ICDR (INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION)

ICDR Case No. 50-198-T-00825-11

OFFSHORE EXPLORATION AND PRODUCTION, LLC V. KOREA NATIONAL OIL CORPORATION AND ECOPETROL, S.A.

PARTIAL FINAL AWARD

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29 May 2015

Tribunal:
Robert B. Davidson (President)
Oliver J. Armas (Appointed by the claimant (replaced))
Steven A. Hammond (Appointed by the respondent)
Horacio A. Grigera Naón (Appointed by the claimant)

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Partial Final Award

We, the undersigned arbitrators, having been designated in accordance with § 10,7 of a certain Stock Purchase Agreement dated as of December 29, 2008, and having duly heard the proofs and allegations of the Parties, do hereby AWARD as follows:

I. THE PARTIES AND THEIR COUNSEL

1. Claimant Offshore Exploration and Production, LLC ("Offshore" or "Claimant" or "Seller") is a limited liability company organized under the laws of Delaware and located at 13430 Northwest Freeway (Hwy 290), Suite 800, Houston, Texas.

2. Respondent Korea National Oil Corporation ("KNOC") is the national oil company of Korea with its principal place of business at 1588-14, Gwanyang-dong, Congan-gu, Anyang, Gyeonggi-do, Korea 431-711.

3. Respondent Ecopetrol S.A. ("Ecopetrol") is the national oil company of Colombia, with its principal place of business at Carrera 13 No. 36-24, Edificio Ecopetrol, Bogota D.C., Colombia. KNOC and Ecopetrol are sometimes collectively referred to herein as "Purchaser" or "Respondents."

4. Seller was originally represented by the law firm of DLA Piper LLP through lawyers in its New York and Houston offices. On July 31, 2013, Claimant substituted the law firm of Quinn Emanuel Urquhart & Sullivan LLP ("Quinn Emanuel") through lawyers in its Washington, D.C. office for the DLA Piper firm. Quinn Emanuel represented Claimant through the remainder of these proceedings.

5. Both Respondents were initially represented by Mayer Brown LLP, acting through lawyers in its Houston and New York offices. On December 31, 2012, KNOC advised that it had substituted Covington and Burling LLP, acting through that firm's London and Washington, DC offices, as its counsel.

II. THE TRANSACTION, THE AGREEMENT TO ARBITRATE, AND THEGOVERNING LAW

6. On or about December 29, 2008, Seller and Purchaser executed a Stock Purchase Agreement (the "SPA" or the "Agreement") whereby Seller agreed to sell and Purchaser agreed to buy 100% of the shares of a company called Offshore International Group, Inc. ("OIG").[1] Purchaser and Seller also executed a First Amendment to the SPA (the "First Amendment") on the date of the closing which was February 5, 2009 (the "Closing").[2] OIG is a Delaware company that serves as the holding

[1] Under the SPA, each of Ecopetrol and KNOC agreed to acquire 50% of OIG's issued and outstanding Common Stock.

[2] The First Amendment increased the Escrow Amount which, as discussed further below, features prominently in the discussion of the

company for several entities formed in the United States and Peru that are referred to in the Agreement as the "PT Group." The total purchase price for the stock of OIG, which included the PT Group of companies and holdings, was $1.2 billion consisting of an initial payment of $900 million [3] plus an earn-out amount of $200 or $300 million (the "Earn-Out") payable on the second anniversary of the Closing depending upon the average price of oil during a specified period. The Earn-Out was subsequently agreed to be US$300 million.

7. In the First Amendment, the parties agreed to increase the escrow amount of $100 million that was originally negotiated, by another $50 million for a total $150 million (the "Escrow Amount"). The Escrow Amount was funded from a portion of the purchase price and was to be administered by Morgan Stanley. One hundred million dollars of the Escrow Amount was intended to be held as security for the payment by Seller of any indemnification claims that Purchaser might assert under the SPA, to the extent that any such indemnification claims exceeded the sum of $15 million (the "Basket"), all as defined in SPA § 8.5. In accordance with the First Amendment, the additional $50 million was to stand as security for any undisclosed environmental claims.

8. The Indemnification Escrow Agreement dated February 5, 2009 (JTEX 0003) (the "Escrow Agreement") further provided that the Escrow Amount would be invested in U.S. Government securities or their equivalent, and that the income earned on the Escrow Amount would be paid to Seller.

9. The main operating company of the PT Group was Petro-Tech Peruana S.A., currently known as Savia Peru S.A. ("Savia"). Savia is an oil and gas exploration and production company operating in Peru. By virtue of a November 1993 Contract for Oil Field Services for Exploration and Exploitation of Hydrocarbons in Block Z-2B (the "Concession Agreement"), Savia had the right to drill for hydrocarbons offshore Peru.

10. In addition to other subsidiaries, OIG owned all of the shares of a Delaware company known as International Marine, Inc. ("IMI Delaware"). IMI Delaware, in turn, had an unincorporated branch operating in Peru.

11. IMI Delaware also owned, directly or indirectly, all of the shares of two subsidiaries engaged in drilling operations in Peru on behalf of Savia. These companies were known as B and B Drilling, L.C., an Oklahoma limited company ("B and B Drilling"), and Peruana de Perforation S.A.C., a Peruvian corporation ("PEPESA"). B and B Drilling owned three drilling rigs that it leased to PEPESA and PEPESA owned one drilling rig itself. Using the four drilling rigs in its possession—the one it owned and the three it leased—PEPESA provided drilling services to Savia.

12. The agreement to arbitrate is set forth in SPA § 10.7(a), which provides:
(a) Any dispute, controversy or Action arising out of or relating to this Agreement, or the breach thereof (other than a dispute, controversy or Action arising out of or in relation to or in connection with the calculation of the Adjusted Cash Purchase Price, which shall be resolved in accordance with Section 6.4), shall be determined by arbitration administered by the American Arbitration

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so-called "Platform Maintenance Claim," one of the claims in this arbitration.

[3] Purchaser, with adjustments, actually paid $992,180,848 at Closing. *See,* Respondents' Memorial dated April 17, 2013, ¶ 5, and, *generally,* Ecopetrol's application for leave to supplement its counterclaims dated February 8, 2013, pages 1-2.

Association in accordance with its International Arbitration Rules. The place of arbitration shall be New York, New York. The number of arbitrators shall be three (3).

13. Section 10.6 of the SPA, entitled "Governing Law," provides:
This Agreement and the legal relations between the Parties shall be governed by and construed in accordance with the laws of the State of New York, United States of America without regard to principles of conflicts of laws that would direct the application of the laws of another jurisdiction.

III. THE ALLEGED BREACHES OF THE SPA

14. Seller originally commenced this arbitration to resolve disputes that had arisen over Purchaser's demand that Seller indemnify Purchaser for tax and other liabilities which arose during Seller's ownership of OIG. Specifically, Purchaser alleges that, despite its due demand, Seller has failed to indemnify it for the following liabilities:
A. Value Added Tax ("VAT") liabilities that the Peruvian authorities imposed upon Savia attributable to periods prior to the so-called Determination Date, which was defined in the SPA to be June 30, 2008 (the "VAT Taxes Claim");

B. Certain tax obligations for which IMI Delaware was allegedly liable (or will become liable) and which Purchaser paid (or believes it will be compelled to pay), arising out of Seller's operation of IMI Delaware's unincorporated branch, then known as "IMI Peru," in 2000 and 2001 (the "IMI Tax Claims"). These obligations include 2001 taxes of IMI Peru assessed by the Peruvian tax authority and which were ultimately paid by an affiliate of Purchaser, as well as taxes for 2000 which were assessed but have not yet been paid.

C. A claim arising out of a proceeding begun by the Peruvian authorities alleging deficiencies in the maintenance of certain of the drilling platforms used in Savia's operations (the "Platform Maintenance Claim");

D. Additional pre-closing conditions or claims, as more specifically described below, known generally as: (1) the Pipeline Abandonment and EIS Environmental Claims; (2) the Health and Safety Claims; (3) the Vacation Claims; and (4) the Profit Distribution Claim; and

E. A dispute arising over the proper calculation of the income that Seller is entitled to receive from the escrow account (the "Escrow Account") which was established under the SPA to secure Seller's indemnification obligations (the "Escrow Income Claim").

15. In addition to the monetary disputes described generally above, several interpretive disputes under the SPA were also presented. These relate to the effect of the Basket requirement that provides that Seller would pay indemnification claims only if the total of such claims exceeds a certain sum, whether certain of the liabilities are to be characterized as tax claims or warranty claims subject to the Basket requirement, and whether all or some of the claims may be paid out of the funds remaining in the Escrow Account referenced above. There is also a disagreement on how this Final Award should treat the VAT claims which are, or— according to Seller—will most certainly be,

ultimately reimbursed to Savia by the Peruvian tax authorities and whether these VAT Claims, if reduced to an Award, may be satisfied from the Escrow Account.

16. Further, both sides claim interest and the costs of the proceeding, as well as counsel fees.

IV. PROCEDURAL HISTORY

17. Seller commenced this arbitration with the filing of a Notice of Arbitration and Statement of Claim dated November 22, 2011.

18. On December 23, 2011, Purchaser filed its Answer and Counterclaims.

19. On January 31, 2012, Seller filed its Statement of Defense in Response to Respondents' Counterclaims.

20. On February 8, 2013, Ecopetrol filed Supplemental Counterclaims joined on February 19, 2013 by its co-Respondent, KNOC. On March 18, 2013, Seller filed its Statement of Defense in Response to Respondents' Supplemental Counterclaims.

21. Ecopetrol, as part of its submission on February 8, 2013, requested, in effect, an Order of Specific Performance from the Tribunal ordering Seller to reimburse Ecopetrol for the VAT taxes that Savia had paid to the Peruvian tax authorities pending the final disposition of those tax claims. KNOC joined in Ecopetrol's application, which Offshore opposed.

22. After full briefing by both sides, the Tribunal, on April 16, 2013, granted Purchaser's application and ordered the following relief:
WHEREFORE, for the reasons set forth above, Offshore is ORDERED to reimburse Purchaser (including Ecopetrol and/or Savia) for the payments that Savia has made to the Peruvian tax authorities for VAT taxes asserted to be due for the tax years 2002 through 2007 inclusive. This reimbursement shall be made on or before the 30th calendar day after the issuance of this Interim Award.

This Interim Award does not in any way resolve the underlying merits of the dispute among the parties, including, without limitation, whether Offshore would ultimately be entitled to, among other relief, the return of the amounts paid pursuant to this Order by reason of the Respondents' breach of the SPA, or otherwise.

Interim Award, at 7. While the Order was without prejudice to the underlying merits of the dispute, it was premised upon the Tribunal's [4] interpretation of the relevant indemnification section in the SPA which, in the Tribunal's view, required Purchaser to front the VAT tax liabilities pending a final

[4] At that point, the Tribunal was comprised of arbitrators Oliver J. Armas (appointed by Claimant), Steven A. Hammond (appointed by Respondents) and Robert B. Davidson, Chair. After the issuance of the Interim Award, Mr. Armas relocated to another law firm and disclosed a potential conflict in his new firm. Claimant then challenged Mr. Annas' continued service and, on July 12, 2013, the ICDR upheld the challenge. On July 31, 2013, Claimant appointed Quinn Emanuel to represent it. On August 8, 2013, Claimant appointed Dr. Horacio A. Grigera Naón as its new party-appointed arbitrator and the proceedings continued with Messrs. Davidson, Hammond and Grigera Naón as arbitrators.

determination of liability by the Peruvian tax authorities.

23. By letter of July 31, 2013, the law firm of Quinn Emanuel informed the Tribunal that it was substituting for DLA Piper as Seller's counsel.

24. Seller did not comply with the Tribunal's Order of April 16, 2013 quoted above, but, instead, offered to satisfy its obligation with money taken from the Escrow Account. Purchaser refused to consent to a release of funds from the Escrow Account for that purpose and, on May 24, 2013, Seller commenced a proceeding in the U.S. District Court for the Southern District of New York against both Purchaser and the Escrow Agent seeking to compel Purchaser to accept payment of the Interim Award from the Escrow Account.[5] Purchaser, in turn, moved in the district court for an order referring the issue of the payment of the Interim Award to the arbitrators.

25. By Opinion and Order dated November 29, 2013 (the "Opinion and Order"), the U.S. District Court granted Purchaser's motion to stay or dismiss the district court action pending arbitration and stayed the action pending the decision of the arbitration panel on whether Seller could satisfy the Interim Award by making payment from the Escrow Account. Opinion and Order, at 27.

26. On December 1, 2013 the Tribunal issued its "Interim Award Supplementing First Interim Award of April 2013 Requiring Claimant to Reimburse Respondents for VAT Taxes Pending Final Award on the Merits" (the "Supp. Interim Award"). The Supp. Interim Award granted the following relief (Supp. Interim Award, at 9-10):
1. DECLARES that the Tribunal has jurisdiction to the extent necessary to ensure compliance with its Interim Award, including the jurisdiction to interpret SPA Article 8 as it relates to the use of escrowed funds to satisfy the Interim Award.

2. DECLARES that the Seller's tender of performance *[i.e.* its attempt to pay the Interim Award with monies from the Escrow Account] in purported compliance with the Interim Award is ineffective.

3. DEFERS until the final hearings in this arbitration any decision on whether damages, interest and costs, if any, allegedly caused by the Seller's actions, should be awarded to Respondent.

27. Claimant has, to date, not paid the amount described in the Interim Award, but, instead, has reportedly appealed the district court's decision referring the matter of payment of the Interim Award to the arbitrators for determination.

28. Meanwhile, on August 15, 2013, Purchaser filed its Second Request for Interim Relief Requiring the Payment of IMI Peru 2000 Income Taxes ("Purchaser's Second Request"). Seller opposed Purchaser's Second Request in papers filed on September 3, 2013. Reply and sur-reply papers were also filed. The Tribunal did not rule on Purchaser's Second Request, but, instead, heard the claim as part of the merits at the hearings.

29. In the course of the arbitration the Tribunal also issued several Procedural Orders. These were:

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[5] *Offshore Exploration and Production, LLC v. Morgan Stanley Private Bank, N.A. et al.,* 13 Civ. 3537 (JGK).

Procedural Order No. 1. In an attempt to expedite the arbitration and upon the request of the parties, Procedural Order No. 1 dated June 26, 2012 set a schedule for the parties to advise the Tribunal whether they could agree upon a list of issues ripe for preliminary determination. If not, the Order permitted the parties to advise the Tribunal of their positions so that the Tribunal could decide upon a list of issues that might be the subject of a preliminary determination, which could thereafter be briefed and decided. After the parties were unable to agree upon a list of issues and, after briefing and further argument, the Tribunal determined that there were no such issues.

Procedural Order No. 2. Procedural Order No. 2 dated August 22, 2012 set a schedule for the remainder of the arbitration. Procedural Order No. 2 anticipated hearings in October 2013.

Procedural Order No. 3. Procedural Order No. 3 dated December 7, 2012 set a procedure (after briefing and argument) for the resolution of disputes that had arisen over the exchange of documents.

Procedural Order No. 4. A dispute arose over whether the parties had agreed to stay certain claims and whether Seller could issue new document requests relating to the claims allegedly stayed. Procedural Order No. 4 dated December 13, 2012 dealt with the parties' disclosure obligations relating to these claims.

Procedural Order No. 5. Procedural Order No. 5 dated March 4, 2013 memorialized Claimant's consent to Purchaser's application to assert supplemental counterclaims arising out of the Peruvian tax authorities' VAT tax audits for tax years 2002, 2006 and 2007 and granted, on consent, Purchaser's application to supplement such counterclaims.

Procedural Order No. 6. In or about January 2013, Seller petitioned the Tribunal to reconsider its jurisdiction to render the Interim Awards referenced above and, upon reconsideration, to vacate those awards. Procedural Order No. 6 dated January 10, 2014 reaffirmed the Tribunal's view that it had the requisite jurisdiction to issue its prior Interim Awards and declined to issue further rulings or awards in response to Seller's petition.

Procedural Order No. 7. Procedural Order No. 7 dated March 20, 2014 resolved Seller's application, originally made at the hearings, for further information regarding Purchaser's payment, through an affiliate, of IMI Peru's taxes. That application was denied.

Procedural Order No. 8. At the conclusion of the hearings on the merits in March 2014, the Tribunal requested Seller to set forth its position—in view of Seller's prior concession, made in a pleading dated June 21, 2013, that it no longer opposed Purchaser's indemnity claims relating to the VAT taxes paid by Savia—concerning whether it was continuing to oppose such claims. Seller then argued that evidence adduced at the hearings enabled it to withdraw its prior concession. Procedural Order No. 8 dated April 3, 2014 denied Seller's application to withdraw the concession.

30. Each of tire Procedural Orders referenced above were preceded by written briefing and, when deemed necessary, the argument of counsel.

31. Discovery was conducted. Memorials, which included written witness statements, were exchanged prior to the hearings.

32. Hearings were conducted in New York City commencing on February 11, 2014, and continued for eight days, ending on February 21, 2014. In order to accommodate the schedule of one of the experts, a final day of hearings was conducted on March 12, 2014 to hear the testimony of Dr. César Enrique Talledo Mazú and Dr. Luis Hernández Berenguel.

33. The following witnesses submitted written witness statements and were cross-examined at the hearings: Michael Lance, who acted as the financial advisor to Offshore in connection with the sale. Mr. Lance managed the bidding process and assisted Offshore with negotiations through the closing of the transaction in February 2009. Randy B. Crath, the Managing Director of Scotia Waterous, an investment banking firm in Houston. Scotia Waterous is an affiliate of Scotia Bank. Mr. Crath acted as lead outside financial advisor to KNOC in connection with KNOC's and Ecopetrol's acquisition of OIG. In that capacity, Mr. Crath assisted generally in the negotiation of the SPA and was involved in discussions that led to the parties' agreement to supplement the Escrow Amount by an additional $50 million to deal with certain contingencies. Carlos Hamann, a partner of the Peruvian law firm of Studio Brastos. Mr. Hamann is a Peruvian attorney who served as General Counsel of Savia from November 16, 2009, shortly before the SPA was executed, to in or about August 2013. Witness Statement of Carlos Hamann dated April 17, 2013 ("Hamann First WS"), ¶ 69. He now advises Savia on various legal issues as a consultant. Mr. Hamann testified concerning the VAT and other tax and non-tax liabilities of Savia that Respondents seek to recover in the proceeding. José Luis Salazar Ramirez, the Head of the Legal Office of Operations of Savia. Mr. Salazar, a Peruvian attorney, testified regarding the nature of the various OSINERGMIN[6] decrees that ultimately resulted in a liability, discussed further below, referred to as the "platform maintenance claim." He also addressed certain additional claims that Purchaser is pursuing against Seller under the SPA. Dr. Ada Alegre Chang, an expert called by Claimant. Dr. Alegre, a Peruvian attorney specialized in environmental law, addressed the nature and effect of the various OSINERGMIN decrees. Dr. Jorge Danós Ordoñez, an expert called by Respondents. Dr. Ordoñez also addressed the nature and effect of the various OSINERGMIN decrees. Daniel Ulloa Millares, a Peruvian lawyer and an expert on Peruvian labor law. Dr. Ulloa prepared several reports in response to Purchaser's claims for amounts due Savia workers for vacation pay and other liabilities alleged to be owing as of the date of the Closing. Michelle Barclay, a Peruvian bankruptcy lawyer called by Respondents. Ms. Barclay represented "IMI Peru" in a Peruvian bankruptcy proceeding instituted against IMI Peru by SUNAT for the payment of certain taxes owed by IMI Peru. IMI Peru was the unincorporated Peruvian branch of International Marine, a Delaware company ultimately owned by Purchaser. Dino Carlos Caro Coria, a Peruvian criminal attorney called as an expert by Claimant. Dr. Caro opined on the meaning and effect of certain criminal statutes alleged to be applicable in the IMI Peru bankruptcy proceedings. Gonzalo De las Casas, an expert called by Claimant. Dr. De las Casas offered opinions in rebuttal to those rendered by Ms. Barclay and also discussed defenses said to be available to Savia to the so-called pension claims of Savia workers that Respondents are claiming in this proceeding. Jose Antonio Payet, an expert called by Respondents. Dr. Payet was an expert on Peruvian commercial law including aspects of Peruvian corporate and insolvency law. Ernesto Ballón, the head of Savia's Treasury Department and the individual who caused payments to be made by Savia for VAT taxes due. Pedro Figueroa Garbarino, the head of the Tax Section of the Accounting Department of Savia since January 1994. Mr. Figueroa was designated by Purchaser as its authorized representative to handle and coordinate with Seller all matters relating to the control of the VAT tax contests. Dr. Mukesh Bajaj and Dr. David K. A. Mordecai, financial experts called by

[6] OSINERGMIN is an acronym that refers to the Supervisory Agency for Investment in Energy and Mining. It is the Peruvian administrative agency that performs rate regulation, supervision, control and sanction functions of the activities performed by persons engaged in the electricity, hydrocarbons and mining sectors.

Seller and Purchaser, respectively. Drs. Bajaj and Mordecai testified regarding the appropriate amount of "interest and other income" that should be returned to Seller under the Escrow Agreement. Dr. Luis Hernández Berenguel and Dr. César Enrique Talledo Mazú, both experts on Peruvian tax law. Dr. Hernández was called by Claimant, while Dr. Talledo testified on behalf of Respondents. Both gentlemen opined on whether Respondents ought to have paid the tax liabilities of the Peruvian branch of International Marine, one of the PT Group members incorporated in Delaware and acquired by Respondents in the acquisition. Several of the witnesses filed more than one witness statement.

