<sup>34</sup> the present arbitration falls under the rubric "any *other* binding dispute settlement procedure": it is a binding dispute settlement procedure *other* than those before "any administrative tribunal or court constituted under the laws of either Peru or the United States."<sup>35</sup>
21. *Second*, Claimants assert that, despite the Waiver Requirement, Claimants may bring simultaneously before this Tribunal parallel and/or duplicative: (i) contractual and treaty claims under Article 10.16.1 of the Treaty<sup>36</sup>; and (ii) "claims . . . under Clause 11.3(a) of the RER Contract."<sup>37</sup> By contrast, Peru explained that the Waiver Requirement precludes the assertion of claims under different instruments – in this case, the RER Contract and the Treaty – with respect to the same measures.<sup>38</sup>
22. *Supporting Peru's arguments and contradicting Claimants' position*, the United States specified that the Waiver Requirement "is not implicated when multiple **Article 10.16.1 claims** are submitted in a single [Treaty] Chapter Ten proceeding"<sup>39</sup> (emphasis added), and that "[t]he waiver provision thus does not preclude the concurrent submission of treaty and contract claims **under Article 10.16.1** before

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<sup>33</sup> US Submission, ¶ 8 (citing **RL-0078**, VCLT art. 31(1)).

<sup>34</sup> Peru's Rejoinder, ¶ 443.

<sup>35</sup> US Submission, ¶ 8.

<sup>36</sup> **RL-0051**, Treaty, art. 10.16.1(a) ("[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under [Treaty] Section A . . . or (C) an investment agreement . . ."); *see also id.*, art. 10.16.1(b) (providing the same with respect to a claimant acting on behalf of certain enterprises).

<sup>37</sup> Claimants' Reply, ¶¶ 314, 410.

<sup>38</sup> Peru's Rejoinder, ¶ 461.

<sup>39</sup> US Submission, ¶ 8.

one tribunal”<sup>40</sup> (emphasis added). The United States thus confirmed that treaty and contract claims may proceed concurrently before one tribunal as long as each type of claims has been submitted “under Article 10.16.1” of the Treaty.<sup>41</sup> In the present case, however, Claimants have not restricted their contract claims to claims under article 10.16.1. Rather, Claimants have also sought to bring before this Tribunal contract claims “under Clause 11.3(a) of the RER Contract”<sup>42</sup> against the same measures underlying Claimants’ claims under Treaty Article 10.16.1.

23. In sum, the common understanding of the Treaty Parties on the Waiver Requirement confirms that: (i) such requirement applies to international arbitration, such that Claimants are precluded from submitting duplicative or parallel claims even when these are submitted to an international tribunal (including the Tribunal in this case), and (ii) even assuming that Treaty and contract claims could proceed concurrently before one tribunal when both types of claims are submitted “under Article 10.16.1,”<sup>43</sup> Claimants’ claims in this international arbitration under Clause 11.3(a) of the RER Contract would have to be dismissed, as they are precluded by the Waiver Requirement and therefore fall outside the jurisdiction of the Tribunal.

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<sup>40</sup> US Submission, ¶ 10.

<sup>41</sup> US Submission, ¶¶ 8, 10. As the United States noted, treaty and contract claims may proceed concurrently before one tribunal under Article 10.16.1 only subject to the condition that “issues such as potential double-recovery and inconsistent findings are otherwise addressed.” *Id.*, ¶ 10.

<sup>42</sup> Claimants’ Reply, ¶¶ 314, 410.

<sup>43</sup> US Submission, ¶¶ 8, 10.

**C. The Treaty Parties agree that, under the Notice Requirement in Treaty Article 10.16.2, the Tribunal lacks jurisdiction over Claimants' claims that were not notified in accordance with such provision**

24. The United States explained its position on two fundamental points regarding the Notice Requirement, in each case *supporting Peru's interpretation of the Notice Requirement and contradicting Claimants' arguments*.<sup>44</sup>
25. *First*, Claimants argue that the Notice Requirement "is not a jurisdictional predicate, but a procedural rule that does not deprive the Tribunal of jurisdiction."<sup>45</sup> By contrast, Peru has demonstrated that the Notice Requirement is in fact a *jurisdictional* condition, which is integral to Peru's consent to arbitration; failure to meet such condition thus deprives a tribunal of jurisdiction.<sup>46</sup> Supporting Peru's arguments and contradicting Claimants' position, the United States confirmed that the Notice Requirement indeed constitutes a "jurisdictional predicate" (to use Claimants' expression)<sup>47</sup>:

