

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**SOCIEDAD AEROPORTUARIA KUNTUR WASI S.A. AND  
CORPORACIÓN AMÉRICA S.A.**

Claimants

and

**REPUBLIC OF PERU**

Respondent

**ICSID Case No. ARB/18/27**

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**DECISION ON JURISDICTION, LIABILITY AND CERTAIN ASPECTS OF  
QUANTUM, WITH FURTHER DIRECTIONS ON QUANTUM**

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***Members of the Tribunal***

Ms. Lucinda Low, President of the Tribunal

Mr. Enrique Barros Bourie, Arbitrator

Mr. José Emilio Nunes Pinto, Arbitrator

***Secretary of the Tribunal***

Ms. Patricia Rodríguez Martín

*Date of dispatch to the Parties: 11 August 2023*

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## TABLE OF SELECTED DEFINED TERMS

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| Andino                               | Andino Investment Holding S.A.A.   |
| Arbitration Rules                    | ICSID Rules of Procedure for Arbitration Proceedings, in force as of 10 April 2006   |
| Addendum No. 1                       | Addendum No. 1 to the Concession Contract to the New International Airport Chinchero-Cuzco dated 3 February 2017   |
| ALG                                  | Advanced Logistics Group   |
| ALG's Financial Economic Model       | Report issued by ALG on 17 December 2013   |
| Arruda Filho Statement               | Witness Statement of Jorge Arruda Filho dated 1 June 2020  |
| Benavides Torres Report              | Expert Report of Eduardo Benavides Torres dated 30 May 2020  |
| <i>Bases</i> or Bidding Terms        | Terms of Reference of the tender procedure   |
| BIT                                  | Agreement between the Republic of Peru and the Government of Argentina for the Reciprocal Promotion and Protection of Investments, signed by Peru and Argentina on November 10, 1994, and entered into force on October 24, 1996 |
| C-[#]                                | Claimants' exhibit   |
| CAF                                  | Corporación Andina de Fomento-Banco de Desarrollo de América Latina  |
| Chinchero Airport                    | Chinchero International Airport  |
| Chinchero Airport Project or Project | Construction and operation of the Chinchero International Airport  |
| CIL                                  | Customary International Law  |
| CL-[#]                               | Claimants' legal authority   |
| Claimants                            | Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A.   |
| Claimants' Memorial                  | Claimants' Memorial on the Merits dated 6 September 2019   |
| Claimants' Rejoinder on Jurisdiction | Claimants' Rejoinder on Jurisdiction dated 19 October 2020   |
| Claimants' Reply                     | Claimants' Reply on Merits and Counter-Memorial on Jurisdiction dated 1 June 2020  |

|                                  |  |
|----------------------------------|--|
| Concession Contract              | Concession Contract entered into on 4 July 2014 between Peru, acting through the Ministry of Transport and Communications, as concession granter, and Sociedad Aeroportuaria Kuntur Wasi S.A., as concessionaire, amended on 3 February 2017 |
| Concession Owner or Grantor      | <i>Concedente</i> , as defined in the Concession Contract, the Republic of Peru, represented by the Ministry of Transport and Communications (MTC)   |
| <i>Contraloría</i>               | <i>Contraloría General de la República de Perú</i> (Comptroller General of the Republic of Peru)   |
| Corporación América              | Corporación América S.A.   |
| Airport                          | Velasco Astete International Airport   |
| DGAC                             | General Directorate of Civil Aeronautics   |
| EDI                              | <i>Estudio Definitivo de Ingeniería</i>  |
| EGP                              | <i>Endeudamiento Garantizado Permitido</i> (Permitted Guaranteed Indebtedness)   |
| FET                              | Fair and equitable treatment   |
| First Balta del Río Statement    | Witness Statement of José Carlos Balta del Río dated 6 September 2019  |
| First Barrenechea Statement      | Witness Statement of Pablo Ezequiel Barrenechea dated 6 September 2019   |
| First Compass Lexecon Report     | Expert Report of Manuel A. Abdala and Pablo López Zadicoff (Compass Lexecon) dated 6 September 2019  |
| First Ferrando Gamarra Report    | Expert Report of Enrique Ferrando Gamarra dated 13 March 2020  |
| First Finnerty Report            | Expert Report of John D. Finnerty dated 13 March 2020  |
| First Giuffra Statement          | Witness Statement of Bruno Giuffra dated 13 March 2020   |
| First Gutiérrez Damazo Statement | Witness Statement of José Antonio Gutiérrez Damazo dated 13 March 2020   |
| First Kaczmarek Report           | Expert Valuation Report of Brent C. Kaczmarek dated 13 March 2020  |



|                                      |   |
|--------------------------------------|---|
| First Mott MacDonald Report          | Expert Report of Horacio Rossi (Mott MacDonald) dated 29 August 2019  |
| First Ricover Report                 | Expert Report of Andrés Ricover of 13 March 2020  |
| First Session                        | First session held by the Tribunal with the Parties by telephone conference on 9 April 2019   |
| First Vargas Loret de Mola Statement | Witness Statement of Carlos Rodolfo Juan Vargas Loret de Mola dated 6 September 2019  |
| <i>Fiscalía</i>                      | General Prosecutor of the Republic of Peru  |
| FPAO                                 | <i>Fondo de Pagos del PAO</i> (Payment Fund of the PAO)   |
| Guarantee Agreement                  | Guarantee Agreement entered into on 4 July 2014 between Peru, acting through the Vice-Minister of Transport and Communications and Sociedad Aeroportuaria Kuntur Wasi S.A.                        |
| Hearing                              | Hearing on jurisdiction, merits, and damages held virtually via Zoom and administered by Sparq from 13 to 16 September 2021; 11 October 2021; 18 and 19 October 2021; and 15 and 16 November 2021 |
| Roadmap ( <i>Hoja de Ruta</i> )      | <i>Alternativas de Solución</i> (Possible Solutions) dated 1 June 2017  |
| ICSID Convention                     | Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965  |
| ICSID or the Centre                  | International Centre for Settlement of Investment Disputes  |
| ICJ                                  | International Court of Justice  |
| Kuntur Wasi                          | Sociedad Aeroportuaria Kuntur Wasi S.A.   |
| MEF                                  | Ministerio de Economía y Finanzas (Ministry of Economy and Finance)   |
| MINCETUR                             | <i>Ministerio de Comercio Exterior y Turismo</i> (Ministry of Foreign Trade and Tourism of Peru)  |
| MTC                                  | <i>Ministerio de Transporte y Comunicaciones</i> (Ministry of Transport and Communications)   |
| Mobilia Statement                    | Witness Statement of Mariano Mobilia dated 6 September 2019   |
| NPV                                  | Net present value   |

|                                |  |
|--------------------------------|--|
| OSITRAN                        | <i>Organismo Supervisor de la inversión en Infraestructura de Transporte de Uso Público</i> (Peru's Public transport infrastructure regulator)   |
| PAO                            | <i>Pago Anual por Obras</i> (Payment for the Advancement of Works)   |
| Peru or State                  | Republic of Peru   |
| PPO                            | <i>Pago por Obras</i> (Pay-As-You-Work)  |
| Pre-Hearing Conference         | Pre-hearing organizational meeting held by the Tribunal with the Parties by videoconference on 13 October 2020   |
| PROINVERSIÓN                   | Peru's private investment promotion agency   |
| PPP Law                        | <i>Decreto Legislativo del marco de Promoción de la Inversión Privada mediante Asociaciones Público Privadas y Proyectos en Activos, aprobado por Decreto Legislativo n.º. 1224</i> (Law Decree No. 1224 which regulates <i>Public and Private Partnerships</i> ). |
| Quiñones Alayza Report         | Expert Report of María Teresa Quiñones Alayza dated 31 May 2020  |
| R-[#]                          | Respondent's exhibit   |
| RL-[#]                         | Respondent's legal authority   |
| Request for Arbitration        | Request for Arbitration dated 21 June 2018   |
| Respondent's Counter-Memorial  | Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 13 March 2020   |
| Respondent's Rejoinder         | Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 20 August 2020  |
| Schreuer Report                | Legal Opinion of Cristopher Schreuer dated 26 May 2020   |
| Second Balta del Río Statement | Second Witness Statement of José Carlos Balta del Río dated 29 May 2020  |
| Second Barrenechea Statement   | Second Witness Statement of Pablo Ezequiel Barrenechea dated 30 May 2020   |
| Second Compass Lexecon Report  | Second Expert Report of Manuel A. Abdala and Pablo López Zadicoff (Compass Lexecon) dated 1 June 2020  |