34. Juan Carlos Zegarra Vilchez, a Peruvian lawyer and tax expert, filed a Witness Statement on September 3, 2013 in support of Seller's opposition to Purchaser's Second Request. Purchaser's Second Request, as explained above, sought indemnification from Seller for IMI Peru's 2000 income taxes assessed by the Peruvian tax authority.

35. The parties simultaneously filed post-hearing memorials on May 1, 2014 and reply memorials on June 2, 2014.

V. ANALYSIS

A. The VAT Taxes Claim

36. As referenced above, Savia and PetroPeru (later known as PeruPetro), a Peruvian government enterprise, entered into the Concession Agreement enabling Savia to develop Peru's oil reserves located in Block Z-2B offshore Peru. Under the Concession Agreement, Savia had the right to import any assets necessary for the performance of its services, and PeruPetro had the obligation to pay, on behalf of Savia, the import fees and the VAT on those assets. In its tax filings beginning in November 2001, while Savia was still in control of Seller, Savia began to deduct the VAT that PeruPetro had paid, and—as generally permitted by the procedure under VAT—credited PeruPetro's VAT payments against the VAT that Savia owed on its resale of the hydrocarbons that it produced. Figueroa Second WS, ¶ 5. [7]

37. In 2003, however (while Savia was still under Seller's ownership), the Peruvian tax authority, the *Superintendencia National de Aduanas y de Administración Tributaria* ("SUNAT") challenged this practice and initiated a tax audit seeking to disallow the VAT credits that Savia had taken in tax year 2001. SUNAT then progressively initiated audits for every year thereafter, ultimately affecting all tax years from 2001 through 2008. [8]

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[7] Mr. Figueroa, the head of the Tax Section of Savia's Accounting Department, submitted three witness statements: the first dated February 8, 2013 ("Figueroa First WS"); the second dated April 16, 2013 ("Figueroa Second WS"); and the third dated June 20, 2013 ("Figueroa Third WS").

[8] Prior to the Closing, SUNAT informed Savia that SUNAT had concluded that Savia owed VAT taxes with respect to Tax Years 2001 through 2005. By that time, SUNAT had also initiated an audit of Savia's 2006 VAT filings. *See,* Ecopetrol's Request for Interim Relief dated February 8, 2013 ("Request for Interim Relief'), ¶¶ 14 and 15. After the Closing, SUNAT rendered adverse determinations with respect to Tax Years 2006 and 2007 and initiated an audit with respect to Tax Year 2008. *Id.,* n. 3. Purchaser makes no affirmative claim for relief with respect to Tax Year 2008.

38. The tax assessment process in Peru is procedurally complex, but essentially involves an initial assessment by SUNAT, and then an appeal to Peru's *Tribunal Fiscal* (the "Administrative Tax Court"). If the initial deficiency determination is upheld, the taxpayer, upon the happening of certain conditions, has the right to access the Peruvian court system in an effort to overturn SUNAT's adverse determinations. The various proceedings move at different paces, and so Savia's liability for VAT taxes, say, for 2004, could be adjudicated prior to any adjudication relating to tax year 2001. The Tribunal need not delve in depth into these procedural nuances except to note that several tax and other court proceedings relating to these VAT taxes were pending at the time of the execution of the SPA in December 2008. *See,* Statement of Facts in Respondents' Memorial dated April 17, 2013 ("Statement of Facts"), ¶ 14 *et seq.* [9]

39. Notwithstanding the existence of these tax contests, Seller was confident that Savia would ultimately prevail. As a result, instead of deducting the potential tax liabilities from the Purchase Price, the parties agreed prior to the Closing that the purchase price for OIG would assume that there were no outstanding VAT tax liabilities for the period prior to the SPA's defined "Determination Date" of June 30, 2008. In return, Seller agreed to indemnify Purchaser by making tax indemnity payments as any taxes became due. SPA § 7.4(d). Ecopetrol's Reply in Further Support of its Request for Interim Relief, ¶ 27.

40. Specifically, SPA § 7.4(a) provided:
Seller shall indemnify and defend the Purchaser Indemnitees and hold the Purchaser Indemnitees harmless from and against (1) all liability for Taxes of any PT Group Member... attributable to (A) any Pre-Determination Date Tax Period... ; (5) any Loss that a Purchaser Indemnitee shall suffer, sustain or become subject to as a result of the breach of Seller's representations and warranties contained in Section 3.6 (Taxes and Assessments) or Seller's covenants and agreements herein... ; and (7) all liability for reasonable legal, accounting and appraisal fees and expenses with respect to any item described in clauses (1) - (6) of this Section 7.4(a).

41. In addition, as to the timing of Seller's obligations, Seller expressly agreed to pay indemnification with respect to taxes, including VAT, when they were required to be paid. In that regard, SPA § 7.4(d) provided in pertinent part:
Any indemnity payment required to be made pursuant to this Section 7.4 will be paid within thirty (30) days after an Indemnified Party makes written demand upon an Indemnified Party, but in no case earlier than five (5) Business Days prior to the date on which the relevant Taxes (including estimated Tax payments) are required to be paid.... If the Taxes that are contested must be paid under applicable law prior to or upon commencement of a contest proceeding, Seller shall pay such Taxes to the applicable Governmental Authority prior to or upon commencement of such proceeding.

42. At the time the various VAT tax contests arose (prior to the Closing), Seller retained the Peruvian office of PriceWaterhouseCoopersDongo-Soria, Gaveglio y Asociados Sociedad Civil ("PWC") to represent its interests. PWC continued to represent Savia and to keep Seller informed of

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[9] *By the time Purchaser filed its Answer and Counterclaims in December of 2011, Purchaser had paid VAT taxes for tax years 2001 and 2003, 2004 and 2005 and was seeking reimbursement from Seller. In its supplemental counterclaims asserted in February 2008, Purchaser added tax years 2002, 2006 and 2007 to the years already asserted increasing its total VAT indemnification claim to US$75.3 million as specified below.*

developments after the Closing. Specifically, Seller, in 2004, instructed PWC to appeal SUNAT's adverse determination relating to the 2001 VAT tax year. Statement of Facts, ¶ 30. PWC took similar action prior to the Closing on behalf of Seller with respect to VAT tax years 2002-2006. *Id.*

43. About a year after the Closing, certain events took place in the VAT tax contests relating to the 2001 and 2003 tax years. Specifically, the Administrative Tax Court, on February 2, 2010, upheld SUNAT's determinations disallowing Savia's VAT deductions for those years. *Id.,* ¶ 21. PWC notified Seller of these events the following day. Request for Interim Relief, ¶ 22.

44. When a taxpayer such as Savia finds itself on the losing end of an Administrative Tax Court decision, it can contest the findings of the Administrative Tax Court by filing an action before the applicable Federal District Court in Peru to vacate the Tax Court's adverse resolutions. *Id.,* ¶ 26; Figueroa Second WS, ¶ 8. If the taxpayer wishes to avoid SUNAT collection efforts during that court process, however, it must also obtain an injunction from the court. Such an injunction is rarely granted unless it is filed simultaneously with an action seeking to vacate the adverse Tax Court resolutions. *Id.* Absent an injunction or the voluntary payment of the taxes owed, SUNAT can begin collection efforts, which may include the attachment of the company's bank accounts and the seizure of other company assets. Statement of Facts, ¶¶ 26-27. This latter possibility was unacceptable to Savia. Savia, therefore, had to take steps either to pay the assessment or obtain an injunction.

45. Having had no response from Seller after notification of the adverse resolutions relating to tax years 2001 and 2003 *(see generally,* Figueroa Second WS, ¶ 10), Purchaser began to prepare to take action to vacate the Tax Court determinations and to obtain the needed injunction.

46. Purchaser kept Seller informed in writing of its intentions. As it wrote to Seller at the time:
Therefore, in an effort to mitigate the damages that a demand for payment and/or an attachment over the company's assets will cause to Savia's cash-flow and existing cash holdings... Savia has commenced working on the preparation of actions seeking to vacate the resolutions issued by the Tax Court and to obtain injunctions authorizing Savia to withhold any payments to Sunat in connection with the applicable Tax Determinations until such actions are resolved by the courts.

    Request for Interim Relief, ¶ 27.

47. Seller did not respond to the above communication, nor did it take any other action to defend Savia. Figueroa First WS, ¶ 4; Request for Interim Relief, ¶ 28.

48. On March 4, 2010, Purchaser again wrote to Seller informing it as follows:
Unless an injunction is obtained, Sunat can pursue the collection of the amounts claimed in the Tax Determinations related to the [2001 and 2003 tax years].... There is an imminent risk that Sunat will issue updated determinations and demand payment of such amounts at any time. Such request will adversely affect the company's cash flow and seriously compromise the company's ability to conduct business in its ordinary course.

    * * *

    Therefore, in order to protect and/or mitigate any damages to Savia and/or Seller and/or Purchaser,

you are hereby notified that [Purchaser] has instructed Savia to proceed with the filing of the Lawsuits [*i.e.* injunction applications and appeals in order to stay Sunat enforcement efforts] and take any other legal action required thereto.

Id., ¶ 29; Joint Exhibit ("JTEX") 0179.

49. Having no response to this communication, Purchaser, on March 11, 2010, filed its appeals and its application for an injunction. Request for Interim Relief, ¶ 33.

50. That same day, March 11, 2010, Seller sent Purchaser its "Claim Notice No. 1" which constituted Seller's first notice to Purchaser's several notifications. JTEX 0187. Seller's notice of March 11th claimed that Purchaser had not informed Seller of the 2001 and 2003 tax proceedings until February 25, 2010. Request for Interim Relief, ¶ 34. Seller's notice further accused Purchaser of breaching the SPA by improperly assuming control of the tax contests in alleged violation of SPA § 7.1(d), which provides:
Seller shall control and bear the cost of any Tax audit or Tax contest that relates solely to a Pre-Determination Date Tax Period...; provided, however, that Purchaser shall be entitled to attend and participate in any such Tax audit or Tax contest at its sole cost and expense.

51. In response, Purchaser sent Seller a letter dated March 24, 2010 denying Seller's allegations and pointing out that Seller, through PWC, was always made aware of the status of the tax contests. Purchaser further offered to continue to provide Seller with access to information about the pending tax contests and proposed regular meetings to keep Seller informed. JTEX 0196.

52. Purchaser also stated its position that Seller had no right to control the various tax contests as it had wrongfully repudiated its indemnification obligation. *Id.,* at 4. Finally, Purchaser, in its March 24, 2010 letter, advised Seller that no injunction against collection efforts had been obtained thus compelling Purchaser, on March 17, 2010, to pay the 2001 assessment to avoid SUNAT collection efforts, and to enable an appeal to go forward. *Id.,* at 5. Purchaser also (again) demanded indemnification for both the 2001 and 2003 assessments. *Id.*

53. Purchaser, on March 24, 2010, paid $8,987,041 for the 2001 and 2003 VAT tax assessment. Witness Statement of Ernesto Ballón ("Ballón WS"), ¶ 5; Request for Interim Relief, ¶46.

54. Meanwhile, the remaining VAT tax contests for 2002, 2004 and later years continued in the Administrative Tax Court. In December of 2010, Savia learned that adverse determinations for these other years would be issued. On December 30, 2010, Purchaser demanded indemnification for those liabilities as well. JTEX 0239, at 1 -4; Request for Interim Relief, ¶ 50.

55. Seller responded reiterating its defense that it was denied control over the tax contests and further accusing Purchaser of paying "for unripe Tax claims." JTEX 0242, at 2.

56. As the parties were staking out their legal positions, the date for Purchaser's payment of the Earn-Out—some $300 million—was fast approaching. This prompted intense negotiations over Seller's

failure to reimburse Purchaser for the 2001 and 2003 VAT tax liabilities and its repudiation of the obligation to reimburse Purchaser for the other expected adverse VAT determinations.

57. Purchaser argued that it should be able to deduct all VAT assessments for all years through 2005 from the Earn-Out. JTEX 0239; Request for Interim Relief, ¶ 54. Seller objected to this proposal.

58. Seller reimbursed Purchaser $8,987,041 on February 15, 2011 for the 2001 and 2003 VAT assessments that Savia had paid. This did not include interest and costs, which Purchaser still demanded. *Id.,* ¶ 55. Two days later, Purchaser notified Seller that the Administrative Tax Court had rejected Savia's appeal of SUNAT's VAT deficiencies for the 2004 and 2005 tax years. *Id., ¶¶* 56-57.

59. Upon Seller's reimbursement for the 2001 and 2003 tax years, Purchaser "tendered control" of the remaining tax contests to Seller and, on February 18, 2011, Seller acknowledged that Purchaser had tendered such control and that Seller had accepted it. *Id.,* ¶ 56. There were apparently some other things to be done to effect an actual transfer of "control" and this later became a point of contention. In any event, Seller agreed at the time to make "timely payment" for the 2004 and 2005 VAT tax assessments "provided that Purchaser actually gives control of this matter to Seller." *Id.,* ¶ 58.

60. By letter of February 22, 2011, Purchaser notified Seller that it would wire the Earn-Out payment. JTEX 0278, at 1; Request for Interim Relief, ¶ 59. In its letter, Purchaser further stated:
As indicated above, because Seller is already in control of the 2004-2005 VAT Tax Contest, Purchaser has relied on the foregoing representation as assurance of Seller's payment despite the substantial cause for insecurity arising from Seller's non-performance and delayed performance in the past, and on that basis Purchaser is refraining from suspending its performance to the extent of this amount and is not withholding payment of this amount from the Earn Out. Purchaser therefore expects Seller to promptly comply with the foregoing representations and all of its obligations under the [SPA] and to timely pay all the Taxes for which Seller is required to indemnify Purchaser under the [SPA, including]... the 2004-2005 VAT Tax Amount as required.

61. Savia was able to obtain an injunction enjoining SUNAT's collection of the 2004- 2005 taxes in March of 2011. In November, however, that injunction was revoked, and collection efforts were imminent. *Id.,* ¶¶ 60-61. Purchaser then demanded that Seller honor its promise and pay the 2004 and 2005 assessments. Seller responded to this demand by filing its Notice of Arbitration in this proceeding alleging that it was excused from further tax indemnification obligations because of Purchaser's failure to cede control of the tax contests. Faced with this position, Savia again had to pay VAT taxes to SUNAT. Savia's payments this time were $11,674,652.59 (for 2004) and $11,770,399.25 (for 2005). Ballón WS, ¶ 5.

62. In August 2012, Savia received notice that the Administrative Tax Court had issued an adverse determination and was further notified that SUNAT had demanded payment for the 2002 VAT taxes. Purchaser then notified Seller. Seller responded that its counsel would be filing a judicial complaint contesting these adverse determinations. However, Seller advised that it would not be seeking an injunction enjoining payment, nor would it pay for the posting of a bond to avoid enforcement.[10]

[10] The taxpayer was required to post a bond in connection with any injunction application. Prior to July 19, 2012, the amount of the bond was only a small percentage of the tax as assessed. Hamann First WS, ¶ 17; JTEX 0016; Statement of Facts, ¶ 28. After July 19, 2012, the amount of the bond was required to be in the full amount of the assessment. *Id.*

Request for Interim Relief, ¶¶ 71-72. Purchaser then paid the 2002 assessment of $11,998,170.93. Ballón WS, ¶ 5. Seller filed its appeal of the 2002 determinations on November 19, 2012. Request for Interim Relief, ¶¶ 73-74.

63. The Administrative Tax Court also affirmed SUNAT's assessment relating to the 2006 VAT taxes, and the tax assessment became payable in mid-November 2012. After Seller refused to pay that assessment or to fund the necessary bond to stay collection efforts, Savia, again under protest, paid the taxes of $27,614,850.25. Ballón WS, ¶ 5.

64. Following other procedural events in the Peruvian tax courts, Savia paid $12,249,506.00 in August 2012 for the 2007 VAT assessment. As usual, this was paid under protest. *Id.;* Request for Interim Relief, ¶¶ 86-88.

65. Thus, as of November 2012, Savia had paid the following tax assessments to SUNAT:

Tax Year	Payment Date	Payment Amount in US Dollars
2001	March 17, 2010	$1,139,244.19
2002	August 31, 2012	$11,998,170.93
2003	March 24, 2010	$7,847,797.39
2004	November 21, 2011	$11,674,652.59
2005	November 21, 2011	$11,770,399.25
2006	November 13, 2012	$27,614,850.25
2007	August 28 and 29, 2012	$12,249,506.00
	Total	**$84,294,620.60**

Ballón WS, ¶ 5. Savia's payments to SUNAT were in Nuevos Soles. The above chart reflects the U.S. Dollar equivalents "at the exchange rates recorded in Savia's accounting reports in effect at the time of each payment." *Id.,* ¶ 6. Each of these payments was preceded by an unsuccessful demand upon Seller to reimburse Purchaser in accordance with the terms of the SPA. As explained above, Seller reimbursed Purchaser for the 2001 and 2003 assessments totaling $8,987,041.58 leaving a balance claimed by Purchaser of $75,307,579.02.

66. On April 16, 2013, the Tribunal issued the Interim Award requiring Seller to reimburse Purchaser as required by § 7.4(d) of the SPA pending a determination of Seller's claim that Purchaser had failed to cede control of the tax contests. As explained above, Seller attempted to tender payment of the Interim Award from the Escrow Account and, when the Tribunal upheld Purchaser's right to reject that tender, appealed the district court's decision giving the Tribunal the ability to decide that issue. To date, Seller has not satisfied the Interim Award even though it has since acknowledged its ultimate liability to indemnify Purchaser for these payments.

67. Seller's excuse for its non-performance of SPA § 7.4 has been that it was denied control of the tax contests as required by SPA § 7.1(d) and that this excused its indemnification obligation. Purchaser has, however, demonstrated that it was always willing to cede control provided that Seller paid the VAT assessments or posted the security needed to avoid SUNAT enforcement action. In the meantime, Purchaser was careful to keep Seller informed of all material developments and permitted Seller, as well as PWC, to participate in the efforts to fight the assessments and to prosecute the needed appeals. *See, generally,* JTEX 0196.

68. Seller on the other hand was perfectly willing to participate but only to the extent necessary to preserve Savia's appellate rights. It consistently, however, refused to reimburse Savia claiming a failure to cede control.

69. The Tribunal, however, finds no breach by Purchaser of its obligation to cede control of the tax contests. The Tribunal is perfectly willing to accept that Purchaser refused to follow through with its tender of control in March 2010, but that was upon Seller's refusal to pay the VAT taxes, which Seller now acknowledges it always had a responsibility to pay. Seller cannot on the one hand refuse to indemnify and then, on the other, demand control of the tax contests. The Tribunal agrees with Purchaser's position set forth in its letter to Seller of March 24, 2010 (JTEX 0196, at 4):
Seller is only entitled to assume the control of a Tax contest for which Seller will indemnify, defend and hold Purchaser harmless. Because Seller has repudiated Purchaser's claim for indemnification, Seller has no right to control the defense of the Tax Determinations and the related Tax Proceedings.

70. There was, in any event, insufficient proof of any adverse consequences occasioned by Purchaser's refusal or inability to cede complete control of these contests to Seller. Seller contends that the tax contests were being mishandled when Purchaser was in control, and the taxpayer's fortunes only reversed themselves once Seller controlled the tax litigation. Seller, however, through PWC or directly, always had the practical ability either to direct the defense of these contests or to influence the content of the filings that were made. The "losses" in the tax proceedings in the early years could well have been caused not by unskilled lawyering by Purchaser but by the fact that adverse determinations are rarely won at the administrative level. In any event, the proof was insufficient to raise the inference that any missteps by Purchaser caused the adverse determinations in the earlier years.

71. It is apparent to the Tribunal that Seller's overriding goal was to avoid any cash outlay until the last minute and, even then, to avoid compliance with the Interim Award upon Purchaser's refusal to permit that Award to be satisfied from the Escrow Account already established. We find that Purchaser's attempts to involve Seller in the 2001 and 2003 contests (including PWC's activities throughout) were entirely reasonable given Seller's unresponsiveness. We also find that Purchaser's refusal to cede complete control of the tax contests—and we recognize that there is a contested factual issue in that regard—was completely justified when Seller reneged on its promise to pay the 2004 and 2005 assessments, a promise conveniently forgotten once Seller received the Earn-Out payment.

72. The timing of Seller's concession of liability for these VAT taxes, is also telling. Since the issuance of the two Interim Awards, the Peruvian courts have reversed the Peruvian tax courts' decisions for several of the tax years at issue, and—subject to further rights of appeal or

reconsideration—ordered SUNAT to reimburse Savia for the VAT taxes that Savia had previously paid for those years, together with interest as provided by Peruvian law. SUNAT has effected some of those reimbursements.

73. After the courts of Peru reversed SUNAT and upheld Savia's position that Savia properly took credits for the VAT taxes that PetroPeru had originally paid, Seller (under the assumption that the taxes that Savia paid would ultimately be refunded) conceded its liability to pay such taxes.[11] *See,* Claimant's Response to Respondents' Statement of Facts and Memorial, ¶ 10, in which Seller stated "Offshore has decided to withdraw and hereby withdraws its opposition to Purchaser's indemnity claims in relation to the VAT paid by Savia that is the subject of the Tribunal's April 25, 2013 Interim Award ('Award'). This is the underlying merits issue left open in the Tribunal's Interim Award, but it will no longer contest Purchaser's right to indemnity for the VAT paid by Savia. Offshore makes no further submissions on this issue" (footnote omitted).