A disputing investor that does not deliver a valid Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy the procedural requirement under Article 10.16.2, and so fails to engage the respondent's consent to arbitrate. Under such circumstances, **a tribunal will lack jurisdiction *ab initio***.<sup>48</sup> (Emphasis added)

26. *Second*, Claimants assert that "a notice of intent is not required to be complete or exhaustive for purposes of complying with the Notice and Wait requirement,"<sup>49</sup>

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<sup>44</sup> **RL-0051**, Treaty, Art. 10.16.2 ("At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent'). The notice shall specify [certain information regarding the claimant(s) and the claim(s)].").

<sup>45</sup> Claimants' Reply, ¶ 353.

<sup>46</sup> Peru's Rejoinder, ¶¶ 470-490.

<sup>47</sup> Claimants' Reply, ¶ 353.

<sup>48</sup> US Submission, ¶ 14.

<sup>49</sup> Claimants' Reply, ¶ 357.

but rather that “all that is required is a reasonable degree of specificity that allows an adequate identification of the dispute.”<sup>50</sup> However, Peru explained that the Notice Requirement expressly requires Claimants to specify with precision the factual and legal issues that are the basis for each claim.<sup>51</sup> This interpretation is consistent with the object and purpose of the Notice Requirement, as it allows the respondent State to: (i) attempt to reach an amicable solution in relation to the various claims, before such claims are submitted to arbitration; (ii) understand the complexity and implications of each claim; and (iii) have a defined period of time to take actions needed to respond to each claim.<sup>52</sup>

27. The United States made clear that the Notice Requirement cannot be interpreted to require merely some reasonable degree of specificity allowing an adequate identification of the dispute.<sup>53</sup> Rather, the United States emphasized that the requirements within the Notice Requirement serve several “important functions”:

The procedural requirements in Article 10.16.2 are explicit and mandatory, as reflected in the way the requirements are phrased (i.e., “shall deliver”; “shall specify”). These requirements serve important functions, including to provide a Party time to identify and assess potential disputes, to coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence or the preparation of a defense.<sup>54</sup>

28. These same functions had also been identified by Peru.<sup>55</sup>

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<sup>50</sup> Claimants’ Reply, ¶ 357.

<sup>51</sup> Peru’s Rejoinder, ¶¶ 491–497.

<sup>52</sup> Peru’s Rejoinder, ¶¶ 513–515.

<sup>53</sup> Claimants’ Reply, ¶ 357.

<sup>54</sup> US Submission, ¶ 15.

<sup>55</sup> Peru’s Rejoinder, ¶¶ 513–515.

29. A Notice of Intent that merely identifies the overall dispute (as opposed to specific information on each claim comprising the dispute) would not allow a notice to fulfill the important functions identified above.
30. In sum, the Treaty Parties agree that: (i) absent a “valid”<sup>56</sup> Notice of Intent, a claimant “fails to engage the respondent’s consent to arbitrate,” in which case “a tribunal **will lack jurisdiction** *ab initio*” (emphasis added);<sup>57</sup> and (ii) the requirements within the Notice Requirement serve “important functions” that can be achieved only through a Notice of Intent that provides *detailed information* regarding each claim that the claimant intends to submit to arbitration, in accordance with the “explicit and mandatory”<sup>58</sup> requirements set out in Article 16.10.2.

**D. The Treaty Parties agree on important matters concerning the identification and general application of the customary international law minimum standard of treatment under Treaty Article 10.5**

1. *The customary international law minimum standard of treatment under Treaty Article 10.5 cannot be proven by arbitral decisions by themselves, and any arbitral decisions applying autonomous standards of treatment carry no weight for identifying the minimum standard of treatment*
31. The United States made two main observations regarding the customary international law minimum standard of treatment (including “fair and equitable treatment”) under Treaty Article 10.5, in each case *confirming the position of Peru and refuting arguments by Claimants*.
32. *First*, Claimants argue that arbitral decisions are a sufficient basis for establishing the content of the minimum standard of treatment under customary international

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<sup>56</sup> US Submission, ¶ 14.