|   |   |
|---|---|
| Second Ferrando Gamarra Report                | Second Expert Report of Enrique Ferrando Gamarra dated 19 August 2020                         |
| Second Finnerty Report                        | Second Expert Report of John D. Finnerty dated 19 August 2020                                 |
| Second Giuffra Statement                      | Second Witness Statement of Bruno Giuffra dated 19 August 2020                                |
| Second Gutiérrez Damazo Statement             | Second Witness Statement of José Antonio Gutiérrez Damazo dated 19 August 2020                |
| Second Kaczmarek Report                       | Second Expert Valuation Report of Brent C. Kaczmarek dated 19 August 2020                     |
| Second Mott MacDonald Report                  | Second Expert Report of Horacio Rossi (Mott MacDonald) dated 26 May 2020                      |
| Second Ricover Report                         | Second Expert Report of Andrés Ricover of 20 August 2020                                      |
| Second Vargas Loret de Mola Statement         | Second Witness Statement of Carlos Rodolfo Juan Vargas Loret de Mola dated 31 May 2020        |
| Transcript, Day [#] ([Language]), [page:line] | Transcript of the Hearing (as revised by the Parties on 23 October 2021 and 16 December 2021) |
| Tribunal                                      | Arbitral tribunal reconstituted on 6 March 2019   |
| VCLT  | Vienna Convention on the Law of Treaties  |

## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of (i) the Concession Contract entered into on 4 July 2014 between the Republic of Peru, acting through the Ministry of Transport and Communications, as concession granter, and Sociedad Aeroportuaria Kuntur Wasi S.A., as concessionaire, amended on 3 February 2017 (the “**Concession Contract**” or the “**Contract**”); (ii) the Guarantee Agreement entered into on 4 July 2018 between the Republic of Peru, acting through the Vice-Minister of Transport and Communications, and Sociedad Aeroportuaria Kuntur Wasi S.A. (the “**Guarantee Agreement**”); (iii) the Agreement between the Republic of Peru and the Government of Argentina for the Reciprocal Promotion and Protection of Investments, signed by Peru and Argentina on 10 November 1994, and entered into force on 24 October 1996 (the “**BIT**”); and (iv) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The claimants are Sociedad Aeroportuaria Kuntur Wasi S.A. (“**Kuntur Wasi**”), a special purpose company organized under the laws of the Republic of Peru, and Corporación América S.A. (“**Corporación América**”), a company organized under the laws of the Argentine Republic, owning 50% of shares in Kuntur Wasi (together, the “**Claimants**”).
3. The respondent is the Republic of Peru (“**Peru**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties.**” The Parties’ representatives and their addresses are listed above on page (i).

## **II. PROCEDURAL HISTORY**

5. On 21 June 2018, ICSID received a request for arbitration from Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. against Peru, accompanied by exhibits 1 through 12 (the “**Request for Arbitration**”).

6. On 27 July 2018, the Secretary-General of ICSID registered the Request for Arbitration, as supplemented by the Claimants' letter of 20 July 2018, in accordance with Article 36(3) of the ICSID Convention, and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
7. On 3 August 2020, the Claimants and the Respondent agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party, and the third and presiding arbitrator to be appointed by agreement of the Parties. Pursuant to their agreed method of constitution, recorded in ICSID's letter of 8 August 2018, failing an agreement of the Parties, the president would be appointed by the Secretary-General from the ICSID Panel of Arbitrators.
8. On 6 August 2018, the Claimants appointed as arbitrator Gaëtan Verhoosel, a national of Belgium and the United Kingdom.
9. On 13 September 2018, the Respondent appointed as arbitrator José Emilio Nunes Pinto, a national of Brazil.
10. By letters of 22 October 2018, the Claimants and the Respondent requested that the Chairman of the Administrative Council appoint the President of the Tribunal in accordance with Article 38 of the ICSID Convention.
11. Through communications of 23 and 26 October 2018, the Secretary-General invited the Parties to select a mutually agreeable candidate as President through a ballot procedure, failing which the Chairman of the Administrative Council would proceed to appoint the presiding arbitrator in accordance with Article 38 of the ICSID Convention.
12. By letter of 20 December 2020, the ICSID Secretariat informed the Parties that the ballot procedure had resulted in the selection of Lucinda Low, a national of the United States of America, as the third and presiding arbitrator.

13. On 28 December 2018 and in accordance with Rule 6(1) of the ICSID Arbitration Rules, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Its members were: Lucinda Low, a national of the United States of America, President, appointed by the Secretary-General pursuant to the Parties' agreement; Gaëtan Verhoosel, a national of Belgium and the United Kingdom, appointed by the Claimants; and José Emilio Nunes Pinto, a national of Brazil, appointed by Respondent. Ms. Salinas Quero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
14. On 14 January 2019, the Respondent submitted a proposal for disqualification of arbitrator Gaëtan Verhoosel pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules, together with exhibits R-001 through R-015 and legal authorities RLA-001 through RLA-008. In accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was made on the proposal.
15. By letter of 17 January 2019, Mr. Verhoosel notified the ICSID Secretariat and the Parties of his resignation to the Tribunal in accordance with Rule 8(2) of the ICSID Arbitration Rules.
16. By letter of 22 January 2019, the ICSID Secretariat notified the Parties that in accordance with ICSID Arbitration Rule 8(2), Ms. Low and Mr. Nunes Pinto had consented to Mr. Verhoosel's resignation. Pursuant to ICSID Arbitration Rule 11(1), the Claimants would appoint a new arbitrator to fill the vacancy resulting from the Mr. Verhoosel's resignation.
17. On 1 March 2019, the Claimants appointed as arbitrator Enrique Barros Bourie, a national of Chile.
18. On 6 March 2019, the ICSID Secretariat notified the Parties that Prof. Barros Bourie had accepted his appointment as arbitrator. In accordance with Rule 12 of the ICSID Arbitration Rules, the vacancy produced by the resignation of Mr. Verhoosel was deemed to have been filled and the proceeding was resumed on that date.

19. On 9 April 2019, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by telephone conference (the “**First Session**”). Participating in the First Session were:

*Tribunal:*

|                         |            |
|-------------------------|------------|
| Lucinda Low             | President  |
| Enrique Barros Bourie   | Arbitrator |
| José Emilio Nunes Pinto | Arbitrator |

*ICSID Secretariat:*

|                          |                           |
|--------------------------|---------------------------|
| Celeste E. Salinas Quero | Secretary of the Tribunal |
|--------------------------|---------------------------|

*For Claimant:*

|                       |                          |
|-----------------------|--------------------------|
| Henry G. Burnett      | King & Spalding LLP      |
| Roberto Aguirre Luzi  | King & Spalding LLP      |
| Cedric Soule          | King & Spalding LLP      |
| Alfredo Bullard G.    | Bullard, Falla, Ezcurra+ |
| Huáscar Ezcurra R.    | Bullard, Falla, Ezcurra+ |
| Bruno Doig G.         | Bullard, Falla, Ezcurra+ |
| Nicolás de la Flor P. | Bullard, Falla, Ezcurra+ |
| Ezequiel Barrenechea  | Corporación América      |
| Marcelo Pozzetti      | Corporación América      |
| José Balta del Río    | Kuntur Wasi              |
| Giuliana Cavassa      | Kuntur Wasi              |

*For Respondent:*

|                                   |  |
|-----------------------------------|--|
| Stanimir A. Alexandrov            | Stanimir A. Alexandrov PLLC                                |
| Jennifer Haworth McCandless       | Sidley Austin LLP  |
| Marinn Carlson                    | Sidley Austin LLP  |
| María Carolina Durán              | Sidley Austin LLP  |
| Ricardo Ampuero Llerena           | Ministerio de Economía y Finanzas de la República del Perú |
| Mónica del Pilar Guerrero Acevedo | Ministerio de Economía y Finanzas de la República del Perú |

20. On 6 May 2019, following the first session, the Tribunal issued Procedural Order No. 1, recording the Parties’ agreements on procedural matters and the decision of the Tribunal on the disputed issues. Procedural Order No. 1 established, *inter alia*, that: the applicable Arbitration Rules would be those in effect from 10 April 2006, the procedural languages would be English and Spanish; the Tribunal’s award, decision, or procedural order would be publicly available subject to the deletion of confidential information; and that the place of the proceeding would be Washington, D.C. In its Procedural Order No. 1, the Tribunal

invited the Parties to jointly propose a procedural calendar and to submit their observations regarding confidentiality of information in the proceeding.