74. Notwithstanding Offshore's position that the VAT tax contests are all but over, the reimbursements noted above for tax years 2001, 2003, 2004 and 2005 are still subject to disgorgement. SUNAT has instituted a so-called *amparo* proceeding before the Constitutional Court in Peru seeking to refer the matter to the Peruvian Supreme Court for reconsideration. If the *amparo* succeeds (and all seem to agree that that eventuality is unlikely), the tax proceedings will continue with the possibility, however, remote, that Savia will be compelled to repay the VAT taxes for the years in question. At the moment, however, the parties agree that, given the status of the legal proceedings in the Peruvian courts, it is unlikely that the Constitutional Court of Peru will reconsider its prior ruling and that, ultimately, Savia will receive reimbursement for the VAT assessments that it has paid.

75. While it is likely that Savia will eventually be reimbursed, Seller argues that, because of Purchaser's alleged failure to tender control, all fees and costs incurred in Seller's defense of the tax contests should be awarded to Offshore. Offshore also claims interest on the fees and costs that it was compelled to pay to fund its defense to Purchaser's VAT claims.

76. Seller argues that Purchaser should have transferred control of the first VAT proceedings in February 2009, a date prior to any adverse administrative determinations. Instead, Purchaser (says Seller) delayed for over a year, finally first offering, and then refusing, to transfer control to Seller on March 24, 2010. By that time, adverse administrative determinations by SUNAT had placed the proceedings in a different and more difficult posture. This alleged breach by Purchaser caused Offshore to deny Respondents' indemnification request on March 11, 2010 while insisting on its right to control further proceedings. When Seller finally gained at least limited control of the proceedings, Offshore prevailed before the Supreme Court of Peru in finally extinguishing Savia's VAT tax liabilities for years 2001, 2004 and 2005 and also prevailed in the trial court in the VAT contests for years 2002 and 2006. Thus, Seller argues that, absent Purchaser's alleged breach, Seller's successful efforts would have likely resulted in no claim for damages. Further, Seller contends that had Purchaser notified Seller of the tax contests earlier, Seller could have posted a bond in lieu of payment to the tax authorities, thus obviating the perceived need for Purchaser's interim application to the Tribunal for reimbursement, an application that culminated in two Interim Awards and the district court proceeding.

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[11] After the hearings Seller moved to withdraw that concession. In Procedural Order No. 8 the Tribunal refused to allow the withdrawal of the concession, but emphasized that "Evidence of the Purchasers' conduct in response to Offshore's demand for control of the VAT contests, however, may still have an effect upon costs incurred by one side or the other, or interest that may be due to Purchaser by reason of its advancement of the VAT taxes. The Tribunal will deal with those issues in its Final Award." Procedural Order No. 8, page 5.

77. In view of the findings above, and particularly that Purchaser, under the circumstances, was fully justified in failing to cede control of the tax contests to Seller, the above defenses are rejected, and this Award will compensate Purchaser for all of its losses, including the amounts advanced for the payment of the assessments, interest on those amounts and the costs incurred in attempting to obtain Seller's compliance with the SPA, including the costs incurred in pursuit of the Interim Award, as well as the costs of defending Seller's district court action.

78. Seller will be entitled to receive appropriate credit for any refunds or credits that SUNAT repays to Savia, all as more specifically addressed below.

B. The IMI Tax Claims

79. The "PT Group," which Purchaser acquired when it bought the stock of OIG included IMI Delaware. Hamann First WS, ¶ 52.

80. As explained in ¶ 11 above, IMI Delaware owned, directly or indirectly, all of the shares of two subsidiaries which, at the time of the parties' entry into the SPA, engaged in drilling operations in Peru under contract with Savia, B and B Drilling and PEPESA.[12] B and B Drilling owned three drilling rigs that it leased to PEPESA and PEPESA owned one drilling rig itself. Using the four drilling rigs in its possession, PEPESA provided drilling services to Savia. *Id.,* ¶¶ 53 and 55.

81. Well prior to the sale of OIG, IMI Delaware operated an unincorporated branch in Peru known as IMI Peru. This branch was duly registered as an unincorporated branch of a foreign parent company. Barclay First WS, ¶ 22.[13] IMI Peru provided maritime transportation services to Petro-Tech (Savia's predecessor). Respondents' Counter-Memorial dated June 21, 2013 ("Respondents' Counter-Mem."), ¶ 14. In the 1990's, however, a new statute in Peru provided that only Peruvian companies could provide maritime transportation services. *Id.,* ¶ 15.

82. In order to comply with the new law, Seller created a wholly-owned subsidiary, IMI del Peru S.A.C. ("IMI del Peru") to take over IMI Peru's operations. *Id.,* ¶¶ 15-16.

83. Seller then transferred all of the assets of IMI Peru to IMI del Peru leaving IMI Peru a mere shell, other than a claim against SUNAT for a tax refund. Claimant's Mem., ¶ 23, 42. IMI Peru pursued an action against SUNAT for this refund, which SUNAT denied in 2005. Seller appealed that denial, and SUNAT reversed its decision and granted IMI Peru's request. *Id.*, ¶ 43, n. 14.

84. Seller's successful pursuit of the tax refund on behalf of IMI Peru, however, had unintended consequences. Seller's claim for reimbursement triggered an audit of IMI Peru, and in 2005, SUNAT determined that IMI Peru was responsible for unpaid income tax liabilities with respect to tax years 2000 and 2001. *Id.;* Purchaser's Second Request, ¶ 7.

85. Even though IMI Peru had no assets at the time of SUNAT's assessments for 2000 or 2001, Seller

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[12] Specifically, IMI Delaware owned 100% of B and B Drilling and approximately 3% of PEPESA. B and B Drilling owned 97% of PEPESA. Hamann First WS, ¶ 54.

[13] Michelle Barclay submitted three witness statements in the proceeding: the first dated April 16, 2013 ("Barclay First WS"); the second dated June 20, 2013; and the third dated October 3, 2013 ("Barclay Third WS").

appealed those assessments. *Id.;* Claimant's Mem., ¶¶ 43, 44. Here, the procedural histories for the 2001 and 2000 tax determinations diverge.

1. IMI Peru's 2001 Income Tax Liability

86. On December 13, 2005—approximately three years prior to the Closing of the SPA—SUNAT dismissed IMI Peru's appeal and upheld its decision imposing a 2001 tax liability. *Id.,* JTEX 0066; JTEX 0148. The tax liability totaled S/.19,419,548.[14] Barclay First WS, ¶ 28. SUNAT ordered the commencement of collection proceedings and, after unsuccessful challenges by Seller, the taxes became payable. Respondents' Counter-Mem., ¶ 20.

87. At the time of the Closing SUNAT was, therefore, sitting on an outstanding tax judgment against IMI Peru for unpaid 2001 income taxes (*Id.,* ¶ 23), a branch of a foreign company with no assets in Peru because, years earlier, IMI Peru, when it was under Seller's control, had transferred all of these assets—without consideration—to IMI del Peru. The underlying facts were known to SUNAT which recited the facts in an internal memorandum dated October 29, 2009 (the "SUNAT Memorandum"), JTEX 0137, at 11 (English version).

88. On or about October 30, 2009 (about eight months after the Closing), SUNAT filed an involuntary bankruptcy petition against IMI Peru claiming that it owed back taxes for 2001 in the amount of S/. 19,419,548 (US$6,696,396 including attorneys' fees, costs and expenses of $101,701.90). Barclay First WS, ¶ 28 and JTEX 0139.

89. The SUNAT Memorandum, dated the day before the date of SUNAT's filing of the bankruptcy petition, stated that there was an "absence of realizable assets" because the applicable statute of limitations had passed. JTEX 0137. Seller contends that the SUNAT Memorandum was a final, definitive statement by SUNAT to the effect that the IMI Peru tax debt was uncollectible (Hernández First Opinion, ¶¶ 37-40),[15] and that SUNAT filed the bankruptcy petition not in the hope of collecting the tax debt, but to enable SUNAT to write off the tax debt as uncollectible. *Id.,* ¶¶ 43-45.

90. The intricacies of the Peruvian bankruptcy system were the subject of much testimony at the hearings. All agree, however, that such proceedings are handled by an administrative authority, the *Comisión de Procedimientos Concursales y las Comisiones Desconcentradas de las Oficinas Regionales del INDECOPI* ("INDECOPI"). *Id.,* ¶ 2.

91. A bankruptcy proceeding initiated by a creditor, such as SUNAT in this case, can result in either the debtor's reorganization or liquidation. The decision to reorganize or liquidate is usually made at a creditors' meeting, but when the debtor's carried losses less retained reserves exceed its paid-in capital, INDECOPI will order a mandatory liquidation. *Id.,* ¶¶ 5-7. This was the case with IMI Peru.

92. On November 16, 2009, INDECOPI recognized SUNAT's involuntary petition and, in accordance with the Peruvian Bankruptcy Law, requested several documents from IMI Peru including a detailed list of assets. *Id.,* ¶ 29.

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[14] The currency denominated as "S/." represents Nuevos Soles, the Peruvian currency.

[15] Dr. Hernández filed two opinions, the first dated September 30, 2013 ("Hernández First Opinion"), and the second dated December 9, 2013 ("Hernández Second Opinion").

93. On December 17, 2009, IMI Peru filed an objection to SUNAT's bankruptcy petition, alleging that the tax claim for tax year 2001 was unenforceable. *Id.,* ¶¶ 29-30. On January 27, 2010, INDECOPI ruled against the objection and ordered the commencement of the bankruptcy proceeding and the liquidation of IMI Peru. *Id.,* ¶ 31; JTEX 0161.

94. On December 23, 2009, Purchaser notified Seller of SUNAT's filing of the bankruptcy petition and informed Seller of the December 28, 2009 deadline for appearing in the proceeding and for filing a response. Purchaser's notification to Seller included the following:
Failure to appear in the procedure on or before such date [December 28, 2009] would authorize Sunat to proceed with the bankruptcy proceeding and request INDECOPI to declare the bankruptcy of International Marine, which would, in turn, materially affect the operations of the company and/ or its subsidiaries and affiliated companies including, but not limited [to], imposing restrictions and/or attachments to the assets of such companies.

Id., JTEX 0148.

95. After various objections and an unsuccessful appeal,[16] the bankruptcy proceeding officially began when INDECOPI, on January 3, 2011, announced IMI Peru's liquidation in Peru's Official Gazette, *El Peruano. Id.,* ¶¶ 7 and 35. In that announcement, INDECOPI informed creditors that, consistent with Peruvian Bankruptcy Law, proofs of claim must be filed within thirty business days after the publication date. *Id.,* ¶ 35.

96. SUNAT filed a proof of claim in the bankruptcy in the amount of S/. 19,419,548.00. In addition, four pension funds *(Administradoras de Fondos de Pensiones,* or "AFPs") filed proofs of claim in addition to SUNAT. The four AFP claims totaled S/. 7,008,847.82. *Id.,* ¶¶ 36-37; JTEX 0258, 0262, 0264-0206. The pension claims were filed by pension funds that administered pensions for workers formerly employed by IMI Peru. During the time it was conducting business, IMI Peru had not made required pension contributions, and these contributions were allegedly owing.

97. IMI Peru challenged the amounts of the claims on various grounds. INDECOPI ultimately allowed SUNAT's claim in the amount of S/. 21,715,524, and a total of S/. 534,059.64 for the four pension funds, a significantly lower amount than originally claimed.

98. As the largest creditor, SUNAT was appointed President of the creditors committee. *Id.,* ¶¶ 38-42. A plan of liquidation was eventually approved that included a general information and document request directed to IMI Peru that asked for information about, among other things, the company's assets in Peru.[17] On January 20, 2012, IMI Peru sent a notarized letter to the Liquidator appointed by the creditors (the firm of Espinoza and Pastrana S.R.L.) stating that the requested documents were available for the Liquidator's review at IMI Peru's office. The documents only provided information related to IMI Peru, not its foreign parent or affiliated companies. Barclay First WS, ¶¶ 42-45. This document request, however, effectively began the creditors' quest for information

[16] IMI Peru filed an objection to INDECOPI's January 27, 2010 decision which was denied in April 2010. IMI Peru then appealed the denial to the appellate court of INDECOPI, the *Tribunal de Defensa de la Competencia y de la Propiedad Intelectual - Sala No. I* (the "INDECOPI Appellate Court"). The INDECOPI Appellate Court denied the appeal on November 10, 2010, thus permitting the declaration of bankruptcy to move forward and the filing to be publicized in accordance with law. Barclay First WS, ¶¶ 30-35.

[17] The letter requested information and provided that, if the debtor failed to comply, the Liquidator would assess the potential liabilities of the former officers and directors. Statement of Facts, ¶ 285.

concerning the debtor's assets that Purchaser alleged could have led to demands for more detailed disclosures from IMI Delaware. [18]

99. Purchaser, in order to protect IMI Delaware from enforcement actions by the Liquidator, then caused a subsidiary of OIG, Offshore Foreign Group, Inc. ("OFG"), to pay all the creditor claims. [19] On May 2, 2012, in light of the payments made, INDECOPI then issued a Resolution terminating IMI Peru's bankruptcy proceeding. Barclay First WS, ¶ 49.

100. OFG was a stranger to the entire series of transactions. Purchaser contends that there was an advantage to having a third party pay the claims—namely an early termination of the insolvency proceeding. Barclay First WS, ¶¶ 26-27; Statement of Facts, ¶¶ 258-259. Among other advantages to an early termination was the cutting off of the possibility that additional creditors would see the notice in *El Peruano* and file claims.

101. Previously, on December 30, 2010, Purchaser, in accordance with SPA §§ 7.4(a) and 7.4(d), had demanded that Seller, within 30 days, reimburse it for the tax claim that OFG eventually paid to SUNAT. JTEX 0238. Seller never paid the amounts demanded.

102. Purchaser notified Seller of the termination of the bankruptcy proceeding on May 23, 2012. JTEX 0362. The letter increased Purchaser's indemnification claim to $9,139,538.72 and an additional $105,198.78 in costs and fees. Purchaser had previously withheld $7,753,352.86 from the Earn-Out and, therefore, demanded the balance of $1,491,384.64. Statement of Facts, ¶ 292.

103. Seller rejected this demand alleging, as a first argument, that the payments were gratuitous and unnecessary. Seller contended that there was a zero or negligible chance that IMI Delaware would ultimately have had to answer for the IMI Peru creditor claims. [20] Seller argued, instead, that Purchaser imprudently made these payments either because: (i) it was privy to incorrect legal advice; or (ii) it decided to pay voluntarily to curry favor with the Peruvian governmental authorities at Seller's expense.

104. As a corollary to this argument, Seller also contended that the SPA entitled it to control the proceedings and, had Purchaser tendered such control, these liabilities would never have been incurred.

105. Seller further alleged that Purchaser—in any event—cannot collect on these claims because IMI Peru is not within the SPA's definition of a member of the "PT Group" and, therefore, Seller has no contractual duty to reimburse Purchaser for its payments even if the debts were truly owed. Moreover, Seller alleges that Purchaser did not mitigate its damages as the statute of limitations under Peruvian law would have certainly prohibited the pension funds from asserting their claims in 2011 for liabilities that accrued in 2001. Claimant's Counter-Mem., ¶ 54; Barclay Third WS, ¶ 2. [21]

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[18] Whether there was a realistic chance that the creditors or the Liquidator would have focused upon, and ultimately looked to, the assets of IMI Delaware for the payment of their claims will be discussed below.

[19] In March 2012, OFG paid S/. 23, 694,259 to SUNAT and S/. 695,514.03 to the unions (substantially less than the S./ 7,008,847.82 initially claimed). Barclay First WS, ¶¶ 39-40, 47-48; JTEX 0346, 0348-0357, 0359.

[20] As Claimant stated in its Memorial at page 9: "Following th[e] liquidation, Sunat would have closed its books on IMI Peru and written off the uncollectible 2001 tax liability [and] [t]hat would have been the end of the matter."

[21] As noted above, Purchaser's application directed to INDECOPI to dismiss the bankruptcy petition—at the time that the only creditor was SUNAT—on the ground that the 2001 tax debt was unenforceable had been previously denied.

106. Seller also hypothesizes that Purchaser gained certain tax advantages by having OFG make the payments, and—in the event Seller is found liable to reimburse Purchaser for either the SUNAT payment or the payment to the unions (or both)—Seller should be entitled to a credit for the tax advantages that may have been realized upon OFG's payment of the debts. [22]

2. Whether IMI Delaware Would Be Liable for the Debts of IMI Peru

107. Seller's main contention is that Purchaser's payment of IMI Peru's tax and pension debts was gratuitous, and that Purchaser caused these debts to be paid either because it was privy to incorrect legal advice, or it did so to curry favor with the Peruvian authorities at Seller's expense.

108. According to Seller, The SUNAT Memorandum, referenced above, proves that SUNAT did not believe that the debt was collectible, and that it only pursued a bankruptcy proceeding to liquidate the indebtedness in order to write off the debt as uncollectible.

109. Purchaser, on the other hand, contends that it faced real risks if it simply ignored the bankruptcy proceeding and the Liquidator's requests for information. These risks included the possible seizure of four drilling rigs owned by B and B Drilling and PEPESA, both subsidiaries of IMI Delaware; harm to Purchaser's business reputation; potential criminal penalties for IMI Delaware executives if false or misleading information would have been provided to the Liquidator either by IMI Peru or IMI Delaware; [23] and the filing of additional claims by creditors in response to the notice in *El Peruano.* Statement of Facts, ¶ 287.

110. Purchaser also points out that SUNAT did not file the bankruptcy proceedings merely to enable it to write off the IMI Peru tax debt. According to Purchaser, SUNAT could have simply requested a Certificate of Non-Recovery for these taxes thereby saving the bother and expense of a bankruptcy proceeding. Barclay First WS, ¶¶ 7-8; Respondents' Counter- Mem., ¶¶ 71-71.

111. In resolving these contentions, the Tribunal may refer to several rules of Peruvian law that are not in dispute. First, both sides agree that an unincorporated branch of a non-Peruvian company that is doing business in Peru is a separate taxpayer for tax purposes. As Dr. Hernández, Claimant's expert, stated in his report:
Peruvian law states that a Peruvian branch and its foreign parent are two different legal entities for purposes of their respective tax obligations. Thus, the Peruvian branch and its foreign parent are two separate taxpayers.

Hernández First Opinion, ¶¶ 14, 23-26.

112. Second, both sides agree that, at least from the standpoint of Peruvian business law, a foreign parent is liable for the debts of its unincorporated branch. The Peruvian Corporations Act (Law No. 26887, as amended through 2012, Articles 396 and 397, as translated) provide:

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[22] At the conclusion of the hearings, Seller made application for further documents and information concerning such possible tax advantages, which the Tribunal denied in Procedural Order No. 7.

[23] *See,* Barclay First WS, ¶¶ 22-23; Respondents' Counter-Mem., ¶¶ 41-49.

Article 396. - Concept

A branch is a secondary establishment through which a corporation develops, in a place different than its domicile, certain activities within its corporate purpose. The branch has no legal identity independent from that of its principal. It is provided with permanent legal representation and enjoys administrative autonomy within the scope of the activities it is assigned by the principal, in conformity with the terms of the powers of attorney granted to its representatives.

Article 397. - Responsibility of the parent

The parent corporation is liable for the obligations of the branch. Any agreement to the contrary is null and void.

Barclay First WS, Ex. 13 and 14.

113. The parties sharply differ, however, on whether Articles 396 and 397 would apply in the context of a tax judgment obtained against an unincorporated branch. As Dr. Hernández stated in his Second Opinion: "[T]his General Corporations Law provision [Article 397] is *not applicable* to income tax obligations, because under the Peruvian Income Tax Law, foreign parents *are separate* legal entities from their branches." Hernández Second Opinion, ¶ 21 *et seq.* (emphasis in original). *See also,* Hernández Tr. 2641.

114. By contrast, Dr. César Enrique Talledo Mazú, Respondents' expert, opined:
Based on this conclusion and its underlying principles, the author of this report disagrees with Dr. Hernandez's assertion that, since our law does not expressly provide *"that the foreign parent company is liable for payment of taxes owed by its Peruvian branch as a taxpayer... SUNAT cannot impose this liability to the foreign parent company and therefore may not demand payment of the tax debts of the branch office."* I reiterate that the imposition of this liability is fully covered by article 397 of the Law of Companies.

Expert Testimony of Dr. César Enrique Talledo Mazú dated December 21, 2013, ¶ 27. *See also,* Barclay Tr. 1544.

115. Each of the experts agreed that the Peruvian courts have never determined the issue or provided definitive guidance. Talledo Tr. 2734-2735.

116. The Tribunal, after considering the competing views of these eminent experts, and further considering the uncertain state of the law in Peru with respect to the potential liability of a foreign parent for the tax debts of its unincorporated branch, concludes that Purchaser's payment made to conclude the bankruptcy proceedings cannot be characterized as either gratuitous or unnecessary. Further the language of SPA § 7.4(a) compels a similar conclusion with regard to the tax debt.