<sup>57</sup> US Submission, ¶ 14.

<sup>58</sup> US Submission, ¶ 15.

law.<sup>59</sup> Peru demonstrated, however, that the decisions of arbitral tribunals are not in and of themselves, and without more, proof of the existence or content of customary international law.<sup>60</sup> Such postulation has one narrow and qualified exception, which is that, when an arbitral decision has collected the necessary (direct) evidence of customary international law, such a decision could serve as (indirect) evidence of customary international law.<sup>61</sup>

33. In the US Submission, the United States agrees with Peru that the “decisions of international courts and arbitral tribunals interpreting ‘fair and equitable treatment’ as a concept of customary international law are not themselves instances of ‘State practice’ for purposes of evidencing customary international law.”<sup>62</sup> The United States also agrees with Peru that “such [arbitral] decisions can be relevant for determining State practice when they include an examination of such practice,”<sup>63</sup> consistent with the one narrow and qualified exception noted by Peru.
34. *Second*, Claimants assert that the customary international law minimum standard of treatment, including fair and equitable treatment, is “materially indistinguishable”<sup>64</sup> from autonomous fair and equitable treatment standards.

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<sup>59</sup> See, e.g., Claimants’ Reply, ¶ 454 (“Claimants can satisfy their burden simply by relying on investor-State jurisprudence because such jurisprudence reflects the customs and practices of States”), *id.*, ¶ 455 (“how investor-State tribunals have interpreted the [Minimum Standard of Treatment] since the *Neer* decision in 1926 is, itself, evidence of an evolving State practice”), *id.*, ¶ 457 (“[I]nvestment tribunal decisions are the most legitimate source for interpreting the content of customary international law vis-à-vis [fair and equitable treatment]”).

<sup>60</sup> Peru’s Rejoinder, ¶ 595; see also *id.*, ¶¶ 595–602.

<sup>61</sup> Peru’s Rejoinder, ¶ 596; see also *id.*, ¶¶ 595, 597–602.

<sup>62</sup> US Submission, ¶ 22 (citing **CL-0030**, *Glamis Gold, Ltd v. United States*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 605; **RL-0147** *Obligation to Negotiate Access to the Pacific Ocean*, Judgment, 1 October 2018, ¶ 162).

<sup>63</sup> US Submission, ¶ 22 (citing **CL-0030**, *Glamis Gold, Ltd v. United States*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 605; **RL-0147** *Obligation to Negotiate Access to the Pacific Ocean*, Judgment, 1 October 2018, ¶ 162).

<sup>64</sup> Claimants’ Reply, ¶ 452; see also, e.g., Claimants’ Reply, ¶¶ 460, 464.

Claimants accordingly rely upon arbitral decisions that applied such autonomous standards as support for Claimants' claims.<sup>65</sup> However, Peru explained that any arbitral decision applying an autonomous standard of fair and equitable treatment cannot create or prove customary international law, and therefore carries no weight for determining the customary international law standard under Treaty Article 10.5.<sup>66</sup>

35. The United States affirmed that "arbitral decisions interpreting 'autonomous' fair and equitable treatment . . . provisions in other treaties, outside the context of customary international law, **cannot** constitute evidence of the content of the customary international law standard required by Article 10.5"<sup>67</sup> (emphasis added).
36. The Treaty Parties thus agree that arbitral decisions that interpret autonomous fair and equitable treatment standards cannot be evidence of the content of the customary international law standard required by Treaty Article 10.5. As a result, Claimants' reliance upon arbitral decisions that interpret autonomous fair and equitable treatment standards is misplaced, and the Tribunal accordingly should disregard such decisions.<sup>68</sup>

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<sup>65</sup> See, e.g., Peru's Rejoinder, ¶¶ 637, 676, 678, 682, 689, 692, 693 (identifying instances where Claimants formed arguments under Article 10.5 by referring to arbitral decisions that applied autonomous standards of fair and equitable treatment).

<sup>66</sup> Peru's Rejoinder, ¶ 614.