21. On 13 May 2019, in accordance with the schedule established by the Tribunal, the Claimants submitted their observations on the question of confidentiality.
22. On 16 May 2019, the Parties submitted their joint proposal on the procedural calendar.
23. On 20 May 2019, in accordance with the schedule established by the Tribunal, the Respondent submitted its observations on the question of confidentiality.
24. On 31 May 2019, the Tribunal issued Procedural Order No. 2 regarding the procedural calendar and question of confidentiality.
25. On 7 September 2019, the Claimants filed a Memorial on the Merits dated 6 September 2019 (“**Claimants’ Memorial**”), with exhibits C-001 through C-165 and legal authorities CL-001 through CL-149. The pleading was also accompanied by four witness statements and two expert reports, as follows: (i) Witness Statement of Mariano Mobilia dated 6 September 2019 (“**Mobilia Statement**”); (ii) Witness Statement of Pablo Ezequiel Barrenechea dated 6 September 2019 (“**First Barrenechea Statement**”); (iii) Witness Statement of José Carlos Balta del Río dated 6 September 2019 (“**First Balta del Río Statement**”); (iv) Witness Statement of Carlos Rodolfo Juan Vargas Loret de Mola dated 6 September 2019 (“**First Vargas Loret de Mola Statement**”); (v) Expert Report of Manuel A. Abdala and Pablo López Zadicoﬀ (Compass Lexecon) dated 6 September 2019 [CER-1] (“**First Compass Lexecon Report**”), with supporting documents CLEX-001 through CLEX-072; and (vi) Expert Report of Horacio Rossi (Mott MacDonald) dated 29 August 2019 [CER-2] (“**First Mott MacDonald Report**”), with supporting documents MML-001 through MML-022.
26. On 14 March 2020, the Respondent filed a Counter-Memorial on the Merits and Memorial on Jurisdiction dated 13 March 2020 (“**Respondent’s Counter-Memorial**”), with exhibits R-001 through R-118 and legal authorities RL-001 through RL-075. The pleading was also accompanied by two witness statements and four expert reports, as follows: (i) Witness Statement of Bruno Giuffra dated 13 March 2020 [RWS-1] (“**First Giuffra Statement**”);



- (ii) Witness Statement of José Antonio Gutiérrez Damazo dated 13 March 2020 [RWS-2] (“**First Gutiérrez Damazo Statement**”); (iii) Expert Valuation Report of Brent C. Kaczmarek dated 13 March 2020 [RER-1] (“**First Kaczmarek Report**”), accompanied by appendices C to F and exhibits IAV-001 through IAV-010; (iv) Expert Report of Enrique Ferrando Gamarra dated 13 March 2020 [RER-2] (“**First Ferrando Gamarra Report**”); (v) Expert Report of John D. Finnerty dated 13 March 2020 [RER-3] (“**First Finnerty Report**”); and (vi) Expert Report of Andrés Ricover of 13 March 2020 [RER-4] (“**First Ricover Report**”), with supporting documents AR-001 through AR-111.
27. On 9 May 2020, the Parties agreed to modify the dates for the presentation of the main pleadings, without affecting the dates reserved for the hearing on jurisdiction, merits, and damages.
28. On 12 May 2020, the Tribunal issued Procedural Order No. 3 regarding the modified procedural calendar. The Tribunal established that the hearing on jurisdiction, merits, and damages was scheduled for 3 to 11 December 2020 (with 12 and 14 December 2020 held in reserve).
29. On 1 June 2020, the Claimants filed a Reply on Merits and Counter-Memorial on Jurisdiction dated 1 June 2020 (“**Claimants’ Reply**”), with exhibits C-021Update, C-086Update, C-165 through C-245 and legal authorities CL-150 through CL-268. The pleading was also accompanied by four witness statements and five expert reports, as follows: (i) Witness Statement of Jorge Arruda Filho dated 1 June 2020 (“**Arruda Filho Statement**”); (ii) Second Witness Statement of Pablo Ezequiel Barrenechea dated 30 May 2020 (“**Second Barrenechea Statement**”); (iii) Second Witness Statement of José Carlos Balta del Río dated 29 May 2020 (“**Second Balta del Río Statement**”); (iv) Second Witness Statement of Carlos Rodolfo Juan Vargas Loret de Mola dated 31 May 2020 (“**Second Vargas Loret de Mola Statement**”); (v) Second Expert Report of Horacio Rossi (Mott MacDonald) dated 26 May 2020 [CER-3] (“**Second Mott MacDonald Report**”), with supporting documents MML-023 through MML-025; (vi) Second Expert Report of Manuel A. Abdala and Pablo López Zadicoff (Compass Lexecon) dated 1 June 2020 [CER-4] (“**Second Compass Lexecon Report**”), with supporting documents CLEX-073

through CLEX-098; *(vii)* Expert Report of Cristopher Schreuer dated 26 May 2020 [CER-5] (“**Schreuer Report**”), with supporting documents CS-001 through CS-080; *(viii)* Expert Report of María Teresa Quiñones Alayza dated 31 May 2020 [CER-6] (“**Quiñones Alayza Report**”), with supporting documents MTQ-001 through MTQ-051; and *(ix)* Expert Report of Eduardo Benavides Torres dated 30 May 2020 [CER-7] (“**Benavides Torres Report**”), with supporting documents EB-001 through EB-044.

30. On 20 August 2020, the Respondent filed a Rejoinder on the Merits and Reply on Jurisdiction dated 20 August 2020 (“**Respondent’s Rejoinder**”), with exhibits R-0089bis, R-119 through R-182 and legal authorities RL-076 through RL-100. The pleading was also accompanied by two witness statements and four expert reports, as follows: *(i)* Second Witness Statement of Bruno Giuffra dated 17 August 2020 [RWS-3] (“**Second Giuffra Statement**”); *(ii)* Second Witness Statement of José Antonio Gutiérrez Damazo dated 19 August 2020 [RWS-4] (“**Second Gutiérrez Damazo Statement**”); *(iii)* Second Expert Valuation Report of Brent C. Kaczmarek dated 19 August 2020 [RER-5] (“**Second Kaczmarek Report**”), accompanied by appendices G to I and exhibits IAV-005bis, IAV-011 through IAV-016; *(iv)* Second Expert Report of Enrique Ferrando Gamarra dated 19 August 2020 [RER-6] (“**Second Ferrando Gamarra Report**”); *(v)* Second Expert Report of John D. Finnerty dated 19 August 2020 [RER-7] (“**Second Finnerty Report**”); and *(vi)* Second Expert Report of Andrés Ricover of 20 August 2020 [RER-8] (“**Second Ricover Report**”), with supporting documents AR-113 through AR-227.
31. On 3 September 2020, the Tribunal invited the Parties to present their observations, if any, on the possibility of holding the hearing in a virtual manner, considering the travel restrictions and social distancing measures implemented as a result of the COVID-19 pandemic.
32. On 15 and 16 December 2020, the Claimants and the Respondent, respectively, submitted their comments on the Tribunal’s communication of 3 September 2020.
33. On 2 October 2020, the Tribunal issued Procedural Order No. 4 deciding to hold the hearing in a virtual manner. In addition, the Tribunal transmitted, through the Secretary of the Tribunal, a draft protocol for the organization of a virtual hearing.