117. It is true that there is no certainty that the bankruptcy proceeding, if ignored, would have necessarily resulted in further inquiry by the Liquidator into the possible existence of realizable assets which may have included IMI Delaware's ownership interest in B and B Drilling and PEPESA. Nor is there any certainty that, if ignored, or handled in a different manner, the bankruptcy

proceeding would not have died a painless death with no liability being imposed upon, or sought, against IMI Delaware.

118. However, given the inherent uncertainty that existed, especially in the presence of SPA § 7.4(a), which unambiguously imposes upon Seller liability for taxes incurred while Seller controlled the OIG group, the Tribunal finds that Purchaser was within its rights to handle the bankruptcy proceedings in a manner that minimized its financial and reputational risk,[24] even if that meant full payment of the creditor claims for the purpose of terminating the proceedings.

119. The Tribunal further finds that Purchaser properly invoked SPA § 8.2(a)(i) when it demanded reimbursement of its payment for both the tax imposed and the pension claims from Seller. That section provides:
Seller agrees to defend, indemnify and hold harmless each PT Group Member, Purchaser and their Affiliates... from and against all Losses incurred by any of the Purchaser indemnitees as a result of (i) the breach of any of the representations and warranties of Seller in this Agreement.

quoted at Statement of Facts, ¶ 297. (Purchaser's payment of the bankruptcy debts, which included the pension claims, also constituted a "Loss" as defined in the SPA. SPA, Ex. A (Definitions), at 8.

120. While the pension debts also arise out of the breach of Seller's representations and warranties including SPA § 3.9 (warranting compliance by Savia with applicable laws); § 3.3(q)(iii) (warranting that Savia had made all contributions to its "Employee Plans"); § 3.3(1) (warranting compliance by Savia with Peruvian labor laws); § 3.3(p) (warranting that Savia had paid all amounts due employees earning certain minimum compensation); § 3.3(b) (warranting the fair presentation of Savia's financial statements (which did not include any contingency for either the SUNAT tax claim or the pension claims made in the bankruptcy), they are also Tax Claims under SPA Article 7. Specifically, the IMI Peru taxes fall under SPA § 7.4(a)(1) and the pension claims fall under SPA § 7.4(a)(5), notwithstanding the fact that the pension claims, if independently asserted, would have been a breach of SPA Article 3, they are not subject to the Basket.

121. The Tribunal further finds that Purchaser expended all reasonable efforts to mitigate the Loss within the meaning of SPA § 8.5(a). Purchaser caused a third party, OFG, to pay the debts thus causing an early termination of the bankruptcy proceedings before any additional creditor claims could be filed. Purchaser also contested the amounts of the claims thus minimizing the required payment. Barclay First WS,¶¶ 39, 40, 48; Respondents' Counter-Mem. ¶ 51.

122. Seller contends that Purchaser's mitigation obligation should include the steps that Seller recommended to avoid the liability altogether. These would have included not terminating the bankruptcy proceeding by a voluntary payment but, instead, allowing the bankruptcy proceeding to run its course, an event that, Seller contends would have resulted in the Liquidator winding up IMI Peru and requesting a judicial declaration of bankruptcy. A judge would then have declared IMI Peru bankrupt and "that would have been the end of IMI Peru and Purchaser's damages." *See,* JTEX 0427 (William Kallop's letter to Purchaser and its counsel dated July 17,2013, at 2-3).

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[24] In that regard, we find it remote at best that criminal prosecutions, under any realistic scenario, would have arisen out of a continuing bankruptcy proceeding and, absent the dictates of SPA § 7.4(a), Seller's contentions may well have prevailed if criminal prosecution was the only perceived risk to Purchaser.

123. The Tribunal, however, cannot excuse Seller's indemnification obligation under SPA § 7.4(a) because Purchaser declined Seller's advice. First, the SPA does not require Purchaser to follow Seller's advice, nor, in this situation, does it require a tender of defense to Seller. Second, as explained above, Purchaser, at the time that it embarked on the course of action that resulted in OFG's payment of the SUNAT and pension debts, entertained a good faith belief that the continuance of the bankruptcy proceedings might well have resulted in civil liability and reputational harm. This belief was supported by the advice of able Peruvian counsel, as well as the absence of definitive statutory or precedential guidance to the contrary.

124. In addition, this was an obligation of Seller's own making. It apparently did not pay (or underpaid) IMI Peru's taxes for 2001 hoping that the disappearance of the assets of the company by transferring them to a newly formed IMI del Peru would spell the end to any further tax obligations. It then pursued a tax refund from SUNAT, and SUNAT responded with an audit of its own that resulted in the imposition of the 2001 assessment. Seller might have preserved its right to deal with this liability in its own way when it sold the PT Group to Purchaser, but it did not. (It did not even reveal to Purchaser the existence of a possible tax liability arising out of the transfer of IMI Peru's assets to IMI del Peru.) Instead, it entered into an SPA that, in § 7.4(a), contained an absolute indemnification obligation for pre-Determination Date tax liabilities. As long as Purchaser paid these taxes in good faith, it is entitled to rely upon that promise. There was no credible evidence that Purchaser's payment to terminate the bankruptcy proceedings was made for ulterior motives, whether to curry favor with governmental authorities or otherwise.

125. The Tribunal finds Seller's additional defenses to payment without merit. IMI Delaware is, indeed, a PT Group member and, therefore, entitled to the protections of the SPA. JTEX 0001; JTEX 0148; JTEX 0139; Respondents' Counter-Mem. ¶ 55.

126. We also reject Seller's argument that Purchaser was required to tender control of the bankruptcy proceedings to Seller. The obligation to tender control, as explained in SPA § 7.1(d), relates only to tax proceedings and not to bankruptcy proceedings. Moreover, the right to exercise control requires that Seller pay the liability, which Seller declined to do in this case notwithstanding Purchaser's demand.

127. Seller also seeks a credit for any favorable tax consequences that Purchaser may have realized from OFG's payment. That claim is also rejected. Purchaser may or may not have realized tax benefits from the payment by OFG (as opposed to payment by Savia or some other PT Group member), but any such benefits do not factor into the damages calculation, and Seller has not cited any case law to the opposite effect.

128. Therefore, for the above reasons, the Tribunal finds that Purchaser was entitled to reimbursement of the payment made by OFG to terminate IMI Peru's bankruptcy proceeding in the full amount of $9,139,538.72 plus $105,198.78 in costs and fees for a total of $9,244,737.50. As Purchaser previously withheld $7,753,352.86 from the Earn-Out, Seller is liable to Purchaser for the balance of $1,491,384.64. No portion of this is subject to the Basket. Purchaser paid this amount in March 2012 and is due appropriate interest from that date.

3. IMI Peru's 2000 Income Tax Liability

129. Shortly before issuing determinations with respect to the 2001 IMI Peru taxes discussed above, SUNAT, in November 2005, issued several other adverse determinations relating to IMI Peru's 2000 income taxes. These concluded that IMI Peru owed taxes for tax year 2000 to the Peruvian government. *See,* Indemnification Claim No. 23 dated January 31, 2011 and attached as Ex. 1 to Purchaser's Second Request.

130. On December 27, 2005 (well before the Closing of the SPA), IMI Peru filed a petition with SUNAT challenging those adverse determinations. *Id.,* at 1.

131. On October 24, 2006, SUNAT affirmed its tax determinations and, on December 11, 2006, IMI Peru filed an appeal of that affirmance to Peru's Administrative Tax Court.

132. Seller, in the SPA, did not disclose these tax claims as outstanding. After the Closing, faced with these potential liabilities, Purchaser filed Claim No. 23 with Seller in which it sought a total of $10,339,350 comprised of $9,719,350 for the estimated tax liabilities and $620,000 in estimated legal fees, accounting fees, costs and expenses to be incurred in the contesting and ultimate resolution of the claims. *Id.,* at 2.

133. By letter dated February 25, 2011, Seller rejected Purchaser's Claim No. 23 on the ground that the pending appeal (originally filed by Seller when it owned the PT Group) had not been resolved and that the Purchaser's claim was, therefore, not yet ripe. *See* Ex. 3 to Purchaser's Second Request.

134. Two and a half years later, by letter dated July 17, 2013 (after the Closing), signed by William Kallop, Offshore's President, Seller advised that "the Tax Court is likely to affirm Sunat's decision imposing tax liabilities on IMI Peru for 2000." JTEX 0427.

135. Mr. Kallop's letter did not offer to indemnify Purchaser pursuant to SPA § 7.4(a) but, instead suggested a strategy which, if pursued by Purchaser, would (according to the letter) result in no liability for these IMI Peru 2000 taxes. The letter also contained Seller's offer to defend and indemnify IMI Delaware and its affiliates if SUNAT ever pursued them for the 2000 taxes provided Purchaser followed the suggested course of action.

136. Mr. Kallop's suggested course of action was the same as that recommended with respect to the 2001 IMI Peru tax liability discussed above. That is, Mr. Kallop assumed that SUNAT would, consistent with its practice with respect to the 2001 tax liability, file a bankruptcy petition against IMI Peru with INDECOPI. The letter counseled that—when that occurred—Purchaser should not object to the initiation of the bankruptcy. INDECOPI would then declare IMI Peru insolvent and liquidated (as it did with respect to the earlier bankruptcy petition) because IMI Peru's accumulated losses were larger than its capital contributions. The letter predicted that the creditor's committee (like it did in the earlier proceeding) would have no other choice than to agree to the appointment of a liquidator. The letter then advised, "This time, Purchaser should not intervene or cause any of its subsidiaries to intervene. If Purchaser allows events to run their course, the liquidator will wind up IMI Peru and request its judicial declaration of bankruptcy. A judge will then declare IMI Peru bankrupt." JTEX 0427, at 3.

137. According to the Mr. Kallop's letter, this eventuality would result in no harm to Purchaser. Indeed, the letter advised that Purchaser should not wait for the tax court to affirm SUNAT's decision imposing tax liabilities. Instead, Purchaser should—prior to that time—have OFG, as a creditor of IMI Peru (OFG having previously paid IMI Peru's 2001 tax liabilities), request that INDECOPI initiate the bankruptcy proceeding. In that event, even if SUNAT or others joined the proceeding, OFG would control the creditor's committee as the largest creditor. The letter concluded that "[r]egardless of who controls the committee, the proceeding should conclude with the liquidation of IMI Peru, which would cause no harm to Purchaser." *Id.,* at 4.

138. The letter also alleged that Purchaser's payment of the 2001 liabilities when it did caused a loss that did not have to be incurred had Purchaser, at the time, simply followed the plan outlined in the letter.

139. Purchaser presses its claim for eventual reimbursement and seeks an Order from this Tribunal declaring Seller liable for those 2000 taxes if and when a final determination is made or, if prior to that time, payment must be made to foreclose the possibility of enforcement proceedings.

140. Seller contests Purchaser's claim asserting that enforcement proceedings will not eventuate if Purchaser merely follows the strategy outlined in the Kallop letter. If Purchaser fails to do so, argues Seller, any liability for these taxes will be self-imposed.

141. As with the 2001 IMI Peru tax liabilities, SPA § 7.4(a) imposes a strict obligation upon Seller to pay undisclosed Pre-Determination Date tax liabilities. Seller was fully aware of these liabilities when Seller was in control of the business, and Seller failed to disclose them in the SPA. Seller also failed to make any special provision for them by, for example, requiring Purchaser to follow Seller's instructions as later set forth in the Kallop letter or otherwise.

142. As explained in ¶¶ 116-118 and 124 above, Seller failed to prove that Purchaser's fears of SUNAT enforcement affecting the business that it purchased were neither irrational nor motivated by factors other than a legitimate fear that the assets of the business might well be adversely affected.

143. In view of the above, the Tribunal concludes that—like the 2001 IMI Peru tax liabilities—Seller is liable under SPA ¶ 7.4(a) to pay the IMI Peru 2000 tax liabilities, together with any related expenses incurred (or to be incurred) by Purchaser, if and when these tax liabilities are finally imposed or, if and when enforcement proceedings are imminent.

C. The Platform Maintenance Claim

144. Seller's assets included some 75 drilling platforms (also called marine platforms) used in Savia's business of extracting oil and gas. In the course of its due diligence, Purchaser's engineering consultants and technical personnel conducted various on-site physical inspections of these platforms. Witness Statement of Michael Lance dated October 1, 2013 ("Lance WS"), ¶ 5. Many required routine repairs to varying degrees and some needed extensive work and environmental remediation. *Id.,* ¶ 17. According to Michael Lance, a close advisor to Seller, Purchaser budgeted some $50 million for expected repairs and remedial work thus accounting in the purchase price for

the poor condition of many of the platforms. *Id.,* ¶ 8.

145. A Peruvian government agency called OSINERGMIN [25] was charged with the task of inspecting these platforms and enforcing the environmental regulations that governed them. In August 2007, in connection with its enforcement duties, OSINERGMIN retained SERMABU S.R.L. ("SERMABU"), a third party consultant, to audit the condition of Savia's operations and marine platforms. SERMABU conducted inspections from August 2007 to January 2008, and issued a report with its findings and recommendations, identifying several deficiencies in Savia's maintenance of the platforms. *Id.,* ¶ 11. OSINERGMIN then issued a so-called notice of noncompliance 8604 *("Oficio 8604")* dated September 17, 2008, in which it listed various violations of Peruvian environmental laws in relation to the maintenance and operation of Savia's platforms. These violations specifically included reference to violations of Articles 171 and 217 of Regulatory Decree 032. OSINERGMIN served *Oficio 8604* on Savia on October 3, 2008, several months prior to the execution of the SPA. *Id.,* ¶¶ 12-13, 15. On December 29, 2008 Savia disputed OSINERGMIN's allegations in its response to *Oficio 8604. Id.,* ¶ 16.

146. In the SPA, Offshore agreed to indemnify Purchaser for, among other things, losses resulting from any breach of Offshore's representations and warranties concerning Environmental Laws (as defined). Specifically, Offshore represented and warranted that, to its knowledge, Savia was complying with Peru's Environmental Laws except for those matters disclosed in a schedule to the SPA, Schedule 3.7. *Id.,* ¶ 14.

147. In Schedule 3.7 Offshore disclosed (by incorporating by reference the disclosures made in Schedule 3.5) that OSINERGMIN had issued *Oficio 8604* with respect to Savia's operations. The disclosure included the ten observations listed in *Oficio 8604* concerning needed maintenance and remediation on the platforms. Schedule 3.7, albeit in tiny print, also referenced article 217 of Regulatory Decree 032 in the column marked "Legal Standard." Schedule 3.7 further referenced that OSINERGMIN had given Savia 60 days from October 3, 2008 to respond to the ten listed observations. It also listed "fines and sanctions" as possible consequences of Savia's non-compliance. *See,* Schedule 3.7. (As noted above, Savia had disputed OSINERGMIN's allegations on December 29, 2008 in its response to *Oficio 8604. Id.,* ¶ 16.)

148. Purchaser was therefore made aware in Schedule 3.7 of *Oficio 8604* and OSINERGMIN's position with respect to the remediation efforts that would be required on many of the platforms.

149. However, on January 28, 2009—after the SPA had been executed but before the Closing—OSINERGMIN issued what was called Technical Report 155002 (the "Technical Report"). The Technical Report concluded that Savia had violated articles 171 and 217 of Regulatory Decree 032 and announced that "an administration sanction procedure ha[d] been initiated" against Savia "for not providing adequate maintenance and anti-corrosion protection to the Marine Platforms in Block Z-SB, which constitutes an administrative infraction." JTEX 0105. The administrative sanction procedure was denominated File No. 155002 ("File 155002"). The purpose of the administrative procedure was to determine whether Savia should be sanctioned. Lance WS, ¶ 19.

150. Savia was notified of both the Technical Report and File 155002 (the initiation of the sanctions proceeding) on January 30, 2009. Savia notified purchaser in turn on February 2, 2009, three days before the scheduled Closing. *Id.,* ¶ 20.

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[25] OSINERGMIN is an acronym that refers to the Supervisory Agency for Investment in Energy and Mining.

151. Purchaser then threatened not to close the transaction, and discussions ensued. Seller claimed that File 155002 did not add anything material to what Offshore had already disclosed in Schedule 3.7. *Id.* Purchaser on the other hand claimed that OSINERGMIN's commencement of a sanctions proceeding based on the observations disclosed in Schedule 3.7 greatly increased Savia's exposure and necessitated a renegotiation of the purchase price in order to protect Purchaser from fines and other expenses that might arise out of the newly commenced administrative proceeding. Purchaser also expressed concern that there might be other significant undisclosed liabilities that could exist in relation to environmental matters and insisted on protection from these unanticipated liabilities. According to Mr. Lance, "Purchaser apparently was told by governmental sources that Savia. faced a great number of environmental liabilities, some of which Purchaser seemed to believe may have not been disclosed by Offshore." *Id.,* ¶ 21.

152. OSINERGMIN's initiation of proceedings in File 155002 led to a series of discussions and, eventually, an agreement between the parties embodied in the First Amendment to the SPA to add $50 million to the Escrow Amount to be established under the contract ("the Supplemental Escrow Amount"). Purchaser claims that this additional amount was to secure any liability that might be incurred by reason of File 155002 together with any other undisclosed environmental claims. Seller on the other hand alleges that the additional $50 million added to the Escrow Amount was not added to secure Purchaser from any loss occasioned by File 155002 because Purchaser already knew about the underlying facts through its own inspections and the remedial measures listed in Schedule 3.5 and incorporated by reference into Schedule 3.7. Instead, Seller claims that the additional $50 million was added solely to secure Purchaser against any hitherto *unknown and undisclosed* environmental liabilities that might exist, not to include the platform deficiencies identified in Schedule 3.7 or the sanctions that might flow from File 155002. Lance WS, ¶¶ 23-24.

153. This question has more than academic significance. After the Closing, on or about May 21, 2009, OSINERGMIN levied a fine against Savia in the amount of approximately $30 million (24,758.89 Peruvian tax units) based on the observations detailed in *Oficio 8604. See* Claimant's Reply Memorial dated October 4, 2013 ("Claimant's Reply Mem."), ¶¶ 215-217. Savia appealed OSINERGMIN's resolution to the forum in Peru that hears administrative appeals, *Tribunal de Apelaciones de Sanciones en Temas de Energía y Minería* ("TASTEM"). TASTEM heard the appeal and reduced Savia's fine to 18,040.98 Peruvian tax units, roughly equivalent to $23.5 million. *Id.,* ¶ 218.

154. Savia further challenged the fine in Peru's Court of First Instance which upheld TASTEM's decision. The ruling of the Court of First Instance is currently under appeal before the Superior Court where it is reportedly still pending. *Id.,* ¶¶ 219-220. The fine remains unpaid, but will have to be paid if the Peruvian courts do not reverse the TASTEM ruling. Purchaser therefore seeks indemnification from Seller under the assumption that the fine will ultimately have to be paid.

155. Purchaser filed Indemnification Claim No. 1 relating to the Platform Maintenance Claim, and objected to the release of $24,699,352.04 from the Supplemental Escrow Amount.[26] Seller seeks an Order from this Tribunal releasing this sum.

156. Purchaser asserts several reasons why the Supplemental Escrow Amount that the parties negotiated for, and established, after Savia's receipt of OSINERGMIN's File No. 155002, was intended to stand

[26] Seller calculated the fines to be $23.5 million at the exchange rate in effect on April 8, 2013.

as security for, among other undisclosed environmental liabilities, the ultimate fine that might be levied by reason of the platform maintenance deficiencies noted in *Oficio 8604.*

157. First, the threatened scuttling of the transaction and the very existence of the Supplemental Escrow Amount that added $50 million to the $100 million Escrow Amount initially established under the SPA, was negotiated because of OSINERGMIN's filing of its sanctions proceeding. Under these circumstances, it is absurd, argues Purchaser, to conclude that the Supplemental Escrow Amount was not established specifically to cover this potential liability. Indeed, the drafts of the First Amendment that were exchanged reflect a specific recitation that the additional sum was intended to cover that liability (as well as any other "undisclosed" liabilities).

158. Second, Purchaser contends that Schedule 3.7 did not fairly disclose the seriousness of an OSINERGMIN sanctions proceeding. Purchaser's expert, José Luis Salazar Ramirez, explained the distinction between "observations," such as those in *Oficio 8604* (disclosed in Schedule 3.7 to the SPA) and sanctions proceedings such as those instituted by OSINERGMIN in File 155002. The former are routine matters that do not imply the imposition of fines, while the latter are much more serious proceedings that could well lead to significant liability.

159. Third, Mr. Lance's own email of February 3, 2009 to Purchaser's representatives after their threat not to close the transaction lulled Purchaser into a false sense of security. As Mr. Lance explained,
[T]here are no new issues in the letter [from OSINERGMIN] informing us of the initiation of administrative procedure. This type of procedure is routine and we have worked through these types of proceedings in the past. This type of proceeding is subject to a defined administrative process and there is no immediate action, sanction or fine. We are extremely confident in our ability to manage this issue. We strongly caution you against jumping to conclusions or extreme reactions based on this letter.

160. Fourth, Purchaser argues that an examination of the so-called Closing Letter which the parties executed at the Closing confirms that Seller cannot rely on Purchaser's alleged prior knowledge of the condition of the marine platforms—whether from its own inspections or the infirmities listed in Schedule 3.7 and *Oficio 8604*— to avoid its indemnification obligation. That Closing Letter stated in pertinent part:

> Purchaser does not waive and shall not be deemed to have waived any right to indemnification under applicable provisions of the Stock Purchase Agreement for any breach of any of [Offshore's] representations or warranties under Sections... 3.7... regardless of whether Purchaser was aware of any such breach at the time of Closing.
>
> JTEX 0109.