<sup>67</sup> US Submission, ¶ 21.

<sup>68</sup> See, e.g., Peru's Rejoinder, ¶¶ 637, 676, 678, 682, 689, 692, 693.



2. *The vast majority of the alleged minimum standard of treatment principles invoked by Claimants are not component elements of the minimum standard of treatment; those that are component elements of such standard must be applied with high deference to the right of States to regulate matters within their borders*

37. The United States also addressed the general application of the customary international law minimum standard of treatment under Treaty Article 10.5, again *supporting Peru's interpretations and rejecting Claimants' arguments.*
38. Claimants present claims under five alleged components of the Article 10.5 minimum standard of treatment: legitimate expectations, arbitrariness, transparency, discrimination, and good faith.<sup>69</sup> For each alleged component, Claimants either contest or fail to recognize that proving any violation of the minimum standard of treatment under customary international law is subject to a high threshold.<sup>70</sup> As Peru noted, Claimants have not established that three alleged components of the minimum standard of treatment (viz., legitimate expectations, transparency, and good faith) are part of the customary international law minimum standard of treatment.<sup>71</sup> For the two other alleged components of the minimum standard of treatment (viz., arbitrariness and discrimination), Peru showed that each is subject to a high threshold for proving any violation.<sup>72</sup>
39. The United States specifically emphasized that “the concepts of legitimate expectations, transparency, good faith, and non-discrimination **are not component elements** of ‘fair and equitable treatment’ under customary international law that give rise to independent host State obligations”<sup>73</sup> (emphasis added). The United States likewise noted that, for any claim, “[d]etermining a breach of the minimum standard of treatment ‘must be made in the light of the

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<sup>69</sup> E.g., Claimants’ Reply, ¶ 459.

<sup>70</sup> See, e.g., Claimants’ Reply, ¶¶ 468, 476, 482, 483, 493, 500, 501.

<sup>71</sup> E.g., Peru’s Rejoinder, ¶¶ 625–626, 657–658, 688.

<sup>72</sup> E.g., Peru’s Rejoinder, ¶¶ 648–649, 670–671; see also Peru’s Rejoinder, ¶ 621.

<sup>73</sup> US Submission, ¶ 26; see also ¶¶ 27–30.

**high measure of deference** that international law generally extends to the right of domestic authorities to regulate matters within their own borders”(emphasis added).<sup>74</sup>

40. Thus, the Treaty Parties have confirmed their common understanding that: (i) the concepts of legitimate expectations, transparency, and good faith are *not* component elements of fair and equitable treatment under customary international law which give rise to independent host State obligations, and (ii) the concepts of discrimination and arbitrariness – assuming that each applies under the customary international law minimum standard of treatment– would be subject to a “high measure of deference” to State regulation of matters within its own borders. The Tribunal therefore should reject Claimants’ claims that: (i) are based on Claimants’ theories of legitimate expectations, transparency, and good faith, and/or (ii) fail to recognize the “high measure of deference” applicable to any claim under the customary international law minimum standard of treatment.

**E. The Treaty Parties agree that proving an expropriation under Treaty Article 10.7 requires establishing that a government measure destroyed all, or virtually all, of the economic value of an investment**

41. Claimants argue that “a measure constitutes an indirect expropriation when it leads to a ‘substantial’ deprivation of the economic value of an investment.”<sup>75</sup> However, Peru has shown that Claimants must prove that the value of an investment was radically affected by the alleged measures to such an extent as to constitute a taking (“*privación*”) of its property.<sup>76</sup>

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<sup>74</sup> US Submission, ¶ 24 (citing **RL-0010**, *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000 (Hunter, Schwartz, Chiasson), ¶ 263; **RL-0136**, *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler, Brower, Landau), ¶ 505; **RL-0154**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, 26 January 2006 (Salans, van den Berg, Veeder), ¶ 127).

<sup>75</sup> Claimant’s Memorial ¶ 363.

<sup>76</sup> Peru’s Rejoinder, ¶¶ 792–801.