34. The Parties presented their comments on the draft protocol on 9 and 12 October 2020.
35. On 13 October 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by videoconference pursuant to Section 20.1 of Procedural Order No. 1 (the “**Pre-Hearing Conference**”).
36. On 19 October 2020, the Claimants filed a Rejoinder on Jurisdiction dated 19 October 2020 (“**Claimants’ Rejoinder on Jurisdiction**”), with exhibits C-246 through C-247 and legal authorities CL-086, CL-269 through CL-280.
37. On 22 October 2020, the Tribunal issued Procedural Order No. 5 on the organization of the virtual hearing.
38. On 23 October 2020, the Parties notified each other and the Tribunal of the witnesses and experts to be examined at the hearing.
39. On 6 and 7 November 2020, the Parties submitted the joint tentative schedule for the hearing, indicating the order of examination of witnesses and experts.
40. On 1 December 2020, after several exchanges with the Parties, the Tribunal informed the Parties that the hearing was suspended until a later date in 2021.
41. On 25 February 2021, after several exchanges with the Parties, the Tribunal confirmed 13-17 September 2021 and 15-19 November 2021 as the new hearing dates.
42. By letter of 6 May 2021, the Secretary-General informed the Tribunal and the Parties that Ms. Rodríguez Martín had been appointed to serve as the Secretary of the Tribunal, replacing Ms. Salinas Quero.
43. On 28 June 2021, the Parties confirmed their agreement to hold the September 2021 hearing remotely.
44. By communications of 11 August 2021, the Parties informed the Tribunal that they had not been able to reach an agreement regarding the daily agenda for the September 2021 hearing. Each party submitted to the Tribunal a proposed daily agenda.

45. On 23 August 2021, the Claimants requested that the Tribunal annul the September 2021 hearing dates and reschedule the hearing to November 2021. The Claimants also requested that the Tribunal identify three weeks in the first trimester of 2022 where it would be available to hold the second part of the hearing.
46. On 26 August 2021, the Respondent submitted its observations on the Claimants' letter of 23 August 2021.
47. By communication of 27 August 2021, the Claimants submitted additional comments on the Respondent's observations of 26 August 2021.
48. By letter of 30 August 2021, the Tribunal informed the Parties that it would maintain the hearing dates of 13-17 September 2021 and 15-19 November 2021. Likewise, the Parties were instructed to reserve 18-19 October 2021 for the cross-examination of the air transport experts (Mr. Rossi and Mr. Ricover) and the damage experts (Compass Lexecon and IAV Advisors). The Tribunal reiterated its strong preference that all the witnesses called to testify do so during the same week.
49. By communication of 31 August 2021, the Tribunal informed the Parties of the tentative hearing agenda.
50. By letter of 2 September 2021, the Respondent notified the Tribunal that Mr. Giuffra was not available to testify in September and would only be available to testify during the November 2021 hearing.
51. By letter of 3 September 2021, the Claimants submitted to the Tribunal their observations on the Respondent's letter of 2 September 2021.
52. By communication of 4 September 2021, the Respondent submitted its further observations on the Claimants' communication of 3 September 2021.
53. By communication of 6 September 2021, the Tribunal invited the Respondent to provide by 7 September 2021 the details as to the measures it would adopt to ensure the sequestration of Mr. Giuffra prior to his testimony in November 2021. The Parties were instructed to refrain from submitting observations without prior leave from the Tribunal.

54. By communication of 7 September 2021, the Respondent submitted their response to the Tribunal's request of 6 September 2021.
55. On 9 September 2021, upon invitation from the Tribunal, the Claimants submitted their observations to the Respondent's communication of 7 September 2021.
56. By letter of 10 September 2021, the Tribunal informed the Parties that Mr. Giuffra would not be called to testify during the September 2021 hearing. The Tribunal further invited the Parties to indicate dates in October 2021 when they would be available to have Mr. Giuffra testify.
57. On 11 September 2021, the Claimants submitted a letter with an attachment regarding the location of Mr. Giuffra. The Claimants requested that the Tribunal reconsider its decision regarding the date of Mr. Giuffra's testimony.
58. On 13 September 2021, the Respondent submitted a letter to the Tribunal regarding Mr. Giuffra's location.
59. By communication of 16 September 2021, the Tribunal informed the Parties of its availability in October 2021 to hear Mr. Giuffra's testimony. The Tribunal invited the Respondent to confirm whether its counsel team and Mr. Giuffra were available on the proposed dates. On 28 September 2021, the Respondent confirmed availability.
60. A Hearing on jurisdiction, merits, and damages held virtually via Zoom and administered by Sparq from 13 to 16 September 2021 (the "**Hearing**"). The following persons were present at the Hearing:

*Tribunal:*

Lucinda Low  
Enrique Barros Bourie  
José Emilio Nunes Pinto

President  
Arbitrator  
Arbitrator

*ICSID Secretariat:*

Patricia Rodríguez Martín

Secretary of the Tribunal

*For Claimants:*

Counsel

Henry G. Burnett  
Roberto Aguirre Luzi  
Cedric Soule  
Fernando Rodriguez-Cortina  
Renzo Seminario Córdova  
Arturo Oropeza Casas  
Esteban Sanchez  
Zhennia R. Silverman  
Alonso Gerbaud  
Luisa R. Gutierrez Quintero  
Alfredo Bullard  
Huáscar Ezcurra  
Bruno Doig  
Daniel Masnjak  
Matías Quiroz  
Lucía Cortijo  
Arom Herrera

King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
King & Spalding LLP  
Bullard, Falla, Ezcurra+  
Bullard, Falla, Ezcurra+  
Bullard, Falla, Ezcurra+  
Bullard, Falla, Ezcurra+  
Bullard, Falla, Ezcurra+  
Bullard, Falla, Ezcurra+  
Bullard, Falla, Ezcurra+

Parties

Ezequiel Barrenechea  
Marcelo Pozzetti  
Giuliana Cavassa

Corporación América  
Corporación América  
Kuntur Wasi

Witnesses

Jorge Arruda  
Carlos Vargas  
José Balta

Corporación América  
Kuntur Wasi  
Kuntur Wasi

Experts

Horacio Rossi  
Enric Cuadras Oliva  
Gonzalo Carrasco Garcia  
Manuel Abdala  
Pablo López Zadicoff  
Paola Gutierrez  
Diego de la Vega  
María Teresa Quiñones  
Pablo Ferreyros  
Milene Jayme

Mott MacDonald  
Mott MacDonald  
Mott MacDonald  
Compass Lexecon  
Compass Lexecon  
Compass Lexecon  
Compass Lexecon  
Quiñones Alayza Abogados  
Quiñones Alayza Abogados  
Quiñones Alayza Abogados

*For Respondent:*

Counsel

Stanimir A. Alexandrov  
Jennifer Haworth McCandless

Sidley Austin LLP  
Sidley Austin LLP

María Carolina Durán  
Alex Young  
Lindsay Wardlaw  
Angela Ting  
Natalia Zuleta  
Gavin Cunningham  
Ally Reilly  
Ralph Antonioli  
Ricardo Puccio  
Jorge Masson  
Sandra Sánchez Cerro  
Andrea Navea Sanchez Cerro  
Angelica Gonzales González  
Mauricio Martínez

Sidley Austin LLP  
Sidley Austin LLP  
Sidley Austin LLP  
Sidley Austin LLP  
Sidley Austin LLP  
Sidley Austin LLP  
Sidley Austin LLP  
Sidley Austin LLP  
Estudio Navarro & Pazos Abogados  
Estudio Navarro & Pazos Abogados  
Estudio Navarro & Pazos Abogados  
Estudio Navarro & Pazos Abogados  
Osterling Abogados  
Osterling Abogados

Parties

Vanessa del Carmen Rivas Plata  
Saldarriaga  
Monica del Pilar Guerrero Acevedo  
  
Mijail Feliciano Cienfuegos Falcon  
  
Gian Carlo Silva

Ministerio de Economía y Finanzas de la  
República del Perú  
Ministerio de Economía y Finanzas de la  
República del Perú  
Ministerio de Economía y Finanzas de la  
República del Perú  
Ministerio de Transporte y Comunicación  
de la República del Perú

Experts

John Finnerty  
Isabel Kunsman  
Jack Chen  
Brad Hall  
Brent Kaczmarek  
Gabriel Perkinson  
Andrés Ricover  
Enrique Ferrando

AlixPartners  
AlixPartners  
AlixPartners  
AlixPartners  
IAV Advisors LLC  
IAV Advisors LLC  
Air Transport Specialist  
Osterling Abogados