161. Seller on the other hand argues that the $50 million addition to the Escrow Amount was decidedly not for the payment of any fine that might arise out of the OSINERGMIN proceeding relating to File 155002. First, Purchaser, when confronted with the commencement of the administrative sanctions procedure, initially demanded that Seller deposit an additional amount (the Supplemental Escrow Amount) of $100 million (later reduced to $50 million) to secure losses from the OSINERGMIN proceeding, File No. 155002. An early draft of the First Amendment, which created the Supplemental

Escrow Amount, provided for an additional deposit of $50 million "which sum may be applied solely to claims that Seller is obligated to pay... that result from (i) a sanction made in the administrative proceeding [File 155002]... provided such sanction is a breach of Section 3.7... or (ii) any material breach of Section 3.7 (an 'Undisclosed Environmental Matter')...." Respondents' Counter-Mem., Ex. 251.

162. By contrast, the final version of the First Amendment provides that the Supplemental Escrow Amount "may be applied solely to claims that Seller is obligated to pay... that result from a breach of § 3.7 (an 'Undisclosed Environmental Loss')...." *Id.,* JTEX 0002. Thus, argues Seller, the parties rejected the version of the First Amendment that would have created the Supplemental Escrow Amount of $50 million specifically to secure any loss that might arise from File 155002. Instead, says Seller, the final version of the First Amendment makes it clear that any loss from File 155002 was excluded and that the Supplemental Escrow Amount was only created to secure losses that might be incurred from Undisclosed Environmental Loss[es], *i.e.* those resulting from a breach of § 3.7.

163. Second, Seller argues that the Platform Maintenance Claim was neither undisclosed, nor resulted from a breach of § 3.7. Instead, Seller contends that Schedule 3.7 of the SPA fairly disclosed all of the information needed to inform Purchaser that most of the marine platforms were in need of repair or remediation, and that the deficiencies listed in *Oficio 8604* might well lead to further enforcement proceedings.

164. Much of the hearing involving this claim involved dueling experts who opined on the nature of OSINERGMIN administrative sanction proceedings, and whether the information disclosed through Schedule 3.7 (in light of the reassuring statements made by Mr. Lance in his email of February 3, quoted above) should have put Purchaser on notice of the imminent nature of the sanction that was ultimately imposed.

165. In reviewing and resolving the parties' respective contentions, the Tribunal believes that the language of the SPA, the Closing Letter and the First Amendment to the SPA, respectively, must guide its analysis, particularly in light of Purchaser's decision to base its claims on contractual theories of liability. [27]

166. Three provisions of the SPA are key to understanding the nature and extent of the warranties given by Seller as they relate to the Platform Maintenance Claims. [28] Under § 3.7, Seller warranted that,

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[27] Purchaser's contentions may be summarized as follows:
1. Seller breached § 3.7 of the SPA at the signing and at the Closing by failing to:
a) set forth in Schedule 3.5 the violations asserted in File No. 155002; and
b) disclose the Petro-Tech Report in which Seller had allegedly admitted violations of applicable environmental laws.
2. Seller breached § 3.5 of the SPA at Closing by failing to:
a) schedule the distinct and separate administrative sanctions proceeding commenced by File No. 155002 (the "sanctions proceeding"); and
b) disclose the sanctions proceeding as a "threatened" proceeding.
Respondents' Opposition to Seller's Post-Hearing. Mem., at 1-18.
Seller contests each of these contentions. *See* Claimant's Post-Hearing. Mem., at 1-19.

[28] SPA §§ 3.5, 3.7 and 6.2 provide in relevant part:
Section 3.5: "Except as disclosed on Schedule 3.5, there are no claims, causes of action, suits, audits, demands, arbitrations, mediations, inquiries, investigations or proceedings (each an "**Action**") pending before any Governmental Authority, mediator or arbitrator or to Seller's knowledge threatened."
* * *
Section 3.7: "Except as set forth on Schedule 3.7, to Seller's knowledge, the PT Group has complied with, and the operation of the Assets has been in compliance with, all applicable Environmental Laws."

except as disclosed in the accompanying schedule (which incorporated by reference the disclosures contained in Schedule 3.5), the PT Group was to Seller's knowledge in compliance with all applicable Environmental Laws. Schedule 3.5 in turn clearly disclosed the existence of an administrative proceeding *(Oficio 8604)* by which Petro-Tech was notified of certain observations of its non-compliance with environmental laws and invited to demonstrate either that the observations were incorrect or that it would take appropriate action to lift them. Although Petro-Tech informed the regulatory authorities on the day the SPA was executed (by submission of the Petro-Tech Report) that in certain particulars it would not contest or take corrective action with respect to at least some of the observations, this Report was not provided to Purchaser until sometime after the execution of the SPA.

167. The Tribunal notes that Purchaser's claims are all based in contract. In restricting its claims to contractual theories of liability, Purchaser has avoided certain problems of reliance since, as it correctly notes, "[a]t the signing of the SPA, the parties agreed to the terms of the transaction, including the purchase price of a 'certain value based on information furnished by the seller.' *See CBS Inc. v. Ziff-Davis Publ'g Co.,* 553 N.E.2d 997, 1002 (N.Y. 1990) *("Ziff-Davis")* ('[T]he warranties... were express terms of the bargain and part of what [the buyer] contracted to purchase.')." Respondents' Opposition to Seller's Post-Hearing Mem., n. 2.

168. As Judge Rakoff explained in discussing *Ziff-Davis* in a later case:

> [In] *CBS Inc.* v. *Ziff-Davis Publishing Co.,...* the New York Court of Appeals held that a buyer can recover for breach of warranty even if the purchaser had formed doubts as to the truth of the warranted facts prior to the closing. To hold otherwise, "would have the effect of denying the express warranties of their only value to [the purchaser]—i.e., as continuing promises by [the seller] to indemnify [the purchaser] if the facts warranted proved to be untrue." *Id.* at 506, 554 N.Y.S.2d 449, 553 N.E.2d 997. The Court of Appeals adopted the "basis of the bargain" approach to this issue, holding that "[t]he critical question is not whether the buyer believed in the truth of the warranted information.... but whether [the buyer] believed [the buyer] was purchasing the [seller's] promise [as to its truth]." *Id.* at 503, 554 N.Y.S.2d 449, 553 N.E.2d 997.
>
> The exception to the *Ziff-Davis* rule is if a "buyer closes on a contract in full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty." *Galli* v. *Metz,* 973 F.2d 145, 151 (2d Cir. 1992).
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> *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB,* 892 F.Supp.2d 596, 604 (S.D.N.Y. 2012) ("*Flagstar*")[29].

169. As this passage indicates, *Ziff-Davis* and its progeny focus primarily on the effect of a buyer's knowledge on its indemnification rights, not on the scope of a seller's disclosure obligation and the adequacy of its disclosure in the first instance. These cases represent attempts by New York courts to grapple with the problem of "sandbagging," i.e., the circumstances in which a Purchaser is entitled to indemnification even though it proceeds to closing with knowledge of a breach of

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* * *

Section 6.2: "At the Closing... Seller shall deliver:...
(m) A certificate executed by Seller as to the accuracy of the representations and warranties of the PT Group as of the Closing."

[29] *The Closing Letter (JTEX 0109) precluded any application of "[t]he exception to the Ziff-Davis rule" noted by Judge Rakoff, but, for reasons set out below, this circumstance does not in itself establish a breach.*

warranty. But this question is separate from (and analytically subsequent to) the initial question of the adequacy of Seller's contractual disclosures. As *Flagstar* suggests, if there are no "warranted facts" whose untruth has been established, then no indemnity obligation has been triggered, and the effect of any knowledge Purchaser obtained prior to Closing is irrelevant.

170. Under New York law, which governs the agreement here, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *UBS Financial Services, Inc. v. West Virginia University Hospitals, Inc.,* 660 F.3d 643, 649 (2d Cir. 2011). Under the plain language of SPA § 3.7, Seller warranted that it had complied with all applicable environmental laws except as disclosed in Schedule 3.7. Under the plain language of SPA § 3.5, Seller undertook to disclose all Actions (as that term is defined by the contract) of which it had knowledge. By virtue of SPA § 6.7, Seller undertook to provide a certificate confirming the accuracy of its representations and warranties, including those provided under SPA §§ 3.5 and 3.7, as of the date of the Closing. As previously indicated, the existence of the *Oficio 8604* proceeding, as well as the range of potential fines at risk in the event that proceedings should mature into a sanctions proceeding, were clearly disclosed by Seller and cannot, in and of themselves, form the basis of any claim of breach founded on a failure to disclose.

171. This, however, does not end the inquiry. Purchaser contends that Seller breached its contractual obligations by allegedly failing: (1) to disclose in a timely manner the contents of the Petro-Tech Report; and (2) to amend the §§ 3.5 and 3.7 Schedules prior to Closing. As such, Purchaser has challenged the adequacy of Seller's disclosures as a matter of New York contract law. We treat each of these two alleged failures in turn.

1. The Alleged Failure to Make Timely Disclosure of the Contents of the Petro-Tech Report

172. Purchaser has cited only one precedent for the specific question of whether Seller's Schedule 3.5 and 3.7 disclosures were insufficient as a matter of New York contract law. Purchaser cites the *Flagstar* decision for the proposition "that, in contravention of its warranty that there were no errors, negligence, or fraud associated with certain loans, a bank failed to meet its disclosure obligations under the warranty, where the bank had provided 'data' and 'detailed loan information' to the mortgage loan insurer but had not disclosed additional information that actually revealed the existence of errors and fraud." Respondents' Counter-Mem. at 57 (emphasis supplied). But *Flagstar* focuses on issues of New York insurance law and is largely about causation in the context of a motion for summary judgment. The court there held only that there was a triable issue of fact, even though in doing so it did provide some initial guidance on New York warranty law:

> Viewing the facts in the light most favorable to [the Purchaser, it] obtained the representations and warranties to ensure the quality of the loans in part because its reviews were not comprehensive. Moreover, the representations and warranties do not mention [the Purchaser's] due diligence. [The Purchaser] obtained those representations and warranties even after conducting its own diligence review.
>
> *Flagstar,* 892 F.Supp.2d at 603.

173. The fact remains that the court in *Flagstar* never reached the substantive issue of whether or not Seller there had failed to meet its disclosure obligations. This Tribunal must therefore look elsewhere to determine the adequacy—as a matter of New York contract law—of Seller's disclosure.

174. Purchaser's decision to ground its liability theories in contract has a clear impact on our analysis. Although Purchaser makes frequent reference to oral statements by Seller's representatives about how the issues raised by *Oficio 8604* were "manageable," Purchaser has asserted no claim of fraudulent misrepresentation or other tort-based theory. New York law is clear that such verbal statements cannot change the scope of warranty protection that flows from the written undertakings set out in the text of the agreement itself. *See Ambac Assur. Corp. v. DU Mortgage Capital, Inc.,* 33 Misc. 3d 1208(A), 939 N.Y.S.2d 739, (Sup. Ct. 2011), 2011 N.Y. Slip Op. 51815(U) at 6, *rev'd on other grounds,* 102 A.D.3d 487, 956 N.Y.S.2d 891 (2013) *("Ambac") (citing Siemens Westinghouse Power Corp.* v. *Dick Corp.,* 299 F.Supp.2d 242, 247 (S.D.N.Y. 2004) ("Where there is a meaningful conflict between a written contract and prior oral representations, a party will not be deemed to have justifiably relied on the prior oral representations."). [30] Seller's disclosure of *Oficio 8604* and the observations contained in it provided clear notice of the PT Group's non-compliance with environmental laws in the areas described by the *Oficio.* Absent proof by Purchaser that the disclosure was inadequate or misleading as a matter of New York *contract* law, there is no basis for a finding of breach here.

175. Although § 161 of the Restatement (Second) of Contracts indicates that there are limited instances in which a misrepresentation through non-disclosure may rise to the level of a breach of contract, the special circumstances covered by § 161 have not in the Tribunal's view been established here. Section 161 provides:
Misrepresentation

§ 161 When Non-Disclosure is Equivalent to an Assertion

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

(a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them. [31]

[30] Purchaser's contentions concerning why the Petro-Tech Report should in Purchaser's view have been disclosed suggest the "special facts doctrine," under which a Seller has a disclosure duty where its "superior knowledge of essential facts renders a transaction without disclosure inherently unfair." *Ambac,* Slip Op. at 10, *quoting Swersky* v. *Dreyer and Traub,* 219 A.D.2d 321, 327 (1st Dept. 1996). But the special facts doctrine likewise sounds in tort, not contract.

176. Schedule 3.5 as incorporated into § 3.7 of the SPA provided Purchaser with notice that Seller was not in environmental compliance with the matters covered by the *Oficio 8604* observations.[32] The Tribunal fails to see how the failure to disclose the Petro-Tech Report was tantamount to the non-disclosure of a material fact since Purchaser was already on notice of OSINERGMIN's allegations of non-compliance with respect to all of the observations. As *Republic of Palau* indicates, § 161 of the Restatement (Second) requires a non-disclosure that effectively renders the initial representation false. The Petro-Tech Report cannot for the reasons already stated establish that falsehood, since the Report simply (at most) provided further evidence of non-compliance. Respondents, as sophisticated purchasers, may well have placed too much confidence on Seller's pre-contractual statements that there was no need to worry about the disclosed non-compliance, but those statements have already been shown to be irrelevant to establishing the scope of the warranties themselves, which are set out in plain and unambiguous language in SPA §§ 3.5 and 3.7.[33]

177. Purchaser has neither invoked Restatement § 161 nor attempted to establish any of the specific misrepresentation scenarios set out in that provision, and the Tribunal finds that no contractual misrepresentation within the meaning of that provision has been established on the record before it.

2. Seller's Failure to Amend the Schedules to Disclose the Existence of Proceeding 155002

178. Purchaser also asserts that Seller breached the SPA by failing to amend Schedules 3.5 and 3.7 prior to Closing to separately disclose the initiation of the sanctions phase through Proceeding 155002. This claim is based on Purchaser's reading of SPA § 3.5, which sets out the kinds of proceedings or events that are to be disclosed, and then qualifies this list of plural nouns with the parenthetical (each an "Action").[34] Purchaser submits that, because the SPA requires that *each* such Action be disclosed, the failure of Seller to separately list Proceeding 155002 resulted in a breach of the SPA.

179. The Tribunal rejects this view, and concludes that the parenthetical language contained in § 3.5 of the SPA was intended to be definitional only, that is, "(each an Action)" was intended to avoid any need to repeat the list of plural nouns that precedes the parenthetical language when, elsewhere in the agreement, the same universe of proceedings or events is relevant.[35] As such, the appearance of the word "each" within the parenthetical provides no meaningful guidance as to the underlying

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[31] *Restatement (Second) of Contracts* § 161. Section 161 has been cited with approval by New York courts, including the federal district court in *Morgan Guar. Trust Co. of N.Y.* v. *Republic of Palau,* 657 F. Supp. 1475, 1483 (S.D.N.Y. 1987) (denying summary judgment where half-truth resulting from non-disclosure might be regarded as crossing the line from nondisclosure to active false assertion of fact).

[32] The reasons why as a matter of Peruvian law the observations set out in *Oficio 8604* established non-compliance with Peruvian environmental norms are discussed *infra* at § C.3..

[33] Put another way, Seller provided no express warranty of the truthfulness and reliability of its oral statements that the potential liabilities triggered by *Oficio 8604* were "manageable," (whatever that term might have meant in the context of the parties' negotiations). In the absence of such contractual language, the Tribunal may not read into the SPA such an undertaking.

[34] Section 3.5: "Except as disclosed on Schedule 3.5, there are no claims, causes of action, suits, audits, demands, arbitrations, mediations, inquiries, investigations or proceedings (each an 'Action') pending before any Governmental Authority, mediator or arbitrator or to Seller's knowledge threatened."

[35] For example, in SPA § 8.3(b), Respondents agreed to provide written notice of any "Action" asserted by a third party promptly but not later than ten (10) Business Days after receipt. *See also,* SPA Annex A ("Definitions") ("'Action' shall have the meaning set forth in Section 3.5").

purpose of § 3.5.

180. The Tribunal derives the plain meaning of § 3.5 from its language as a whole, which reflects a clear intention that Purchaser should be given notice of a wide variety of "Actions" (as that term is defined within the section itself) "whether pending... or to the seller's knowledge threatened." There is no reason based on this clear language to believe that Purchaser, once placed on notice of a pending or threatened "Action," was entitled to require Seller to separately schedule different phases or manifestations of legal exposure arising from the same set of facts. The fact that the Parties inserted the parenthetical *before* they referred to "pending or threatened Actions" reinforces our finding that their use of the word "each" was not intended to require that threatened actions be "re-disclosed" once they become actual proceedings. Purchaser bargained for a wide universe of legal exposures as to which it was entitled to receive notice, whether pending or threatened. But this is not to say—and the plain language of the Agreement does not establish—that it bargained for what would amount to overlapping and duplicative notice. By obliging Seller to provide notice of threatened Actions of which Seller had knowledge, Purchaser bargained for and obtained the earliest possible notice of potential liabilities. There is no basis in the plain language of the SPA to conclude that Purchaser was, after receiving such notice, entitled to be re-noticed once a threatened proceeding matured into a pending one.

181. The record here clearly reflects that Schedule 3.5 placed Purchaser on notice of *Oficio 8604* and disclosed both of the regulations that would ultimately form the bases for sanctions imposed in Proceeding 155002, including the range of potential fines that might result. By any fair reading of the SPA and its Annexes, Seller thus provided adequate notice of the "threatened" Action that later matured into Proceeding 155002, and thereby gave adequate notice of that eventual proceeding itself through its initial disclosure. Any attempt by Purchaser to suggest that it was hoodwinked by Seller's oral statements into underestimating the importance of what had been disclosed cannot, for reasons already explained, alter the core finding that adequate disclosure was made in the initial schedules and that there has been no established falsehood of any warranted fact.

3. Peruvian Law Aspects

182. Although much time was spent by both parties in debating the impact of Peruvian administrative law on the issue of whether separate disclosure of Proceeding 155002 was required under the SPA, we conclude for the reasons discussed below that the Peruvian law aspects of the debate do not alter our conclusion that no violation of the SPA occurred with respect to the Platform Maintenance claims.

183. Law 26734, §§ 5 and 34, invests OSINERGMIN with the responsibility to verify compliance with legal and technical provisions of Peruvian environmental law in the electricity, hydrocarbon and mining sectors, as well as the responsibility to penalize noncompliance with such provisions. *See* Expert Opinion of Dr. Ada Alegre Chang dated September 26, 2013 ("Alegre Opinion"), ¶¶ 11-14; JTEX 0455, at 2-3.

184. OSINERGMIN exercised its supervisory authority through a number of formal actions, including the inspection visits, and issuance of *Oficio 8604* and *Informe Técnico Sancionador No. 155002-2009.*

The latter found that the various breaches to Articles 171 and 217 were ongoing, and that Petro-Tech's continuing failure to comply with those regulations constituted sanctionable infractions, as a result of which OSINERGMIN recommended the commencement of the administrative sanction proceeding. JTEX 0100.

185. OSINERGMIN's separate oversight and sanctioning powers are defined by Article 36 of the Regulations approved by Supreme Decree 054-2001-PCM, which authorizes OSINERGMIN to impose penalties on individuals or entities conducting production activities within its scope of responsibility for noncompliance with legal or technical requirements, including obligations arising from concession agreements or regulatory provisions issued by OSINERGMIN. *See* Alegre Opinion, ¶ 23.

186. Under §§ 28.3, 28.4 and 28.5 of the Regulations approved by Resolution 324-2007-OS/CD (JTEX 0462), OSINERGMIN may in exercising its sanctioning power chose either to:
a. Notify the company of the identified violations and provide a specific cure period, with the result that the agency may exercise its oversight and sanctioning powers upon the expiration of that period; or

b. Immediately exercise its oversight powers by commencing an administrative sanction proceeding where it has concluded that the violations have occurred repeatedly or are punishable administrative violations warranting the imposition of an immediate sanction.

See Alegre Opinion, ¶ 26.

187. In exercising its oversight and sanctioning authority, OSINERGMIN issued *Oficios Nos. 07-2009* and *25-2009,* and eventually imposed fines for the violations first identified during the supervisory phase by issuing Resolution No. 002775. JTEX 0129. After appeal by Petro-Tech, TASTEM upheld the fines by Resolution No. 319-2010-OS/TASTEM and thereby concluded the administrative process. JTEX 0211, 0212.

188. The fact that these two series of events arose under separate statutory bases of authority does not, in the Tribunal's view, alter the reality, discussed in detail below, that each was the result of non-compliance that: (i) predated the issuance of *Oficio 8604;* and (ii) was disclosed to Purchaser no later than the signing of the SPA.

189. Under Peruvian law, an administrative violation occurs upon a failure to comply with a legal or regulatory provision. As such, it is incorrect to suggest that a violation has taken place only upon one of the following, alternative (and subsequent) events: the identification of the noncompliance by the regulating authority; the issuance of notice by the authority to the noncomplying entity; or the commencement of a sanctions proceeding. Alegre Opinion, ¶ 6.