42. In the US Submission, the United States confirmed the Treaty Parties' common understanding that

for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue **destroyed all, or virtually all, of the economic value** of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been '**taken**' from the owner."<sup>77</sup> (Emphasis added)

43. The Treaty Parties therefore agree that the burden is on Claimants to show that the government measures destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such an extent and so restrictively as to support a conclusion that the property has been taken. Therefore, the Treaty Parties agree that the standard posited by Claimants – "substantial deprivation" – is not the correct one to apply when examining an alleged indirect expropriation, including under Article 10.7.

**F. The Treaty Parties agree that, under Treaty Article 10.4, Claimants must prove that Treaty Annex II does not bar their claims, and that Peru accorded actual treatment to identified third-party investors or investments in "like circumstances"**

44. The United States made three main observations regarding the interpretation of the most-favored-nation clause ("**MFN Clause**") in Treaty Article 10.4, in each case *supporting the position of Peru and contradicting assertions by Claimants.*

45. *First*, Claimants' claims under the MFN Clause disregard Treaty Annex II, which exempts "Non-Conforming Measures"<sup>78</sup> from the MFN Clause. As Peru has explained, the Treaty expressly provides that the MFN Clause shall not apply to

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<sup>77</sup> US Submission, ¶ 34 (citing **RL-0149**, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Interim Award, 26 June 2000 (Dervaird, Greenberg, Belman), ¶ 102; **CL-0030**, *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award, 8 June 2009 (Young, Caron, Hubbard), ¶ 357; **RL-0019**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, 12 January 2011 (Nariman, Anaya, Crook), ¶ 150; **CL-0019**, *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (Pryles, Caron, McRae), ¶ 360).

<sup>78</sup> See Claimant's Reply, ¶¶ 625–641.

certain types of (otherwise) non-conforming measures,<sup>79</sup> and Claimants have the burden to show that the measures they allege to violate the MFN Clause are not encompassed by any Annex II exceptions.

46. In its submission, the United States affirmed that “a **claimant must also establish** that the alleged non-conforming measures that constituted ‘less favorable’ treatment are **not subject to the exceptions contained in Annex II** of the [Treaty]”<sup>80</sup> (emphasis added). The *Treaty Parties therefore agree* that Claimants bear the burden of proving that the Peruvian measures they allege to be non-conforming with the MFN Clause are not subject to any Annex II exceptions.
47. *Second*, Claimants argue that they may import from other Peruvian treaties certain clauses that have no analogue in the Treaty.<sup>81</sup> Peru, however, demonstrated that Claimants’ assertion is incorrect, because the scope of the MFN Clause is limited to treatment of third-party foreign investors or investments that are in “like circumstances” with Claimants.<sup>82</sup>
48. The United States shares Peru’s interpretation of the MFN Clause:

[I]f a claimant does not identify investors or investments of a non-Party or another Party as allegedly being ‘in like circumstances’ with the claimant or its investment, no violation of Article 10.4 can be established . . . Ignoring the ‘in like circumstances’ requirement would serve impermissibly to excise key words from the Agreement.<sup>83</sup>
49. *The Treaty Parties thus have a common understanding* that an MFN Clause claim requires identifying third-party investors or investments in like circumstances with Claimants or their investment.

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<sup>79</sup> Peru’s Rejoinder, ¶¶ 864–872 (analyzing Treaty Articles 10.4 (Most-Favored-Nation Treatment) and 10.13 (Non-Conforming Measures) and annex II).

<sup>80</sup> US Submission, ¶ 41.

<sup>81</sup> Claimant’s Reply, ¶ 625.

<sup>82</sup> Peru’s Rejoinder, ¶¶ 870–871.

<sup>83</sup> US Submission, ¶ 40.

50. *Third*, Claimants have formed their MFN claims based solely on abstract provisions of Peruvian treaties with other countries, without identifying any measures constituting *actual treatment* that Peru, in fact, may have accorded to a third-party investor or investment. However, as Peru has noted, the MFN Clause is premised on Peru having accorded more favorable “treatment” to another investor or investment.<sup>84</sup>
51. The United States’ interpretation confirms that, in order to successfully invoke the MFN Clause, Claimants were required to identify Peruvian measures constituting *actual treatment* of other investors or investments:

If a claimant does not identify **treatment that is actually being accorded** with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established . . . . Moreover, **a Party does not accord treatment through the mere existence of provisions** in its other international agreements such as umbrella clauses . . . .<sup>85</sup> (Emphasis added)