*Court Reporters:*

Dawn Larson  
Paul Pelissier  
Rodolfo Rinaldi  
Marta Rinaldi  
Dante Rinaldi

Worldwide Reporting, LLP  
D-R Esteno  
D-R Esteno  
D-R Esteno  
D-R Esteno

*Interpreters:*

Silvia Colla  
Charles Roberts  
Daniel Giglio

English-Spanish Interpreter  
English-Spanish Interpreter  
English-Spanish Interpreter

*Zoom Technician:*

Mike Young

Sparq

61. The following persons were examined during the Hearing:

*On behalf of Claimants:*

Carlos Vargas

José Balta

Jorge Arruda

Kuntur Wasi

Kuntur Wasi

Corporación América

*On behalf of Respondent:*

John Finnerty

AlixPartners

62. By communications of 28 September 2021, the Parties confirmed their availability to participate in the remainder of the Hearing on 11, 18, and 19 October and 15 and 16 November 2021.
63. On 11 October 2021, the Tribunal and the Parties held a continuation of the Hearing virtually via Zoom and administered by Sparq. Mr. Giuffra was examined during Part II of the Hearing.
64. On 15 October 2021, the Parties requested a week extension, until 22 October 2021, to review and submit their agreed changes to the Hearing transcripts for Days 1 to 4. On the same date, the Tribunal approved the requested extension. The Tribunal informed the Parties that, accordance with Procedural Order No. 1, para 22.3, the corrections to the transcript of Day 5 of the Hearing were due by 9 November 2021.
65. On 18 and 19 October 2021, the Tribunal and the Parties held a continuation of the Hearing via Zoom. Mr. Rossi, Mr. Ricover, and Messrs. Abdala and López Zadicoff were examined during Part III of the Hearing.
66. By communication of 22 October 2021, the Claimants notified the Tribunal that Mr. Abdala would not be available to be examined on 15 November 2021. The Claimants proposed that the damages experts submit simultaneously and in written form responses to questions from the Tribunal at some date to be determined between the parties and the Tribunal. By communication of the same date, the Respondent submitted its agreement



with the Claimants' proposal. The Respondent requested, however, that the Claimants' damages experts continue to be sequestered until after Mr. Kaczmarek had testified.

67. By communication of the same date, the Claimants submitted a reply to the Respondent's proposal that the Claimants' damages experts continue to be sequestered until after Mr. Kaczmarek had testified.
68. By communication of the same date, the Tribunal invited the Respondent to explain, by 25 October 2021, the reasons that justified ordering the sequestration of the Claimants' quantum experts until after Mr. Kaczmarek had testified.
69. On 23 October 2021, the Parties submitted agreed corrections to the Hearing transcripts for Days 1 to 4.
70. On 25 October 2021, the Tribunal invited the Parties to confirm their availability to start the Hearing at 8 am EST on Monday 15 November instead of 9:30 am EST, and end for the day at 2 pm EST instead of 3:30 pm EST.
71. By letter of 25 October 2021, the Respondent submitted reasons for the sequestration of Claimants' quantum experts until after Mr. Kaczmarek had testified.
72. On 26 October 2021, the Tribunal informed the Parties that it had decided that both Parties' quantum experts should remain sequestered except as otherwise expressly authorized by the Tribunal until they had responded to any questions posed to them by the Tribunal following Mr. Kaczmarek's testimony.
73. On 5 November 2021, the Claimants informed the Tribunal that Mr. Abdala and Mr. Lopez Zadicoff would both be available to be interrogated at the Hearing on 15 November 2021.
74. On 8 November 2021, the Tribunal requested that Mr. Abdala and Mr. Lopez Zadicoff appear at the Hearing to be interrogated by the Tribunal.
75. On 9 November 2021, the Parties submitted agreed corrections to the Hearing transcripts for Day 5.

76. On 15 and 16 November 2021, the Tribunal and the Parties held a continuation of the Hearing via Zoom. Mr. Kaczmarek, Mr. Abdala, Mr. López Zadicoff, Ms. Quiñones Alayza, and Dr. Ferrando Gamarra, were examined during Part IV of the Hearing.
77. At the end of last Hearing Day, on 16 November 2021, the Respondent stated its position that the filing of post-hearing briefs was unnecessary,<sup>1</sup> and the Claimants were asked to state their position within 24 hours.<sup>2</sup> On 17 November 2021, the Claimants confirmed that they did not consider it necessary to file post-hearing briefs.
78. On 18 November 2021, the Parties submitted agreed corrections to the Hearing transcripts for Days 6 and 7.
79. On 16 December 2021, the Parties submitted agreed corrections to the Hearing transcripts for Days 8 and 9.

### III. FACTUAL BACKGROUND

#### A. THE BACKGROUND TO THE CHINCHERO INTERNATIONAL AIRPORT

80. The Cuzco region is Peru's main touristic site and a critical component of Peru's touristic sector.<sup>3</sup> However, the Cuzco region's existing airport, the Velasco Astete International Airport (the "**Cuzco Airport**"), built in 1963, has a series of geographical and capacity limitations.<sup>4</sup> In 2017, Peru estimated that by 2020, the Cuzco Airport would be operating at three times the capacity for which it was designed.<sup>5</sup>

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<sup>1</sup> Transcript, Day 9 (English), 1996:3-4.

<sup>2</sup> Transcript, Day 9 (English), 1998:9.

<sup>3</sup> **Exhibit C-98**, Chinchero International Airport – Cuzco (AICC), Presentation of PROINVERSIÓN, February 2014; **Exhibit R-17**, *Oficio No. 050-2017-MINCETUR/DM-GA*, 13 July 2017, attaching *Informe No. 016-2017/MINCETUR/VMT/DGET/DIOT*, MINCETUR's Opinion Regarding Public Interest of Chinchero Airport, 12 July 2017, p. 7.

<sup>4</sup> **Exhibit C-98**, Chinchero International Airport – Cuzco (AICC), Presentation of PROINVERSIÓN, February 2014; **Exhibit R-17**, *Oficio No. 050-2017-MINCETUR/DM-GA*, 13 July 2017, attaching *Informe No. 016-2017/MINCETUR/VMT/DGET/DIOT*, MINCETUR's Opinion Regarding Public Interest of Chinchero Airport, 12 July 2017, pp. 2, 4-6.

<sup>5</sup> **Exhibit R-17**, *Oficio No. 050-2017-MINCETUR/DM-GA*, 13 July 2017, attaching *Informe No. 016-2017/MINCETUR/VMT/DGET/DIOT*, MINCETUR's Opinion Regarding Public Interest of Chinchero Airport, 12 July 2017, p. 7.

81. Accordingly, on 11 October 2001, Peru's Congress enacted Law No. 27528, which classified the Chinchero International Airport (the "**Chinchero Airport**" or the "**New Airport**") as a project of public interest and of the "highest priority to the State" (the "**Project**" or the "**Chinchero Airport Project**").<sup>6</sup> This law also authorized PROINVERSIÓN,<sup>7</sup> the State's private investment promotion agency, to promote a public tender process and grant the concession for the construction and operation of the Airport.<sup>8</sup>
82. In 2009, Peru's Congress reiterated the importance of the Chinchero Airport Project for the country's economic and social development through Law No. 27528, and on 2 February 2010, the Ministry of Transport and Communications (the "**MTC**") requested PROINVERSIÓN to launch a public tender to award the concession for the construction and operation of the New Airport.<sup>9</sup>
83. A few months later, through Emergency Decree No. 039-2010, the President of Peru, President Alan García Pérez, ordered PROINVERSIÓN to prioritize the Chinchero Airport Project to overcome the operational, geographic and social limitations of the Cuzco Airport.<sup>10</sup>
84. In 2017, the MTC and the Ministry of Foreign Trade and Tourism (the "**MINCETUR**" for its acronym in Spanish) were asked again to confirm whether the construction of the Chinchero Airport was in the public interest and to assess the benefits of the Project to the Cuzco region.<sup>11</sup> Both the MTC and MINCETUR concluded that the new Chinchero Airport would bring about significant benefits to the region, including approximately US\$63 billion in benefits during the 40 years of the Concession and the creation of 2,500 jobs during its construction and operation.<sup>12</sup> MINCETUR further concluded that the New

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<sup>6</sup> **Exhibit CL-93**, *Ley No. 27528, Ley que Dispone la Actualización de Estudios Definitivos y la Construcción del Aeropuerto de Chinchero, en el Departamento de Cusco*, 9 October 2001 ("Law No. 27528"), art. 2.