190. Petro-Tech was instructed to comply with the orders contained in *Oficio No.8604-2008* because the SERMABU investigation had led OSINERGMIN to conclude that there were ten ongoing instances of non-compliance. The *Oficio* ordered Petro-Tech to adopt certain measures in order to bring itself into compliance.

191. The Tribunal's finding that the alleged non-compliances had arisen even before *Oficio 8604* was issued is consistent with Article 28.3 of OSINERGMIN's Supervisory Regulations, which provides:

> 28.3.- The respective Management Office for Oversight, the Adjunct Management Office for Tariff Regulation or equivalent area are authorized to issue Reports if they detect observations or situations that violate the current legal and technical framework, and must set forth the applicable provisions for the remediation of all of the instances of non-compliance by the supervised companies." JTEX 0462 at 14-15 (emphasis added)

192. Purchaser's expert, Jorge Danos testified that:

> 11. OSINERGMIN's supervisory function entails finding objective facts, collecting data, supervising, investigating, and, especially, auditing the performance of a regulated activity. Its purpose is to prevent the commission of administrative violations and to ensure compliance with the law. In contrast, the sanctioning power is exercised to punish regulated entities when there is sufficient certainty to affirm that there are transgressions of the legal order or injury to certain legally protected interests recognized by said legal order. (emphasis added)
>
> 12. Notice 8604 did not detect administrative violations, given that it was issued within the framework of an administrative supervisory proceeding and not as part of an administrative sanction proceeding. According to numeral 3 of article 28 of the Supervisory Regulations of OSINERGMIN, Notice 8604 detected "observations," that is to say findings, suggestions, and technical recommendations that are made within the framework of a supervisory visit, but not "situations that violate the current legal and technical framework."

193. The Tribunal disagrees with Mr. Danos' interpretation of *Oficio No.8604-2008* (and of Article 28.3, under which OSINERGMIN was acting in issuing that order). His proffered interpretation is inconsistent with the plain language of the enabling provision quoted above, which empowers OSINERGMIN to "issue Reports if they detect observations or situations that violate the current legal and technical framework, and must set forth the applicable provisions for the remediation of all of the instances of non-compliance by the supervised companies." JTEX 0462 at 14-15.

194. Petro-Tech was given 60 days to rectify all the identified instances of non-compliance that were detailed in the *Oficio's* observations. It would have been illogical for the Regulator to have ordered affirmative remedial action by Petro-Tech if the company had in the regulator's view been in compliance with applicable legal norms.

195. The specific language set out by OSINERGMIN in *Oficio No. 8604* demonstrates the affirmative nature of the remedial action imposed on Petro-Tech (and the correlative non-compliance that prompted the instruction). Thus, for example, the first four "observations" noted:

> a. The platforms 3J of Littoral A2 of Pena Negra and NPBX of Paita **must be intervened upon on an emergency basis** before they collapse.
>
> b. Petro-Tech Peruana SA **must reformulate its Program of maintenance** of 2008, giving priority to the platforms that do not count with any type of corrective maintenance 52 platforms and must intensify the replacement of the Anodes in the platforms, given that in 23 of the platforms examined

(30.67%) there is evidence of wear beyond the permissible amount (80%).

c. Petro-Tech Peruana SA must conduct a Study of structural loads for each platform to ensure the reliability of the use of these installations in the Exploration and or Exploitation of Hydrocarbons. It is also important to complement the study with an analysis of risks taking into account also the last inspections. This analysis entails the evaluation of the vulnerability of the structures of the dangers to which they are exposed and of the economic consequences of the damage that these dangers could cause.

d. Petro-Tech Peruana SA must have diving equipment with sufficient capacity and infrastructure to be able to realize the subaquatic work necessary to maintain the platforms in good operating condition.

(Emphasis added.) This mandatory language of remediation contradicts Purchaser's assertion that *Oficio 8604* was intended merely "to *prevent* the commission of administrative violations."

196. Moreover, while OSINERGMIN exercised its supervisory and sanctioning powers under separate applicable Regulations and during procedures grounded in distinct bases of legal authority, it was in both instances responding to the same allegations of noncompliance identified by *Oficio 8604.*

197. During the supervisory procedure Petro-Tech had the opportunity to: (i) file its *Programa de Mantenimiento de Plataformas Marinas 2008* before OSINERGMIN; (ii) rectify all the breaches to Articles 171 and 217 of the Regulations approved by Supreme Decree 032-2004-EM; and (iii) reply to *Oficio No. 8604-2008* though a submission (the Petro-Tech Report) addressing each observation.

198. During the sanctioning procedure, Petro-Tech had the opportunity: (i) to prove that it had complied with *Oficio No. 8604-2008* by having rectified breaches to the applicable regulations; (ii) to file its challenges to the accuracy or appropriateness of the *Informe Técnico Sancionador* and the *Informe Técnico Ampliatorio;* and (iii) to appeal OSINERGMIN's Resolution No. 002775, before the TASTEM.

199. As such, even though the sanctioning procedure (unlike the administrative supervisory procedure) represented an administrative process in the form of a trial, the two procedures were not in the opinion of the Tribunal separate "Actions" within the meaning of the SPA, but rather were part of an integrated process intended to resolve the questions of non-compliance raised by *Oficio 8604.*

4. The Relevance of the First Amendment to the SPA

200. Respondent devoted substantial effort both in its submissions and at the hearings to presenting what it describes as "the overwhelming evidence showing that the Parties increased the Escrow Amount specifically as a response to the commencement of the File No. 155002 administrative sanction proceeding." Respondents' Opposition to Seller's Post-Hearing Mem., ¶ 9 (citing Respondents' Post-Hearing Mem., ¶¶ 2-6; 16); *see also* Respondents' Rejoinder Mem., ¶ 106, *et seq.*

201. Although the negotiation of the First Amendment to the SPA was triggered by the commencement

of the administrative sanctions proceeding, any change to the parties' respective rights and obligations could only flow from the text of the Amendment itself, which the Tribunal finds to be unambiguous.

202. Section 2.3 (b)(i)(b) of the First Amendment required the delivery of:
(b) an additional sum of $50,000,000 to the Escrow Agent (the "Supplemental Escrow Amount") pursuant to the Escrow Agreement which sum may be applied solely to claims that Seller is obligated to pay pursuant to Article 8 of this Agreement and that result from a breach of Section 3.7 (an "Undisclosed Environmental Loss").

203. As this language makes clear, while the *amount* of protection Purchaser obtained through the escrow mechanism was increased with the execution of the First Amendment to the SPA, the *scope* of the protection it enjoyed did not increase beyond the protection already granted under § 3.7 of the SPA. As Claimant properly suggests, *"Offshore 's duty under SPA §3.7... was only to disclose any knowledge it had regarding 'compliance with all applicable Environmental Laws.'"* Claimant's Post-Hearing Mem., ¶ 3. The Tribunal, for reasons already discussed, has concluded that there was adequate disclosure by Seller in this regard. The fact that the First Amendment increased the amount of protection enjoyed by Purchaser—for a failure to disclose that did not occur- has no impact on our core finding that Seller complied with § 3.7 of the SPA.

204. For the reasons set forth above, the Tribunal rejects Purchaser's Platform Maintenance claims.

D.The Remaining Basket Claims

1. The Pipeline Abandonment and EIS Environmental Claims

205. In addition to the Platform Maintenance Claim (OSINERGMIN File No. 155002 discussed in the preceding section), Purchaser asserted two other environmental claims. One, designated File No. 156054, concerned Savia's alleged failure to comply with a plan for the partial abandonment of certain old pipelines that Savia had placed onshore (the "Pipeline Abandonment Claim"). The other, designated File No. 155557, concerned Savia's alleged failure to comply with an environmental impact study (the "EIS Claim").[36] The EIS Claim alleged that Savia had failed to comply with regulatory requirements regarding the handling of certain toxic substances. The violations were first detected during an OSINERGMIN inspection conducted on February 12-13, 2008. Hamann First WS, ¶¶ 63-67.

206. Savia first became aware of the Pipeline Abandonment Claim after the Closing on March 17, 2009 when it received an official notice from OSINERGMIN. Savia first became aware of the EIS Claim on February 27, 2009 in the same way. *Id.*

207. Savia responded to these claims by engaging a law firm to appear at hearings before TASTEM. The

[36] A third environmental claim known as the Platform Sinking Claim arising out of the sinking of Platform A-3, is not being asserted in this arbitration. Purchaser, however, reserved its right to seek indemnification from Seller in other proceedings. Statement of Facts, ¶ 344.

majority of the work, however, which included the collecting of evidence, was performed in-house. *Id.,* ¶ 71.

208. Purchaser notified Seller of the environmental claims by Claim Notice No. 1 dated December 11, 2009. *Id.,* ¶ 73. By letter dated January 25, 2010, Seller refused to defend the environmental claims or to indemnify Purchaser. Statement of Facts, ¶ 356; JTEX 0159.

209. According to Mr. Hamann, Savia's General Counsel at the time the Claim was made, Seller was aware of the facts underlying the environmental claims when Seller still controlled Savia. Hamann First WS, ¶ 76. *See also,* Statement of Facts, ¶ ¶ 350-351.

210. According to Purchaser's estimates, the maximum potential penalty for the Pipeline Abandonment Claim was $12,241,379.31, and the maximum potential penalty for the EIS Claim was $32,439,655.17. Hamann First WS, ¶ 77.

211. Savia mounted a defense to these claims and, on March 26, 2010, it received Resolution No. 006925 from OSINERGMIN relating to the Pipeline Abandonment Claim. OSINERGMIN imposed a fine of only $20,222.06. Savia was entitled to a discount of twenty-five percent if it paid the fine by April 19, 2010. Purchaser paid the fine and Seller subsequently gave its consent. Statement of Facts, ¶ 359. The total paid was $15,166.55. Hamann First WS, ¶¶ 85-86;

212. Savia also received Resolution No. 008852 regarding the EIS Claim on October 19, 2010. OSINERGMIN imposed a fine of approximately $300,000. Savia paid $224,341.07 after taking the twenty-five percent discount. Seller in this case gave Purchaser advance permission to pay the fine. *Id., ¶¶* 87-88. Statement of Facts, ¶ 361.

213. These amounts totaled $239,507.62.

2. The Health and Safety Claims

214. OSINERGMIN commenced forty-five separate administrative sanction proceedings in respect of alleged violations of worker health and safety regulations which occurred while Seller controlled the PT Group. These fell into two broad categories: (1) claims relating to Savia's purported failure to provide proper training, equipment and safety instruction to workers; and (2) claims relating to Savia's purported failure to report worker accidents. OSINERGMIN notified Savia of the commencement of these Health and Safety Claims between February 2009 and January 2010. Hamann First WS, ¶ 68. Savia's managers would have known of the violations at the times they occurred. *Id.*

215. Purchaser notified Seller of forty-four of these Health and Safety Claims by Claim Notice No. 3 dated December 23, 2009. The Claim Notice was updated on February *4,* 2010 to add the forty-fifth claim. *Id., ¶* 73.

216. Purchaser calculated the maximum potential penalty for the Health and Safety Claims to be $15,760,699.77. *Id., ¶* 79.

217. All of the Health and Safety Claims were resolved for only $50,000. In addition, Savia incurred attorneys' fees, costs and expenses of $85,000. *Id., ¶* 92. Purchaser did not seek Seller's consent before agreeing to pay $50,000 in settlement. Hamann First WS, ¶ 94.

218. Seller asserts two essential defenses to the payment of these claims (all three of which are subject to the Basket requirement in SPA § 8.5(a)). First, Seller defends on the grounds that Purchaser's assertion of the claims was untimely under SPA § 8.3(b).[37] Seller also contends that Purchaser did not solicit and receive advance permission to settle two of the claims in accordance with SPA § 8.3(d)—the Pipeline Abandonment Claim, the settlement of which Seller approved only after Purchaser had agreed to the settlement and paid it, and the Health and Safety Claims which Seller never approved.

219. Seller asserts that both the notice requirement, and the requirement that Seller approve of any settlement prior to its consummation, constitute conditions precedent to payment of the claims. Purchaser denied that either of those covenants constituted a condition precedent and asserted that neither a breach of the notice provision nor the failure to give Seller advance notice prior to settling a claim prejudiced Seller in any way.

220. As for Seller's contention that the time to assert the claims, and the prior notice to settle provisions, constitute conditions precedent, the analysis must begin with the general New York rule that "conditions [precedent] are not favored under New York law, and in the absence of unambiguous language, a condition will not be read into the agreement." *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.,* 660 N.E.2d 415, 418 (N.Y. 1995). A condition precedent exists only where "there is clear language showing that the parties intended to make [a contractual duty] a condition." *Travelers Cas. & Sur. Co. v. Dormitory Auth.- State of New York,* 735 F.Supp.2d 42, 74 (S.D.N.Y. 2010).

221. In support of its contention that §§ 8.3(b) and 8.3(d) constitute conditions precedent, Seller cites the prefatory language in § 8.2 of the SPA which states, "Subject to the limitations set forth in Article 8 and Section 10.16, following the Closing, Seller agrees to defend, indemnify and hold harmless each PT Group Member... from and against and all Losses" (emphasis added). While words such as "subject to" can sometimes be read as reflecting a condition precedent, this generalized language, which appears only in the introduction to § 8.2, is insufficient to overcome the requirement that a condition precedent be set forth in unambiguous terms. Such unambiguous language does not appear in either §§ 8.3(b) or 8.3(d), and the Tribunal will not read a condition precedent into either of those sections, especially in the absence of any significant consequences to the defaults.

222. There was no evidence that the late notice that Seller received prejudiced it in any way.[38] Neither was there evidence that Seller's failure to obtain Purchaser's advance approval for either the Pipeline Abandonment Claim or the Health and Safety Claims resulted in any adverse consequences. Indeed, Seller did approve of the Pipeline Abandonment Claim settlement after its payment, and settling the Health and Safety Claims—claims which gave rise to a potential liability of over $15 million—for $50,000 can hardly be characterized as prejudicial.

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[37] Under SPA § 8.3(b), a party seeking indemnification for a third-party claim must give the Indemnify Party prompt notice, but in any event not later than ten Business Days after the receipt of written notice of such Third Party Claim. Purchaser gave its notices (Claims 1 and 3) after the ten-day period had elapsed.

[38] SPA § 10.19 contains a general "Time of Essence" clause. However, this general term is insufficient to impose the need for strict compliance with the notice requirement alleged to apply to the Health and Safety Claims.

223. As neither of the cited SPA sections constitutes a condition precedent, the only basis for excusing Seller's obligation to indemnify would be if Purchaser's failure to abide by either of those sections constituted a material breach of the SPA thus excusing Seller's own performance.

224. A "material breach" is one that "goes to the essence of the contract" and "defeats the object of the parties in making the contract and deprives the injured party of the benefit that it justifiably expected." *United States v. Abady,* 2004 WL 444081 at *6 (S.D.N.Y. 2004). "Under New York law, for a breach of a contract to be material, it must go to the root of the agreement between the parties." *Frank Felix Assoc., Ltd. v Austin Drugs, Inc.,* 111 F.3d 284, 289 (2d Cir. 1997). In this case, the "root of the agreement" was the sale of the PT Group—not Purchaser's promise to notify Seller of the existence or settlement of indemnified third-party claims that might arise after the sale. We conclude that Purchaser's breaches of §§ 8.3(b) and 8.3(d) did not constitute material breaches of the SPA justifying Seller's non-performance of its third-party indemnity obligations.

225. For the reasons set forth above, Purchaser will be awarded damages for the Pipeline Abandonment Claim, the EIS Claim and the Health and Safety Claims, all subject to the Basket requirement in SPA § 8.5(a). The total amount awarded equals $374,507.62. [39]

3. The Vacation Claims

226. Under Peruvian law, Savia's employees were entitled to a paid, thirty-day vacation for every twelve month period worked. The law further provided that an employee must take his vacation within the 12 months following a year of service. [40]

227. It is the employer's obligation to see that its employees take their required vacations. If an employer fails to ensure that its employees take their required vacation, the employer owes the employees one month of salary for the year during which they failed to take their vacations. Hamann First WS, ¶¶ 95-97. Thus, for example, if an employee works for all of calendar 2011, he accrues the right to take 30 days of vacation in calendar 2012. If he then fails to take any vacation in 2012, the employer owes the employee an extra 30-days' pay on January 1, 2013. This is known as a Penalty Payment *("Indemnizacion por no descanso").* Hamann First WS, ¶ 96; Ulloa Opinion, ¶¶ 6-7. If the employee, as an example, took only 20 days of vacation in 2012, he would be entitled to a Penalty Payment of 10 days on January 1, 2013. Claimant's Reply Mem., ¶ 301.

228. Assuming the employee did not take the vacation to which he was entitled, he remained entitled to take his earned vacation, which will add to the vacations he continues to accrue as he works. This is known as the employees' "Additional Vacation Salary." Hamann First WS, ¶ 97.

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[39] This consists of $239,507.62 for the settlement of File Nos. 156054 and 155557, plus $50,000 paid-in settlement of the Health and Safety Claims plus $85,000 in costs incurred in defense of the Health and Safety Claims. Purchaser also seeks $192,858.95 in attorneys' fees paid to date in defense of the Environmental Claims. *See,* Purchaser's Reply in Further Support of Respondents' Mem. dated October 4, 2013 at n. 13. This figure, however, apparently includes the costs to defend the Platform Maintenance Claim which the Tribunal denies. Similarly, the Supplemental Hamann Witness Statement dated October 3, 2013 contains no allocation of costs or fees. Absent an allocation related to only the Pipeline Abandonment and the EIS Claims, the Tribunal has no basis to award costs to Purchaser in defense of these Claims.

[40] Thus, for example, if an employee began his service on January 1, 2007 and worked through December 31, 2007, he would be entitled to a 30-day vacation which must be taken between January 1 and December 31, 2008. Hamann First WS, ¶ 95; Expert Report of Daniel Ulloa ("Ulloa Opinion"), ¶ 5.

229. If an employee is terminated and had not taken his full accrued vacation, he is entitled to be paid for all vacations he earned and did not take. This is referred to as "Indemnity Pay," or the "Compensation Payment" *(pago por descanso adquirido y no gozado"). Id.,* ¶ 97.

230. The employer must calculate the Penalty Payments and Additional Vacation Salaries using the employee's current salary at the time of payment. Hamann First WS, ¶ 98.[41]

231. If the employer fails to require its employees to take vacation, the Ministry of Labor in Peru can also impose administrative penalties and sanctions upon the employer. *Id., ¶* 99.

232. Prior to Closing, Savia was not in compliance with the Peruvian vacation law. Some employees had not been allowed to take vacation. Other employees had taken vacation, but no records (or inadequate records) had been maintained relating to those vacations. Out of 167 administrative employees at Savia, approximately 95 were owed vacation for years prior to the sale of the company to Purchaser. *Id., ¶* 101.

233. In addition, prior to the sale, Savia had engaged in several questionable practices which exposed it to sanctions and administrative penalties. For example, some employees who had missed several years of vacation had attributed their most recent vacation to the earliest year in which vacation accrued. This had the effect of adding a 30-day Penalty Payment to the employer's obligation. *Id., ¶* 102-103. As another example, Savia's practice, which was inconsistent with Peruvian law, was to pay employees Penalty Payments and Compensation Payments only when the employment relationship ended. There were also record-keeping irregularities. For example, Savia's office in Talara would record each employee as taking vacation in the same month of each year. *Id.,* ¶¶ 104-105.

234. Savia also failed to record accrued Penalty Payments as liabilities in its financial statements. *Id., ¶* 106.

235. Purchaser learned of the violations after the Closing when the Ministry of Labor conducted an inspection at Savia's Lima office on August 11, 2009. At that time the Ministry of Labor ordered Savia to pay Penalty Payments to 23 employees by August 18, 2009, a total of $41,480.45. Three other employees were paid $8,009.00 in October 2009. *Id., ¶* 108. Following the audit, Savia conducted its own internal investigation to determine if these failures evidenced a wider problem.

236. Based on the Ministry of Labor's findings and on additional information learned from Savia's internal investigation, Purchaser concluded that Seller had breached various representations and warranties in the SPA[42] and sent Claim Notice No. 8 to Seller on February 4, 2010 requesting indemnification relating to the 28 employees listed in the Schedule attached to the Claim Notice. JTEX 0171. In the Claim letter, Purchaser reserved the right to amend or supplement its Claim Notice as it learned more information. Hamann First WS, ¶ 110.[43]

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[41] That is, the payments must be calculated based on the fixed wages and the average of the variable wage (for example, overtime or commissions) of the employee at the moment of payout of those obligations. Witness Statement of José Luis Salazar Ramirez dated 20 December 2013 ("Salazar WS"). Mr. Salazar submitted three witness statements in the proceeding. *See also,* Claimant's Reply Mem., ¶ 302.

[42] These included SPA §§ 3.3(h), (1), (p), (q)(ii), (q)(iii) and 3.9. Several of these require any breach to result in a "Tier Two Material Adverse Effect." *See, e.g.,* SPA §§ 3.3(1) and 3.9 among others. Neither side made a point of this condition. Perhaps that is because several of the cited SPA sections do not have that condition, and there seems to be no dispute that there was a breach of at least one of the warranty sections.