52. Thus, *the Treaty Parties agree* on each of three fundamental points for interpreting the MFN Clause: (i) the MFN Clause shall not apply to any Non-Conforming Measures listed in Annex II – and Claimants have the burden of proving that Annex II does not bar their MFN Clause claims; (ii) the MFN clause applies only to third-party foreign investors or investments that are in “like circumstances” with Claimants or their investment; and (iii) to establish any violation of the MFN clause, Claimants must identify actual treatment that Peru, in fact, accorded to a third-party investor or investment; the “mere existence” of clauses in other Peruvian treaties is insufficient to show such “treatment.” In this case, Claimants have not met their burden under any of these three points of Treaty interpretation,

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<sup>84</sup> Peru’s Rejoinder, ¶ 864.

<sup>85</sup> US Submission, ¶ 42.

and the Tribunal accordingly should dismiss their claims under the MFN Clause on any one (or all) of these grounds.

**G. The Treaty Parties agree that Treaty Article 10.6 and international law requires Claimants to demonstrate “proximate causation” between the alleged Treaty breach and the alleged loss**

53. Claimants argue that “the proper standard for causation is a ‘**logical link**’ between the measure and alleged impairment” (emphasis added).<sup>86</sup> By contrast, Peru has shown that the applicable standard is one of “proximate cause,”<sup>87</sup> which requires Claimants to prove (i) that the alleged impairment was the “only and inevitable consequence of the adopted measures,”<sup>88</sup> and (ii) the absence of any “intervening causes” attributable to Claimants or third parties, or to causes outside the Parties’ control, which precipitated the alleged harm.<sup>89</sup>
54. The United States observed that the Treaty requires a claimant to have incurred loss or damage “by reason of, or arising out of, that breach,”<sup>90</sup> and that the ordinary meaning of these terms confirms that an investor must demonstrate “**proximate causation**”<sup>91</sup> (emphasis added) between the alleged Treaty breach and the alleged loss. The United States also noted that “causality in fact” (i.e., when “an act causes an outcome that would not have occurred in the absence of the act”) is “a necessary but not a sufficient condition for reparation.”<sup>92</sup>

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<sup>86</sup> Claimant’s Reply, ¶ 584.

<sup>87</sup> Peru’s Rejoinder, ¶¶ 799–801.

<sup>88</sup> Peru’s Rejoinder, ¶ 799 (citing **CL-0028**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (Caflisch, Bernardini, Stern), ¶ 270).

<sup>89</sup> Peru’s Rejoinder, ¶ 800 (citing **RL-0028**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Fernández-Armesto, Paulsson, Voss), ¶ 163).

<sup>90</sup> US Submission, ¶ 43 (citing Treaty, arts. 10.16.1(a)(ii), 10.16.1(b)(ii)).

<sup>91</sup> US Submission, ¶ 45 (citing several investor-State arbitration decisions); *see also id.*, ¶ 46 (“Injuries that are not sufficiently ‘direct,’ ‘foreseeable,’ or ‘proximate’ may not, consistent with applicable rules of international law, be considered when calculating a damage award.”).

<sup>92</sup> US Submission, ¶ 44.

55. *The Treaty Parties therefore agree* that the Treaty “requires an investor to demonstrate **proximate causation**”<sup>93</sup> (emphasis added) to recover any damages, and that demonstrating proximate causation includes, but is not limited to, proving that an alleged impairment “would not have occurred in the absence of the act.”<sup>94</sup>

#### IV. CONCLUSION

56. The Treaty Parties have confirmed their common interpretation of several Treaty provisions on which Claimants rely for their case on jurisdiction, merits, and damages. Pursuant to the VCLT, the agreement between the Treaty Parties regarding the interpretation of the Treaty is authoritative, and must therefore be taken into account by the Tribunal in interpreting the Treaty.

57. Consistent with the Treaty Parties’ interpretation, and for all the reasons stated in Peru’s written submissions, Peru respectfully requests that Claimants’ claims relying on those provisions be dismissed.

Respectfully submitted,

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<sup>93</sup> US Submission, ¶ 45.

<sup>94</sup> US Submission, ¶ 44.