<sup>7</sup> At that time called Agencia de Promoción de la Inversión Privada.

<sup>8</sup> **Exhibit CL-93**, Law No. 27528, art. 4.

<sup>9</sup> **Exhibit R-21**, *Oficio No. 125-2010-MTC/01* from MTC to Proinversión, 2 February 2010.

<sup>10</sup> **Exhibit C-100**, *Decreto de Urgencia No. 039-2010*, 10 June 2010, "Considerando."

<sup>11</sup> Respondent's Counter-Memorial, paras. 22, 23.

<sup>12</sup> **Exhibit R-18**, Memorandum No. 0524-2017-MTC-12.08, 13 July 2017, attaching *Informe No. 0347-2017-MTC/12.08*, MTC's Opinion Regarding Public Interest of Chinchero Airport, 13 July 2017, pp. 3, 5, 6.

Airport was urgently needed to aid the economic and social development of Cuzco and Peru, and that building the New Airport was in the public interest.<sup>13</sup>

## **B. THE TENDER PROCESS FOR THE CHINCHERO AIRPORT AND THE *Bases***

### **(1) Introduction**

85. As explained above, PROINVERSIÓN had to develop a tender process to select a concessionaire for the design, construction and operation of the Chinchero Airport. According to the Respondent, the tender process was divided into two phases:<sup>14</sup> first, PROINVERSIÓN prepared the bidding terms (the “*Bases*”), which served as the terms of reference of the tender procedures and made drafts of the Concession Contract available to potential bidders. The potential bidders were then invited to make comments on the drafts. Taking the appropriate comments and answers into account, PROINVERSIÓN published the final version of the *Bases* and the Concession Contract. In the second phase of the tender process, PROINVERSIÓN collected proposals from the bidders and selected the winning bid among the qualified bidders.
86. The first version of the *Bases* of the tender was published in August 2010.<sup>15</sup> The *Bases* were modified on various occasions through *circulares*, issued in response to the bidders’ comments and questions, with the final consolidated version published in 2014.<sup>16</sup> According to the *Bases*, the tender process would be divided into three stages:<sup>17</sup>
- Pre-qualification of bidders:<sup>18</sup> During this first phase, bidders had to submit documentation evidencing that they met the minimum technical and financial requirements set out in the

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<sup>13</sup> **Exhibit R-17**, *Oficio No. 050-2017-MINCETUR/DM-GA*, 13 July 2017, attaching *Informe No. 016-2017/MINCETUR/VMT/DGET/DIOT*, MINCETUR’s Opinion Regarding Public Interest of Chinchero Airport, 12 July 2017, p. 9.

<sup>14</sup> Respondent’s Counter-Memorial, para. 29; **Exhibit RWS-2**, First Gutiérrez Damazo Statement, paras. 15, 16.

<sup>15</sup> **Exhibit C-10**, *Bases - Concurso de Proyectos Integrales para la Entrega en Concesión al Sector Privado del Nuevo Aeropuerto Internacional de Chinchero Cusco*, August 2010 (“First Bidding Terms”).

<sup>16</sup> **Exhibit C-18**, *Texto Único Ordenado de las Bases -Concurso de Proyectos Integrales para la Entrega en Concesión al Sector Privado del Nuevo Aeropuerto Internacional de Chinchero Cusco*, *Circulares No. 1 a No. 64*, March 2014 (“Final Bidding Terms”); Respondent’s Counter-Memorial, para. 29.

<sup>17</sup> **Exhibit C-18**, Final Bidding Terms, art. 5, art. 7.1, art. 7.2; Claimants’ Memorial, paras. 45 *et seq.*; Respondent’s Counter-Memorial, paras. 36 *et seq.*

<sup>18</sup> **Exhibit C-18**, Final Bidding Terms, art. 5.

*Bases*. Among those requirements, bidders had to prove that they had the required competence and experience to build, manage and operate an international airport, a net worth of US\$140 million and an annual turnover of at least US\$48 million.

- Evaluation of the bidders' technical proposals:<sup>19</sup> The pre-qualified bidders had to submit their technical proposal and a signed copy of the Concession Contract. The technical proposal had to include a description of the Project and a business plan.
- Evaluation of the bidders' economic proposals:<sup>20</sup> At the same time, the pre-qualified bidders had to submit – in a separate envelope – their economic proposals. Despite receiving the technical and economic proposals at the same time, PROINVERSIÓN had to first assess whether the proposals complied with the technical requirements, inform the pre-qualified bidders, and subsequently review and rank the economic proposals.<sup>21</sup>

87. Given that the Parties dispute the economic structure of the Project, the Tribunal will next turn to that topic.

## **(2) The financial structure of the Project as contemplated in the *Bases***

88. In the first draft of the *Bases*, PROINVERSIÓN classified the Concession as a “self-sustaining PPP,” which meant that the concessionaire would be responsible for bearing the full cost of construction and would recoup its up-front costs through the fees collected during the operation of the Concession.<sup>22</sup>

89. However, according to the Respondent, after conducting a financial analysis, PROINVERSIÓN concluded that the Project would not be viable under a self-sustaining structure and the airport fees required to finance the Project would have to be too high. Consequently, by October 2012, PROINVERSIÓN changed the economic structure of the

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<sup>19</sup> **Exhibit C-18**, Final Bidding Terms, art. 7.1.

<sup>20</sup> **Exhibit C-18**, Final Bidding Terms, art.7.2.

<sup>21</sup> Respondent's Counter-Memorial, para. 46.

<sup>22</sup> Respondent's Counter-Memorial, para. 34; **Exhibit RWS-2**, First Gutiérrez Damazo Statement, para. 13.

Project to a co-financed PPP.<sup>23</sup> This meant that the State would bear part of the costs of the Project.

90. In December 2012 (*i.e.*, before the final version of the *Bases* was approved), PROINVERSIÓN hired the consulting firm Advanced Logistics Group (“**ALG**”) to advise on how to structure the financial and economic model of the Concession.<sup>24</sup> On 17 December 2013, ALG issued a report in which it recommended a financial structure for the Concession (“**ALG’s Financial Economic Model**”), and setting out the maximum levels of co-financing that would be needed from the State. It also recommended the economic criteria to be used to select the concessionaire.<sup>25</sup>
91. ALG’s recommendation was to combine two co-financing mechanisms: Pay-As-You-Work (“*Pago por Obras*” or “**PPO**” for its acronym in Spanish) and Payment for the Advancement of Works (“*Pago Annual por Obras*” or “**PAO**” for its acronym in Spanish).<sup>26</sup>
92. Under ALG’s Financial Model, the PPO mechanism meant that the State would pay the concessionaire periodically as the works covered by that mechanism were being executed, based on the progress of the work as certified by the *Organismo Supervisor de la Inversión en Infraestructura de Transporte de Uso Público* (“**OSITRAN**”). Under the PAO mechanism, the State would pay back the concessionaire for the co-financed costs covered by that mechanism only after the Chinchero Airport had been built and begun operating. Payment would be made through quarterly payments over a period of 15 years. The quarterly payments would include a premium to compensate the concessionaire for financing the construction of the Airport. To calculate the premium, ALG assumed an average borrowing interest rate of 7.01% plus a 2.5% spread.<sup>27</sup>

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<sup>23</sup> Respondent’s Counter-Memorial, para. 35; **Exhibit RWS-2**, First Gutiérrez Damazo Statement, paras. 13, 14.

<sup>24</sup> Respondent’s Counter-Memorial, para. 49; **Exhibit R-29**, Proinversión’s Meeting Minute No. 497-4-2012-CPI regarding Chinchero’s Tender Process, Session No. 497, 7 December 2012.

<sup>25</sup> **Exhibit R-32**, *Circular No. 55*, regarding Chinchero’s Tender Process, 20 December 2013; **Exhibit R-33**, *Circular No. 57*, regarding Chinchero’s Tender Process, 20 December 2013.