[43] Claim Notice No. 8, at 3 of 7, contained the following paragraph:
This letter is not intended to be exhaustive in its description of all matters which may properly relate to the subject matter hereof, and

237. After sending Claim Notice No. 8, Savia began an in-depth investigation to determine the full extent of its liability. In doing so, it examined employee records dating back to 1994. In light of the poor record-keeping of the prior owner, this investigation took about a year. *Id.,* ¶ 111.

238. On January 28, 2011, Purchaser sent Seller an updated claim notice (JTEX 0246) adding additional employees and additional potential liabilities that the investigation had uncovered. Calculations were done using the methodology of vacation allocation used by Seller. *Id., ¶* 112. While the original Claim Notice sought $353,161.25 in indemnification, the updated Claim Notice requested $743,362.01 in "Total Indemnification Payments Due as of February 2009." The updated Claim Notice also informed Seller that "Purchaser was currently considering the possibility of paying the indemnification amounts... in order to resolve this contingency."

239. In May and June 2012, Savia in fact paid outstanding vacation Penalty Payments to its employees. The total amount Savia paid in Penalty Payments was $466,713.49.[44] This amount was lower than the amount in the updated Claim Notice because of certain recharacterizations and reallocations that Savia made after its internal investigation. *Id.,* ¶ 114.

240. According to Mr. Hamann, although Savia paid $466,713.49 in Penalty Payments, its total liability for violation of the vacation law was much higher. *Id.,* 118. This is because: (1) Savia, through May of 2012, had to pay Additional Vacation Salaries to employees who accrued vacation prior to the Closing *(id.);* and (2) Savia would also have to pay Additional Vacation Salaries to employees who have taken (or are yet to take) vacations after May 2012 *(id., ¶* 119).[45]

241. According to Mr. Hamann, Savia estimates its total liability for these claims at $1,157,500.68, which is the sum of (1) the Penalty Payments made to employees ($466,713.49); (2) an estimate of the Additional Vacation Salary to be paid based on May 2012 salaries ($258,117.31); and (3) an estimate of the Additional Vacation Salary to be paid after May 2012 ($432,669.88). *Id., ¶* 120. In addition Savia seeks $5,000 in attorneys' fees in connection with the Vacation Claim. *Id., ¶* 121.

242. Mr. Ulloa, Seller's expert, did his own calculations of the amounts due. According to his calculations, Savia owed the employees only $351,518.19 in Penalty Payments (rather than $466,713.49).

243. Mr. Ulloa also reduced the amount of the Additional Vacation Salaries that Savia employees were paid from Closing to May 2012. According to his calculation, that sum was only $115,474.04, assuming that the salaries were calculated based upon the salaries reflected in the employees' paystubs, and only $157,474.04 assuming that the salaries were calculated based upon the salaries reflected in settlement agreements that Savia entered into with many of its employees relating to these liabilities. These figures were to be contrasted with $258,117.31, which was the amount of the Additional Vacation Salaries that Purchaser had claimed. Claimant's Reply Mem. ¶¶ 317-322.

244. Mr. Ulloa also contended that he was denied the information needed to calculate these figures precisely *(Id.,* ¶¶ 323-327) thereby raising an inference in favor of the lower figures.

Purchaser reserves that right to supplement or amend this letter, or to tender a separate Notice of Claim and/or Notice of Third Party Claim, as circumstances warrant.

[44] Salazar WS, ¶¶ 10-15 and Annex A.

[45] The May 2012 date seems to have been selected because, according to Mr. Salazar, on that date, Savia paid the majority of the Penalty Payments based upon the results of Savia's internal investigation. Salazar WS, ¶ 21.

245. In addition to attacking the quantum of damages sought based upon the inexact nature of the numbers and Purchaser's alleged failure to produce documentary evidence, Seller advanced two additional defenses to Purchaser's vacation claims. First, Seller pointed to the fact that Purchaser's February 4, 2010 Claim Notice (Claim Notice No. 8) only claimed compensation for 28 employees,[46] not for the 95 employees for which it later sought compensation.

246. Second, Seller claims that the vacation claims are "Third Party Claims" under SPA § 8.3(b)-(d), and not primary claims under SPA § 8.3(a). As such, these claims could not have been settled without Seller's prior consent. Because Savia discharged its vacation claim liabilities by entering into settlements with many of its eligible workers without Seller's approval, Seller argues that this violated the proscription in SPA § 8.3(b)-(d).

247. As for Seller's first defense—that Purchaser is limited to compensation only with respect to those 28 workers named in the original Claim letter—SPA § 8.3(a) only requires Purchaser to "describe [its Claim] in reasonable detail to the extent then known" and then to "set forth an estimate" of its "Losses." "Losses" are defined to include liabilities that are "unmatured," "unaccrued," "unliquidated" or "unknown." SPA § 8.2(a) and SPA Ex. A, at 8. In Claim No. 8 Purchaser made clear that it "reserve[d] the right to supplement or amend [Claim No. 8]... as circumstances warrant[ed]." JTEX 0171. Purchaser could not have listed all 95 employees in its Claim because the liabilities associated with many of those employees were unknown to Purchaser at the time.

248. The Tribunal concludes that, in Claim Notice No. 8, Purchaser adequately described the nature of the Loss and the extent of it as it was then known. That is all that the SPA required. Purchaser's supplementing of its Claim to add additional employees when the full consequence of these vacation claims became known was, therefore, permissible, and Purchaser may recover for all 95 workers, not just for those initially identified in Claim Notice No. 8.

249. Seller's second defense is that the vacation claims are "Third Party Claims" that Savia impermissibly settled without Seller's consent, as required by SPA § 8.3(b)-(d). Section 8.3(d) states in pertinent part:

> If the Indemnifying Party disputes the right of the Indemnified Party to indemnification under this Article 8 with respect to the Third Party Claim described in a Third Party Claim Notice, then in such event (i) the Indemnified Party may defend the Third Party Claim with counsel of its choice, subject to the right of the Indemnifying Party to admit its obligation to indemnify the Indemnified Party and assume the defense of the Third Party Claim at any time prior to settlement or final determination; *provided, however,* that the Indemnified Party (x) shall diligently defend such Third Party Claim... and (y) may not enter into a settlement thereof without obtaining approval of the Indemnifying Party.

250. Purchaser's first Claim Notice No. 8 (JTEX 0171) characterized the vacation Claim as a "Third Party Claim." *See,* JTEX 0171 at 1 ("Purchaser hereby seeks indemnification for the Third Party Claim described below.").

251. The definition of Third Party Claim in SPA § 8.3(b), however, defines a "Third Party Claim" as an

[46] Of the 28 employees listed in Claim Notice No. 8, Purchaser seeks compensation for only 27. *See,* Respondents' Post-Hearing Mem., at 20, n. 8.

"Action." SPA § 3.5 defines an "Action" as a "claim[], cause[] of action, suit[]... pending before any Governmental Authority, mediator or arbitrator." Purchaser points out that, when Savia entered into the employee indemnification settlement agreements with its employees and paid those employees their vacation claims, none had filed an "Action." Thus, argues Purchaser, the consent-to-settle provision in SPA § 8.5(d) did not apply to those settlements.

252. Purchaser also raises a practical defense, namely, that it would be quite unwieldy if SPA § 8.3(d) required that Savia, under these circumstances, obtain Seller's permission before entering into an agreed resolution of a vacation claim with each individual worker. Respondents' Post-Hearing Mem., at 21-22.

253. The Tribunal concludes that, in view of the fact that these employee vacation claims were all settled prior to the initiation of any formal dispute resolution process, the claims were not "Third Party Claims" as defined in the SPA. They therefore did not require Seller's consent prior to their resolution. These vacation claims were, in fact, primary "claims" under SPA § 8.3(a) and not Third Party Claims under SPA § 8.3(b)-(d) notwithstanding their mislabeling in the original Claim Notice No. 8. Thus, Purchaser is entitled to indemnification of the Penalty Payments and Additional Vacation Salaries accrued prior to Closing and subsequently paid without Seller's approval.

254. As for the quantum of damage, notwithstanding Mr. Ulloa's calculations, Purchaser's use of the settlement agreements with the workers, rather than the paystubs, constitutes acceptable evidence of amounts actually paid. Purchaser will, therefore, be awarded $466,713.49 in Penalty Payments and $253,650.61 *(see ¶* 258 below) in Additional Vacation Salaries paid. Purchaser is also entitled to the estimated vacation payments that it will be obligated to pay when workers who have not yet taken all of their vacation earned prior to Closing do so.

255. In that regard, much of the dispute over the quantum of damage involved the difficulty in predicting the dates on which the workers who are still owed vacation time accrued prior to Closing will in fact take those vacations and the salaries that such workers will then be earning. Peruvian law provides that an employee is entitled to be paid while on vacation at his then-current salary rate—not the lower rate that he earned when the unused vacation time was originally accrued. Thus, the amounts that Savia will have to pay to those employees who are yet to take their accrued vacations will be higher today than they would have been had Savia simply followed the dictates of the Labor Law prior to Closing. Further, as the company cannot know the precise future dates at which those workers will use their accrued vacation time, the company has to estimate the amounts that this will cost the company based on a prediction of the future salaries of these workers.

256. Seller claims that this all throws any damages purported to represent future liabilities into the world of rank speculation, and speculative damages are not recoverable under New York law. However, "under the long-standing New York rule, when the existence of damage is certain, and the only uncertainty is as to amount, the plaintiff will not be denied a recovery of substantial damages." *Contemporary Mission, Inc. v. Famous Music Corp.,* 557 F.2d 918, 926 (2d Cir. 1977). Purchaser "need only show a 'stable foundation for a reasonable estimate' of the damage incurred as a result of the breach." *Tractebel Energy Mktg., Inc. c. AEP Power Mktg., Inc.,* 487 F.3d 89, 110 (2d Cir. 2007).

257. Purchaser has shown such a stable foundation. It is Seller that must bear the risk of uncertainty in the quantum of damages to be awarded. Seller caused the problem by not following the Peruvian

Labor Law when it controlled Savia. It cannot defend Purchaser's claim by asserting that the damages cannot now be calculated with precision.

258. We therefore find that Purchaser's calculation is rationally based, and award it the damages claimed consisting of: (i) Penalty Payments of $466,713.49; Additional Vacation Salaries paid prior to May 2012 of $253,650.61 (Salazar WS, ¶ 22); Additional Vacation Salaries estimated to be paid subsequent to May 2012 of $422,090.93 *(Id.);* and $5,000 in outside legal costs incurred (Hamann First WS, ¶ 121); for a total of $1,147,455.03.[47]

259. As this vacation claim arises out of the breach by Seller of certain of the SPA's representations and warranties, it is subject to the Basket requirement.

4. The Profit Distribution Claim

260. Under Peruvian law, Savia had the obligation to distribute a percentage of its income to its employees. Statement of Claim, ¶ 64.

261. SUNAT audited Savia's income for tax year 2006 and, on September 6, 2010, disallowed certain deductions. Claimant's Reply Mem., ¶ 328. Seller authorized Savia to settle SUNAT's determinations, and Savia did so. As a result, Savia's income for 2006 increased. *Id.,* ¶ 65; Claimant's. Reply Mem., ¶ 344. This, in turn, increased the amount of income that Savia was obligated to distribute to its workers in 2006.[48] Purchaser, in this claim, seeks $215,083.48 for the additional profit sharing liability that Savia incurred.

262. Purchaser contends that Seller is responsible for paying the additional profit distribution to which Savia's workers are entitled. Purchaser relies for its conclusion on SPA § 7.4(a)(5) in which—according to Purchaser "Seller unconditionally promised to indemnify, defend, and hold Purchaser harmless from any Pre-Determination Date taxes *and* from Losses resulting from it breach of that promise." Respondents' Rejoinder Mem., ¶ 276 (emphasis in original).

263. Specifically, SPA § 7.4(a) provides:
Seller shall indemnify and defend the Purchaser Indemnitees and hold the Purchaser Indemnitees harmless from and against (1) all liability for taxes of any PT Group Member... attributable to (A) any Pre-Determination Date Tax Period,... (5) any Loss that a Purchaser Indemnitee shall suffer, sustain, or become subject to as a result of the breach of Seller's representations and warranties contained in Section 3.6 (Taxes and Assessments) or Seller's covenants and agreements herein, or in any certificate delivered with respect to any of the foregoing, that relate to Taxes.

264. Seller defends on the ground that the claim is untimely, and that the claim is one for consequential

[47] This total varies from the amount claimed by Mr. Hamann in his First Witness Statement at ¶ 120. The differences are attributable either to Mr. Salazar's more precise calculations, or the use of a different exchange rate for Peruvian Soles. The total also varies from the amount requested in Appendix B, ¶ (xxii) of Respondents' Post-Hearing Mem. Indeed, several amounts awarded for claims in this Award are not precisely matched in Appendix B. To the extent inconsistent, however, the amounts awarded in this Award, which are consistent with the factual evidence, must prevail.

[48] As Purchaser set forth in its Statement of Claim at ¶ 65, "Savia, therefore, had the obligation to distribute among its employees a percentage of the difference between its revenue as originally calculated and its final revenue."

damages and, as such, is barred by SPA § 10.16 which provides:
NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, NONE OF PURCHASER, SELLER, OR ANY OF THEIR RESPECTIVE INDEMNIFIED PARTIES SHALL BE ENTITLED TO CONSEQUENTIAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES IN CONNECTION WITH THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY AND EACH OF PURCHASER AND SELLER,... HEREBY EXPRESSLY WAIVES ANY RIGHT TO CONSEQUENTIAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES IN CONNECTION WITH THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY.

265. As to the timeliness of the claim, Seller contends that the "additional distributions were undertaken as a result of a requirement imposed by Peruvian law that is not part of the Peruvian tax laws." Claimant's Reply Mem., ¶ 328. Thus, argues Seller, Purchaser's claim is not a tax claim under SPA § 7 but, instead, must be based upon the alleged breach of a representation or warranty set forth in § 3 of the SPA and, specifically, § 3.9 (the only one that Seller alleges arguably applies), namely the representation in which Seller represented its due "Compliance with Laws."

266. Assuming that Purchaser's claim is based solely upon SPA § 3.9, Seller argues that it is time-barred by SPA § 8.1 which provides that "[a]ll representations and warranties in this Agreement shall survive the Closing for a period of twelve (12) months." That period expired on February 6, 2010. *Id.,* ¶ 335. Purchaser's indemnification notice, which was dated January 28, 2011, was, according to Seller, therefore untimely. *Id.*

267. By contrast, if, as Purchaser contends, the claim is based upon SPA § 7.4(a)(5) *(i.e.* indemnification for a tax claim), then the claim was timely asserted. SPA § 8.1(a)(iii) refers to § 7.4 for the limitation on tax claims. SPA § 7.4(e) provides that § 7.4 claims may be made at any time prior to 60 days after the expiration of the applicable statute of limitations for the assertion by the tax authorities of any such claims. That period had not expired by January 28, 2011.

268. The Tribunal, after consideration, concludes that Purchaser's indemnification claim for the increased profit sharing was timely made. Whether or not the claim can be characterized as a breach of the catch-all representation and warranty set forth in SPA § 3.9, it is also undoubtedly covered under SPA § 7.4(a)(5) which, again, protects Purchaser from "any Loss" that it might "suffer, sustain, or become subject to as a result of the breach of Seller's representations and warranties contained in Section 3.6." As such, the claim is one made under SPA § 7 and is not time-barred.

269. Seller also asserts that the damages Purchaser seeks should be properly characterized as "consequential damages" barred by SPA § 10.16. *See* Respondents' Counter-Mem., ¶¶ 247-249. According to Purchaser, however, the additional amounts owed to Savia's workers should be characterized as general damages and not consequential damages, "General damages measures the losses in the very thing to which the plaintiff is entitled.... Consequential damages measure something else; not the very thing the plaintiff was entitled to but income it can produce or the losses it can avoid." Dobbs Law of Remedies: Damages, Equity, Restitution, § 3.3(4) (2d ed. 1993).

270. Purchaser, citing SPA § 7.4(a)(5) quoted above, argues that a specific contractual covenant assures Purchaser of indemnification for just this kind of damage because the increased profit sharing owed to the workers is a "Loss" (as defined in SPA Ex. A) that Savia sustained as a result of a breach of an

express warranty. The damage sustained is, therefore, not "consequential" but arose out of the breach of a specific contract provision—SPA § 7.4(a)(5). As such, it is a direct damage and not a consequential damage. *Tractebel Energy Mktg,. Inc. v. AEP Power Mktg., Inc.,* 487 F.3d 89 (2d Cir. 2007) at 109 ("[W]hen the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract, the damages sought are general damages.").

271. Not surprisingly, Seller disagrees. According to Seller, this type of "Loss" is a quintessential consequential damage.

272. In deciding whether the "Loss" that Purchaser became "subject to" because of Seller's failure to pay the correct amount of tax in 2006 is consequential or direct, the Tribunal is also guided by § 7.4(f) which provides in pertinent part: "The provisions of... Section 10.16 shall apply to the indemnification obligations set forth in this Section 7.4."

273. This provision reflects the parties' mutual intention that not all § 7.4 claims need be considered direct damages simply because they arose out of a specific contractual covenant. A "Loss" referred to in § 7.4(a)(5) may arise out of that specific covenant, but might nonetheless be considered consequential. Here, the "Loss" claimed does not consist of an unpaid tax. Instead, it consists of a financial consequence imposed by a non-tax provision of Peruvian law that requires additional profit sharing payments by reason of Savia's increase in 2006 income. The Tribunal views such a Loss as a consequential or indirect damage barred under SPA § 10.16. The claim is, therefore, denied. Because Purchaser set off this claim against the Earn-Out, Seller will be entitled to an appropriate credit.

E. Escrow Related Issues

1. The Escrow Income Claim

274. This dispute involves the quantification of the "interest and other income" due Seller under the terms of the Escrow Agreement. The Escrow Agreement provides in pertinent part:
2. Escrow Amount. Pursuant to Section 2.3(b)(i) of the Stock Purchase Agreement, Purchaser is depositing with the Escrow Agent the Escrow Amount, to be held be the Escrow Agent in accordance with the terms hereof. It is hereby expressly stipulated and agreed that all interest or other income on the Escrow Amount shall belong to Seller and not constitute a part of the Escrow Amount. Seller shall be entitled to a quarterly distribution of all interest earned on the Escrow Amount.

JTEX 0003.

275. All agree that Seller is entitled to a return of the earnings on the Escrow fond. Seller computes that amount as $23,408,805.57 as of September 30, 2013 with reference to Morgan Stanley's letter of October 3, 2013. JTEX 0437. Purchaser says that the correct figure is $896,384.55. This leaves an amount in dispute of $22,512,411 ($23,408,805.57 less $896,384.55). Expert Report of David K.A. Mordecai ("Mordecai Opinion"), ¶ 26.

276. The issue is how to account for the Escrow Agent's purchase of a certain type of security that resulted in a reduction in the Fund's principal in favor of an increase in its earnings. According to § 5(c) of the Escrow Agreement:
The Escrow Agent shall invest the funds held in escrow through an account managed by the Escrow Agent.... The funds held in such account shall be held in (i) readily marketable direct obligations of the Government of the United States or any agency or instrumentality thereof or readily marketable obligations unconditionally guaranteed by the full faith and credit of the Government of the United States.

JTEX 0003.

277. One security that qualifies under the above authorization is something called a "prefunded municipal bond." The repayment of a prefunded municipal bond is secured by U.S. government securities. By buying U.S. government securities and then pledging those securities as collateral for the municipal bond's repayment, the issuer takes all the credit risk out of the security. This permits the issuer to obtain a higher credit rating and often results in the prefunded municipal bond trading at a higher price than a comparable municipal bond without the prefunded feature.

278. Prefunded municipals result from a municipal bond issue that has been "called" prior to maturity in order to take advantage of lower prevailing interest rates in the market. Thus, for example, a Chicago School District may have issued its bonds when the prevailing interest rate paid on such securities was, say, 6%. Several years later, the prevailing interest rate paid on such securities might have fallen (as an example) to, say, 2%. if the Chicago School District bond has a call feature, the issuer could reissue bonds paying the lower interest rate of 2% and then use the proceeds to pay off the 6% bonds on the call date (which might be off into the future).[49] A municipality will often have to pay a penalty for the right to call its bonds— usually 1% to 1.5%—but in the example above, the Chicago School District would be foolish not to pay the penalty and then reissue new bonds paying only 2% to pay off the old 6% bonds.[50]

279. These reissued, or prefunded (sometimes called "pre-refunded") municipals have virtually no credit risk and tax-free features. Because of this, they usually sell at a premium to par representing their higher value.

280. Thus, for example, market conditions might dictate that a reissued municipal security with the same credit rating and tax effects as the Chicago School District bond that pays 4% would sell for $100. If, however, that municipal bond had no credit risk (because it was prefunded, *i.e.,* collateralized with U.S. government securities), that same bond would sell on the open market at a premium, say, for example, at a price of $103. Each $100 bond would always pay $4.00 annually. Four percent is called its coupon rate and $4.00 per year would be called the coupon interest.

281. Because these prefunded municipal bonds are backed by U.S. government securities, they are permissible investments by the Escrow Agent.

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[49] There are several scenarios in which prefunded municipal bonds might be issued but all are intended to take advantage of lower interest rates prevailing in the market. A prefunded municipal bond, for example, might be issued to secure the repayment of an earlier issue that could not be immediately called.