<sup>26</sup> **Exhibit R-31**, ALG Report, Deliverable 4-B: Financial Economic Model, December 2013, p. 128.

<sup>27</sup> **Exhibit R-31**, ALG Report, Deliverable 4-B: Financial Economic Model, December 2013, pp. 128-130.

93. Some of ALG's recommendations and parameters set out above were incorporated into the *Bases*.<sup>28</sup> In particular, the *Bases* contemplated that the Project would be developed on a "co-financing" basis, and such term was defined as: "the amount of money expressed in US dollars that the Concession Owner will pay to the Concessionaire through the mechanisms of Pay-As-You-Work (PPO) and Payment for the Advancement of Works (PAO)."<sup>29</sup> In light of this financial structure, Annex 7 of the *Bases* set out the two criteria that would be taken into account by the State to determine the best economic proposals:<sup>30</sup>
- Criteria No. 1, Payment Fund of the PAO: Each bidder would set out the maximum amount the State would have to pay to co-finance the Project. This amount was referred to as the Payment Fund of the PAO ("*Fondo de Pagos del PAO*" or "**FPAO**" for its acronym in Spanish).<sup>31</sup> Under the *Bases*, the bidders' proposals had to include an FPAO equal to or lower than the maximum amount of co-financing that Peru was willing to assume, and which was set at US\$457.489.504. This amount corresponded to the estimated baseline scenario proposed by ALG in its Financial Economic Model.<sup>32</sup>
  - Criteria No. 2, Annual Refund Percentage ("*Porcentaje de Reintegro del Cofinanciamiento*"): <sup>33</sup> The *Bases* established that the concessionaire would have to provide the State a percentage equal to or above 30% of all net income above US\$35 million, obtained from the operational stage of the Chinchero Airport.
94. The bidder that presented the most attractive combination of the low FPAO and a high Annual Refund Percentage would win the bid.<sup>34</sup>

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<sup>28</sup> **Exhibit R-32**, *Circular No. 55*, regarding Chinchero's Tender Process, 20 December 2013; **Exhibit R-33**, *Circular No. 57*, regarding Chinchero's Tender Process, 20 December 2013.

<sup>29</sup> **Exhibit C-18**, Final Bidding Terms, art. 1.2.13. [Tribunal's translation] The original Spanish reads: "*Cofinanciamiento: Es la suma de dinero expresada en Dólares Americanos que el Concedente desembolsará al Concesionario mediante los mecanismos de Pago por Obras (PPO) y Pago por Avance de Obra (PAO), de acuerdo a lo establecido en el Contrato.*"

<sup>30</sup> **Exhibit C-18**, Final Bidding Terms, Annex 7.

<sup>31</sup> **Exhibit C-18**, Final Bidding Terms, Cl. 1.2.43.

<sup>32</sup> **Exhibit R-31**, ALG Report, Deliverable 4-B: Financial Economic Model, December 2013, p. 131; Respondent's Counter-Memorial, para. 60.

<sup>33</sup> **Exhibit C-18**, Final Bidding Terms, Cl. 1.2.61.

<sup>34</sup> Respondent's Counter-Memorial, para. 72.

95. According to the Respondent, PROINVERSIÓN implemented ALG's Financial Economic Model in the *Bases* and in the Concession Contract.<sup>35</sup> However, ALG's Financial Economic Model was confidential and was not disclosed to bidders.<sup>36</sup> Among others, the *Bases* did not expressly incorporate ALG's assumptions in relation to the premium that would be paid by the State to compensate the concessionaire for financing the Project during the PAO stage of the works. In other words, the *Bases* do not set out the assumptions underlying the formula.
96. According to the Respondent, the reason for not disclosing ALG's report was to avoid biasing the bidders' proposals and making sure they carried out their own financial due diligence and projections.<sup>37</sup> Nevertheless, the Respondent argues that some aspects of the ALG report and the State's economic expectations for the Concessions were disclosed through the draft Concession Contract as well as OSITRAN's final opinion on the Concession Contract, which bidders received prior to submitting their economic proposals.<sup>38</sup>
97. Indeed, on 27 December 2013, OSITRAN issued an opinion on the final version of the Concession Contract (which was made public on 7 January 2014),<sup>39</sup> in which OSITRAN discussed PROINVERSIÓN's economic analysis. In the report, OSITRAN refers to the expected interest rate of 9.52%,<sup>40</sup> and explains that the Concession Contract's financial economic model was designed under the assumption that the average borrowing rate of the concessionaire would be 7.02%, plus a spread of 2.5% to reflect the time value of money corresponding to the time between the execution of the works and the payment of those

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<sup>35</sup> Respondent's Rejoinder, para. 35.

<sup>36</sup> Respondent's Counter-Memorial, para. 51; **Exhibit RWS-2**, First Gutiérrez Damazo Statement, para. 31.

<sup>37</sup> Respondent's Counter-Memorial, para. 51.

<sup>38</sup> Respondent's Counter-Memorial, para. 51.

<sup>39</sup> **Exhibit R-35**, Publication of OSITRAN's Technical Opinion of the Final Version of the Contract, El Peruano, 7 January 2014; **Exhibit R-57**, *Informe No. 057-13-GRE-GS-GAJ-OSITRAN*, OSITRAN's Technical Opinion Regarding the Final Version of the Concession Contract, 27 December 2013.

<sup>40</sup> **Exhibit R-57**, *Informe No. 057-13-GRE-GS-GAJ-OSITRAN*, OSITRAN's Technical Opinion Regarding the Final Version of the Concession Contract, 27 December 2013, para. 109; see also **Exhibit R-34**, *Oficio No. 001-14-SCD-OSITRAN*, 3 January 2014; **Exhibit R-56**, OSITRAN's Approval of the Technical Opinion of the Final Version of the Contract, Agreement No. 1671-491-14-CD-OSITRAN, 3 January 2014; **Exhibit R-46**, *Oficio No. 5015-2016-MTC*, 2 January 2017.



works through the quarterly PAO by Peru.<sup>41</sup> The Parties disagree on the content and significance of this report for the terms of the Concession Contract.<sup>42</sup>

### (3) Kuntur Wasi is selected as the winning bidder

98. On 7 July 2011 Corporación América and Andino constituted Consorcio Kuntur Wasi under the laws of Peru, for the purpose of participating in the tender process for the Chinchero Airport.<sup>43</sup> Corporación América and Andino each held an equal 50% stake of the newly created consortium.<sup>44</sup>
99. On 8 July 2011, Consorcio Kuntur Wasi submitted the documentation evidencing that it met the minimum technical and financial requirements set out in the *Bases*. On 18 July 2011, PROINVERSIÓN informed Consorcio Kuntur Wasi that it was designated as a pre-qualified bidder.<sup>45</sup>
100. As explained above,<sup>46</sup> in October 2012, PROINVERSIÓN made substantial changes in the financial structure of the Concession and requested the pre-qualified bidders to confirm if they were still interested in submitting a bid for the Project.<sup>47</sup> Between November 2013 and April 2014, some of the pre-qualified bidders – including Consorcio Kuntur Wasi – reconfirmed their interest.<sup>48</sup>
101. On 22 April 2014, Consorcio Kuntur Wasi submitted its technical and economic proposals.<sup>49</sup> On 25 April 2014, PROINVERSIÓN informed Consorcio Kuntur Wasi that

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<sup>41</sup> **Exhibit R-57**, *Informe No. 057-13-GRE-GS-GAJ-OSITRAN*, OSITRAN’s Technical Opinion Regarding the Final Version of the Concession Contract, 27 December 2013, paras. 105-108.

<sup>42</sup> Respondent’s Counter-Memorial, para. 68; Claimants’ Reply, paras. 495-505; Respondent’s Rejoinder, para. 67.

<sup>43</sup> **Exhibit C-16**, Consortium Agreement between Andino Investment Holding S.A. and Corporación América S.A., 7 July 2011 (“Consortium Agreement”), Cl. 2.1-2.2; Claimants’ Memorial, paras. 47, 60.

<sup>44</sup> **Exhibit C-16**, Consortium Agreement, Cl. 3.2.