[50] Assuming *ceteris paribus,* of course, *i.e.* all other things remaining equal, such as the School District's credit rating, the prevailing tax regime, etc. It also assumes that the issuer did not think that the prevailing 2% rate (in the example above) was going to continue to fall.

282. None of this would pose a problem except for the fact that the Escrow Agent paid $103 (in the example above) for a bond that would eventually realize only $100, either at maturity or if called once again by the municipality. This depletes the principal of the fund (to the tune of $3.00 for each bond) in favor of higher interest earnings than would be realized if the Fund simply invested directly in U.S. government securities. This all has the effect of sacrificing principal for higher interest payments.

283. Normally, this strategy would be fairly neutral as regards the principal amount of the Fund, because some bonds in a "normal" economic environment would be purchased at a premium to par, as in the example above, while others might be purchased at a discount. As Respondents' expert testified, a fund manager under the scenario dictated in the Escrow Agreement would aim to balance the principal of the fund at par. The problem arose when prevailing interest rates beginning in 2008 fell drastically to historic lows. As a result, virtually all of these prefunded municipal bonds were purchased at a premium because the manager (in light of the exigencies of the marketplace) was unable to balance these purchases with bonds bought at a discount as very few discounted bonds were available for purchase in the market.

284. When a bond was purchased at a premium to par, the result was a decrease in the principal of the Fund when the bond was eventually paid off (at par).

285. Seller characterizes all of the income received by the Fund—including all of the coupon interest on these prefunded municipal bonds—as "interest and other income." Seller views as purely incidental the fact that this investment strategy resulted in a decrease in the Fund's principal to a level significantly below the $150 million set in the SPA (less any authorized withdrawals).

286. Purchaser on the other hand contends that the resulting decrease in principal below the $150 million (less authorized withdrawals) should not be characterized as "interest or other income" and that the value of the Fund should stand at $150 million (less previously authorized withdrawals). Purchaser contends that this entire problem was created by the Escrow Agent who either deliberately assisted a good client (Seller) or inadvertently gave Seller an excuse to reduce the principal that it promised to retain in the Fund as security for any post-closing claims arising from its possible breaches of SPA Articles 7 and 8.

287. Each side called a financial expert to support its position. Seller's Expert, Dr. Mukesh Bajaj, argued that all of the proceeds received as "interest," including all coupon interest, should be paid to Seller. Bajaj First Opinion,[51] ¶¶ 16-19. Purchaser's expert, Dr. David A. K. Mordecai, argued that the meaning of "interest and other income" as used in the Escrow Agreement, should include only that portion of the prefunded municipal bond interest that exceeded the amortization of the premium that may have been paid for the bond. Mordecai Opinion, ¶¶ 1-4.

288. After a careful review of the record, the Tribunal determines that Respondents' interpretation is the only one that is consistent with the parties' intentions as evidenced by the provisions of the SPA, the language of the Escrow Agreement and the Escrow Agent's consistent reporting relating to the Escrow Amount before the dispute arose.

289. The Escrow Amount was set at $100 million ($150 million after the First Amendment). It was

[51] Dr. Bajaj offered two written opinions, one dated October 4, 2013 ("Bajaj First Opinion") and the other dated December 21, 2013.

intended to secure the payment of certain defined indemnification claims. It was to be invested in U.S. government obligations or their equivalent. The entire structure of the escrow evidences the parties' mutual intention to leave $150 million intact, save for reductions to pay indemnification claims. This obvious intention would be frustrated if either a particular investment strategy or the happenstance of the bond market, caused by an historic financial disruption, resulted in an unanticipated reduction of principal through the purchase of prefunded municipal securities.

290. Seller argues that the language of the SPA and the Escrow Agreement is unambiguous and requires an interpretation that defines "interest and other income" as inclusive of the full amount that Seller seeks. Seller's argument is essentially that the parties knowingly wrote the Escrow Agreement as they did, thereby allocating to Purchaser the risk of a reduction in the principal of the Escrow Amount caused by the purchase of these particular securities. The Tribunal disagrees.

291. First, the entire purpose of the escrow is to secure claims of Purchaser up to the total of the Escrow Amount. SPA § 2.3(b)(i) provides that "Purchaser shall deliver or cause to be delivered... (i) the sum of $100,000,000 [later increased to $150,000,000] pursuant to the terms of an escrow agreement... which sum may be applied to claims that Seller is obligated to pay pursuant to Article 7 and Article 8 of this Agreement." Allowing the Escrow Amount to fall below the sum established in the SPA because of the purchase of prefunded municipals would frustrate the mandate in § 2.3(b)(i) to have the principal sum in escrow stand as security for claims under Articles 7 and 8. As Purchaser explains, "The result [urged by Seller's expert] would be to deplete the Escrow Account, contrary to its purpose and the mandates that the Escrow Agent "hold," "retain[]" and "not release" the Escrow Amount below the Unresolved Amounts. Escrow Agreement, §§ 3, 4; SPA § 2.3(b)(i); Respondents' Post-Hearing Mem., at 47.

292. Further, contrary to Seller's argument, Purchaser's position is not inconsistent with the language in the Escrow Agreement. Seller is only entitled under the Escrow Agreement to the distribution of "interest earned" ("Seller shall be entitled to a quarterly distribution of *all interest earned on the Escrow Amount...*") (Escrow Agreement, § 2, emphasis added). Seller argues that the phrase "interest and other income" must include all coupon interest. The term "coupon interest," however, is not defined in the Escrow Agreement, and the Escrow Agent's periodic reporting distinguished between interest income earned and amounts reflecting the amortization of principal. *See, e.g.,* JTEX 0572 (a summary of the transactions generated by the Escrow Agent in the ordinary course); and, *generally,* JTEX 0551-0607 (monthly account statements differentiating between interest earned and amounts reflecting amortization of the premiums paid for the prefunded municipals).

293. The conclusion is that "interest earned" does not equate to "coupon interest." As Dr. Mordecai explained, the latter consists of economic interest plus a portion reflecting the return of the premium that the purchaser had to pay to acquire the prefunded municipal. As Purchaser's expert pointed out, Seller's position fails to distinguish between actual income—the return *on* investment—and the return of investment. Mordecai Tr. 2480-2483.

294. On January 19, 2011 when the question surfaced, Morgan Stanley wrote to Mr. Kallop explaining its reporting. There, the author explained how the reporting was done and acknowledged that "[w]e... figure bond interest earned differently than MS [Morgan Stanley] Trust. We use the book value of the positions plus accrued interest less the escrow amount of $150,000,000." JTEX 0243. This, according to Dr. Mordecai, is correct. It is also consistent with the mandate in the SPA that the

defined Escrow Amount stand as security for the payment of claims—not that it be depleted through the purchase of prefunded municipal securities.

295. Finally, it cannot escape notice that support for the Morgan Stanley Trust division's position came primarily in the form of a single-page letter dated October 3, 2013 (JTEX 0437), one day before Claimant filed its Reply Memorial. No witness from Morgan Stanley testified at the hearings. Under those circumstances, the letter is entitled to little if any evidentiary weight.

296. Because the calculation of the proper amount to be remitted to Seller may be a complex calculation, this Award will require the parties' experts to agree upon the appropriate amount of income received from these prefunded municipal bonds to be credited to the Escrow Amount. The Tribunal will retain jurisdiction to resolve any further dispute over the appropriate calculation consistent with the determination made above.

2. Purchaser's Right to Payment Out of the Escrow Account

297. As explained above, on April 16, 2013, the Tribunal issued an Interim Award in which it ordered Seller, pending a final determination of the merits, to reimburse Purchaser $75,308,179.03 for the VAT taxes that Purchaser had paid for tax years 2002 through 2007. Interim Award dated April 16, 2013. Seller at first declined to satisfy the Interim Award and then tendered payment by authorizing the Escrow Agent to pay with funds held in escrow pursuant to the Escrow Agreement. Purchaser objected to that form of payment and Seller commenced litigation in the U.S. District Court to compel the Morgan Stanley, the Escrow Agent, to satisfy the Interim Award from the funds it was holding (called the "Escrow Amount") pursuant to the Escrow Agreement.

298. Seller argued that it had the right to insist that Purchaser accept payment of the Interim Award from the Escrow Amount. Purchaser disagreed and moved to refer the issue to the arbitrators. In an Opinion and Order dated November 29, 2013, the U.S. District Court agreed with Purchaser and ordered that the matter be resolved in arbitration. The Tribunal then issued its Supp. Interim Award. The Supp. Interim Award, quoted at ¶ 26 above, declared ineffective the Seller's attempt to pay the first Interim Award from the Escrow Account in view of the fact that the SPA did not authorize the use of escrowed funds to satisfy an "interim award."

299. However, once the instant Award is reduced to a Final Award, SPA § 2(b)(i) states that escrowed funds "may be applied to claims that Seller is obligated to pay pursuant to Article 7 and Article 8 of this Agreement." The VAT and IMI Peru tax claims arise out of SPA Article 7. They may, therefore, be paid out of the Escrow Amount provided that the Purchaser complies with the requirements for such payment.

300. In that regard, § 3 of the Escrow Agreement states that the Escrow Agent may not release funds from the Escrow Amount to pay an "Indemnification Item" (defined in § 3(a) of the Escrow Agreement to include tax claims under SPA § 7.4):
except in accordance with either (i) written instructions executed both by an authorized officer of Purchaser and by an authorized officer of Seller ***("Joint Instructions"),*** or (ii) a certificate delivered by any Purchaser to the Escrow Agent, executed by an authorized officer of such Purchaser (a

*"**Final Award Certificate**"),* which certificate shall (A) state that, of the amounts contested in Seller's Indemnity Certificate, such Purchaser is entitled to indemnification under Section 7.4 or Article 8 of the Stock Purchase Agreement, (B) state the aggregate amount of such indemnification to which such Purchaser is entitled, [and] (C) have attached thereto a true and complete copy of the Arbitral Award... confirming that such Purchaser is entitled to such amount of indemnification.

301. Thus, because both the VAT tax claims and the IMI Peru tax claims arise under SPA § 7.4, Purchaser is entitled to payment from the Escrow Amount.

302. Neither the SPA nor the Escrow Agreement, however, provides that the Escrow Amount is the exclusive repository of funds to which Purchaser must look for payment of indemnification claims. Indeed, SPA § 8.6 entitled "Escrow: Right of Set-Off' provides that Purchaser may set-off any claims under SPA Articles 7 or 8 against the Escrow Amount, but "Neither the exercise of nor the failure to exercise such right of set-off will constitute an election of remedies or limit Purchaser in any manner in the enforcement of any other remedies that may be available to it." In addition, the penultimate paragraph of § 3 of the Escrow Agreement refers to the possible satisfaction of an Indemnification Item from Seller "independent of this Indemnification Escrow Agreement."

303. Thus, Purchaser, at its option, is free to satisfy its SPA Article 7 or Article 8 claims against Seller, whether or not arising from this Award, from the Escrow Amount (subject to the terms and conditions of the Escrow Agreement) or otherwise.

304. At ¶ 354(b) of Claimant's Reply Mem., Seller requests that the Tribunal "Order Respondents to pay or authorize the release to Offshore of all sums retained from the Purchase Price or in the Escrow Amounts related to the indemnification claims discussed in this memorial." The Tribunal notes that even the payment to Purchaser out of the Escrow Amount of all the amounts awarded to Purchaser in this Award is likely to leave the Escrow Amount with funds remaining, especially as these relate to the Supplemental Escrow Amount established to secure unknown environmental claims. The Tribunal, however, may not have been presented with all claims asserted by Purchaser and is therefore not in a position to quantify the amount of any excess funds to be returned to Seller. Instead, the Tribunal trusts that Purchaser will cooperate in the return of any funds presently being held in escrow that are not needed as security for the payment of outstanding claims arising out of SPA Article 7 or Article 8.

F. Costs and Attorneys' Fees

305. SPA § 10.7(c) provides:
The arbitrators are authorized to include in their award an allocation to any Party of such costs and expenses, including attorneys' fees, as the arbitrators shall deem reasonable.

* * *

In the event that monetary damages are awarded, the award shall include interest, running from the date of default to the date of payment of the award in full. Any award shall be made payable in

United States Dollars, free of any Tax or other deduction.

306. Both sides request interest on their affirmative claims, as well as costs and counsel fees. *See,* Claimant's Reply Mem., ¶ 354(k); Respondents' Post-Hearing Mem., Appendix B. Claimant specifically asks for interest at the New York statutory rate of nine (9%) percent per annum. Respondents seek interest but do not specify a rate. *Id.*

307. The SPA and the legal relations between the parties are to be governed by and construed in accordance with the laws of the State of New York. Accordingly, the Tribunal finds it appropriate to set the rate of interest at nine (9%) percent, New York's statutory rate. *See,* New York's Civ. Pr. Law & Rules, § 5004.

308. With respect to the calculation of interest, such interest will accrue on Respondents' tax claims (the VAT tax claims and the IMI Peru tax claims) commencing on the dates such taxes were actually paid. SPA § 7(d) requires Seller's payment of Taxes (as defined) within thirty days of Purchaser's written demand, but "in no case earlier than five (5) Business Days prior to the date on which the relevant Taxes... are required to be paid." As Purchaser made written demands for the payment of these tax claims well prior to thirty days before the taxes were due to be paid, the Tribunal will order that interest will accrue from the date that Purchaser was deprived of the use of its funds, that is, the dates of actual payment of the tax liabilities. Interest on non-tax claims shall also accrue from the dates of Purchaser's actual payment.

309. The Tribunal also finds it appropriate to award reasonable costs and counsel fees to the party who prevailed on its claims. Purchaser prevailed on all claims except the Platform Maintenance Claim and the Profit Distribution Claim. Hence, Purchaser will be awarded the reasonable costs and fees that it incurred in connection with the successful claims. Claimant will be awarded its reasonable costs and fees incurred in connection with the Platform Maintenance Claim and the Profit Distribution Claim. The parties will be granted the opportunity to make a costs and fees application relating to the claims on which they prevailed.

VI. RELIEF AWARDED

A. With respect to the VAT claims discussed in Section V.A. above:
(1) AWARDS Purchaser compensation for all losses occasioned by Seller's failure to reimburse Purchaser for the VAT taxes that Purchaser paid for tax years 2001 through 2007, including: (a) the amounts of such taxes paid; (b) interest on such amounts at the simple rate of nine percent (9%) per annum from the date of such payments until satisfaction of this AWARD; (c) the reasonable costs and counsel fees incurred in responding to the VAT tax litigation in Peru; (d) the reasonable costs and counsel fees incurred in the prosecution of the VAT claims before this Tribunal; and (e) the reasonable costs and counsel fees incurred in the litigation involving the Interim Awards before the U.S. District Court. With respect to the computation of interest in accordance with ¶ A(1)(b) above, Purchaser shall be entitled to such interest for tax years 2001 and 2003 from the payment dates reflected in ¶ 65 above to the date of Seller's payment of these amounts on February 15, 2011 *(see* ¶ 58 above), and Purchaser shall be entitled to such interest

for tax years 2002 and 2004 through 2007 from the payment dates reflected in ¶ 65 above to the date of Seller's payment of these amounts pursuant to this AWARD.

(2) Purchaser sought no affirmative relief with respect to VAT taxes for Tax Year 2008, but the Tribunal trusts that, to the extent such 2008 VAT taxes are imposed, Seller shall pay such taxes directly when they become due, or shall reimburse Purchaser for its payment of such 2008 VAT taxes immediately upon Purchaser's payment of such 2008 VAT taxes and its written demand for reimbursement.

(3) Assuming Seller's full satisfaction of its VAT obligations as set forth in this ¶ A, Purchaser shall return to Seller, upon 30 days from its receipt, any refunds of VAT taxes that Purchaser has already received for those years (the "VAT Refunds"), whether the VAT Refunds are received in the form of cash or credits against other liabilities that Purchaser may owe. To the extent that Seller does not fully satisfy its VAT obligations as set forth in this ¶ A, Purchaser shall duly credit Seller for VAT Refunds against the amount owing in accordance with this AWARD.

(4) Notwithstanding anything to the contrary in ¶ A(1) above, the accrual of Seller's nine percent interest obligation will cease to accrue upon Purchaser's receipt of any VAT Refunds, but Purchaser need not make any reimbursement until Seller fully satisfies its VAT obligations less any credit to which it is entitled in accordance with ¶ A(3) above.

B. With respect to the IMI Tax Claims discussed in Section V.B. above:

(1) With respect to the IMI Tax Claim relating to tax year 2001, AWARDS Purchaser the sum of $1,491,384.64 with interest on such amount at the simple rate of nine percent (9%) per annum commencing from the date that OFG paid the bankruptcy claims until satisfaction of this AWARD;

(2) With respect to the IMI Tax Claim relating to tax year 2000, DECLARES that Seller shall reimburse Purchaser for any amounts that Purchaser may pay for such tax liability within 30 days of Purchaser's demand for indemnification in accordance with the provisions of SPA § 7.4(d). Any unpaid amount shall bear interest at the simple rate of nine percent (9%) per annum commencing on the date that Purchaser pays any such tax liability and continuing until satisfaction of this AWARD.

C. DENIES Purchaser's Pipeline Maintenance Claim.

D. With respect to the Pipeline Abandonment and EIS Environmental Claims, the Health and Safety Claims, the Vacation Claims and the Profit Distribution Claim discussed in Section V.D. above:

(1) DECLARES, provided that, as of the date of this AWARD, the aggregate amount of liability for all Losses which are subject to the "Basket" defined in SPA ¶ 8.5 has not exceeded the sum of $15 million, there is no present duty of Seller to compensate Purchaser for any of the claims identified in this ¶ D:

(2) DECLARES that, for purposes of any future enforcement of Purchaser's indemnity rights, and only upon any eventual fulfillment of the Basket requirement, Purchaser would be entitled to indemnification in the following amounts:

(a) the sum of $374,507.62 with respect to the Pipeline Abandonment, EIS Environmental and Health and Safety Claims (the "Indemnified Amount"), together with interest at the simple rate of nine percent (9%) per annum commencing on the dates the payments constituting the Indemnified Amount were made until satisfaction of this AWARD; and

(b) the sum of $1,147,455.03 with respect to the Vacation Claims together with interest at the simple rate

of nine percent (9%) per annum commencing on the dates payments of the indemnified Vacations Claims were made until satisfaction of this AWARD;

(c) DENIES Purchaser's Profit Distribution Claim and Awards Seller interest at the simple rate of nine percent (9%) per annum commencing on the date such amount was deducted from the Earn-Out and ending on the date of the Final Award to be rendered in this arbitration. Purchaser shall credit the amount of the Profit Distribution Claim plus the interest against amounts owed to Purchaser in this Award.

E. With respect to the Escrow Income Claim discussed in Section V.E. above:

(1) DECLARES that, in accordance with the findings set forth in Section V.E. above, Seller is not entitled to a distribution of income out of the Escrow Account on any investment in prefunded municipals to the extent that such distribution consists of the amortization of the premium over par paid to acquire the security; and

(2) ORDERS that, within sixty (60) days from the date of the service of this AWARD, the parties' respective advisors meet and confer in an attempt to agree upon the appropriate amount of income received from the prefunded municipal bonds to be credited to the Escrow Amount and, in the event that agreement cannot be reached, either party, within thirty (30) days thereafter, may apply to the Tribunal to resolve any disagreement. The Tribunal will exercise continuing jurisdiction to resolve any dispute that may arise in connection with this ¶ E(2).

F. With respect to the parties' applications for costs and professional fees:

(1) Purchaser is awarded its reasonable costs and counsel fees in connection with the VAT claims, the IMI Peru tax claims, the Pipeline Abandonment and EIS Environmental Claims, the Health and Safety Claims, the Vacation Claims and the Escrow Income Claim;

(2) Seller is awarded its reasonable costs and counsel fees in connection with its defense of the Pipeline Abandonment Claim and the Profit Distribution Claim;

(3) With respect to the award to Purchaser of its reasonable costs and counsel fees in connection with the VAT claims, such costs and reasonable fees include both the costs and fees incurred in prosecuting its claims before this Tribunal and the costs and reasonable fees incurred in the proceedings in the U.S. District Court;

(4) On all claims on which costs and fees are awarded, such costs and fees include those incurred by local Peruvian counsel in the prosecution or defense, as the case may be, of the various claims listed above to the extent such costs and fees are not already included in the amounts awarded;

(5) Within thirty (30) days from the date of the service of this AWARD, each party may submit an application for the costs and fees awarded in accordance with this ¶ F. Such application shall itemize with reasonable particularity the elements of such costs and fees and shall include a description of the work performed, the persons who performed the work and the rates charged for such services. Descriptions of the services performed may be redacted to the extent required to preserve confidentiality. The applications shall include a statement by counsel that such costs and fees have been actually incurred and paid, or that such costs and fees are actually owing. Within two weeks from the receipt of the other side's application, the receiving party may file a response with any objections or observations that it may

wish to raise. The Tribunal will thereafter determine the amounts to be awarded and, in that connection, reserves the right, at its option, to conduct a telephonic or in-person hearing to discuss any matters that may need clarification. The Tribunal will exercise continuing jurisdiction to determine the costs and fees to be awarded in connection with this ¶ F.

G. This PARTIAL FINAL AWARD is in full settlement of all claims and counterclaims submitted to the Tribunal for decision, except as otherwise provided herein,

H. WE HEREBY CERTIFY that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Partial Final Award was made in New York County, NY, United States of America.