<sup>45</sup> Claimants’ Memorial, para. 52; **Exhibit C-38**, *Acta de Presentación y Apertura de Sobre No. 1*, 8 July 2011; **Exhibit C-91**, *Oficio No. 71-2011/JP-AERO-DPI/PROINVERSIÓN*, 18 July 2011. However, Kuntur Wasi had not yet been incorporated.

<sup>46</sup> See para. 89 *supra*.

<sup>47</sup> **Exhibit C-18**, Final Bidding Terms, art. 5.6.

<sup>48</sup> Respondent’s Counter-Memorial, para. 43; **Exhibit R-44**, Proinversión’s Meeting Minutes Regarding Chinchero’s Tender Process, Session No. 344, 20 November 2013, p. 1, para. 4.

<sup>49</sup> Claimants’ Memorial, para. 55; Respondent’s Counter-Memorial, para. 44; **Exhibit C-92**, *Acta de Recepción de los Sobres No. 2 y No. 3 y Apertura del Sobre No. 2*, 22 April 2014; **Exhibit R-27**, Proinversión’s *Libro Blanco* of Chinchero’s Tender Process, Annex 14, “Receipt of Envelope Nos. 2 and 3 and Opening of Envelope No. 2”, p. 1329. Exhibit C-92 and R-27 contain the same document.

its technical proposal was “acceptable,” and therefore, Consorcio Kuntur Wasi was designated as a “qualified bidder.”<sup>50</sup> In addition to Consorcio Kuntur Wasi, two other bidders were qualified: the Chinchero Airport Consortium (formed by Vinci Airports, S.A.S., Vinci Concessions S.A.S., and Graña y Montero, S.A.A.) and the Imperial Airport Consortium (formed by Grupo Odinsa, S.A. and Mota Engil Perú, S.A.).<sup>51</sup>

102. As to the economic proposal, Consorcio Kuntur Wasi proposed that the State’s maximum amount of co-financing (*i.e.*, FPAO) would be US\$264.8 million and a 100% refund of any benefits derived from the operation of the airport above US\$35 million.<sup>52</sup> The Chinchero Airport Consortium proposed an FPAO of US\$411 million and an Annual Refund Percentage of 100%, while Imperial Airport Consortium proposed an FPAO of US\$348 million and an Annual Refund Percentage of 44%.<sup>53</sup>
103. On 25 April 2014, PROINVERSIÓN informed Consorcio Kuntur Wasi that its economic proposal had been selected among all the qualified bidders and that it was awarded the Concession.<sup>54</sup>
104. As provided for in the Consortium Agreement<sup>55</sup> and required in the *Bases*,<sup>56</sup> as winners of the tender process, Corporación América and Andino proceeded to constitute a company in Peru that would later subscribe with the Peruvian State the corresponding contract for the concession of the Chinchero Airport. This is how on 11 June 2014, Corporación América and Andino constituted Kuntur Wasi to develop and later operate the Chinchero

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<sup>50</sup> Claimants’ Memorial, para. 56; **Exhibit C-93**, *Acta de Apertura de Sobres No. 3 y Adjudicación de la Buena Pro*, 25 April 2014.

<sup>51</sup> Claimants’ Memorial, para. 56; **Exhibit C-93**, *Acta de Apertura de Sobres No. 3 y Adjudicación de la Buena Pro*, 25 April 2014; Respondent’s Counter-Memorial, para. 47; **Exhibit R-27**, Proinversión’s *Libro Blanco* of Chinchero’s Tender Process, Annex 14, “Receipt of Envelope Nos. 2 and 3 and Opening of Envelope No. 2”, p. 1330.

<sup>52</sup> Claimants’ Memorial, para. 57; **Exhibit C-93**, *Acta de Apertura de Sobres No. 3 y Adjudicación de la Buena Pro*, 25 April 2014, p. 2.

<sup>53</sup> Claimants’ Memorial, para. 57; **Exhibit C-93**, *Acta de Apertura de Sobres No. 3 y Adjudicación de la Buena Pro*, 25 April 2014, p. 2.

<sup>54</sup> Claimants’ Memorial, para. 57; **Exhibit C-93**, *Acta de Apertura de Sobres No. 3 y Adjudicación de la Buena Pro*, 25 April 2014, p. 3.

<sup>55</sup> **Exhibit C-16**, Consortium Agreement, Cl. 2.2.

<sup>56</sup> **Exhibit C-10**, First Bidding Terms, para. 7.1.e), p. 27; **Exhibit C-18**, Final Bidding Terms, para. 7.1.e), p. 37.

Airport. Corporación América and Andino, each held a 50% stake in the new company Kuntur Wasi.<sup>57</sup>

## **C. THE CONCESSION CONTRACT AND THE GUARANTEE AGREEMENT**

### **(1) Kuntur Wasi and the MTC sign the Concession Contract and the Guarantee Agreement**

105. On 4 July 2014, Peru – represented by the MTC (also referred to herein as the “**Concession Owner**” or the “**Grantor**”) – and Kuntur Wasi (also referred to herein as the “**Concessionaire**”) signed the Contract for the Concession of the New International Chinchero-Cuzco Airport.<sup>58</sup>

106. Clause 10.1.1 of the Concession Contract established that the State would issue a Supreme Decree approving the signing of a contract to guarantee all the representations made and obligations assumed by the MTC in the Concession Contract.<sup>59</sup> This Supreme Decree was approved by President Ollanta Humala on 27 June 2014.<sup>60</sup>

107. On 4 July 2014, as instructed by the Supreme Decree, the State, represented by the MTC, and Kuntur Wasi also signed the Guarantee Agreement, under which Peru guaranteed the “representations, guarantees and obligations of the Concession Owner under the Concession Contract.”<sup>61</sup> On the same date, Kuntur Wasi took possession of the Concession area.<sup>62</sup>

### **(2) The main terms of the Concession Contract**

108. Under the Concession Contract, Kuntur Wasi would carry out the design, financing, construction, operation, and maintenance of the Chinchero Airport.<sup>63</sup> The Concession

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<sup>57</sup> **Exhibit C-17** Constitutive Documents of Kuntur Wasi, 11 June 2014, Cl. 2; Claimants’ Memorial, para. 60.

<sup>58</sup> **Exhibit C-4**, Concession Contract.

<sup>59</sup> **Exhibit C-4**, Concession Contract, Cl. 10.1.1.

<sup>60</sup> **Exhibit CL-35**, *Decreto Supremo No. 185-2014-EF*, 27 June 2014.

<sup>61</sup> **Exhibit C-49**, Guarantee Agreement, Cl. 2.1. [Tribunal’s translation] The original Spanish reads: “...las declaraciones, seguridades y obligaciones del Concedente establecidas en el CONTRATO DE CONCESION.”

<sup>62</sup> **Exhibit C-94**, *Acta de Toma de Posesión del Área de Concesión del Nuevo Aeropuerto Internacional de Chinchero-Cusco (AICC)*, 4 July 2014.

<sup>63</sup> **Exhibit C-4**, Concession Contract, Cl. 2.1.3.

would last for 40 years from the date of signing, unless the Contract was terminated earlier, or the Parties agreed to extend its duration.<sup>64</sup>

109. The Concession Owner would retain the property rights of the Concession area but would transfer the possession of the Concession area to the Concessionaire for the entire duration of the Concession.<sup>65</sup>

*a. Kuntur Wasi's main deliverables as Concessionaire*

110. The Concession Contract established that the first phase of the construction works should begin within 30 days of completion of a number of conditions by the Concessionaire:<sup>66</sup>

- (i) Obtaining a construction Authorization from the DGAC;
- (ii) Obtaining the approval of the Final Engineering Study (“*Estudio Definitivo de Ingeniería*” or “**EDI**” for its acronym in Spanish). The EDI was the detailed set of technical executive drawings for the project that Kuntur Wasi had to develop for each construction phase. For the construction works to begin, the EDI had to be approved by the Concession Owner, subject to OSITRAN’s favorable opinion;
- (iii) Obtaining the approval of an environmental assessment and securing a corresponding certification;
- (iv) Securing the “Financial Closing” for all of the construction works required for the Project;
- (v) Taking possession of the construction area;
- (vi) Obtaining the corresponding municipal permits and licenses; and
- (vii) Obtaining the construction permit from the Ministry of Culture.

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<sup>64</sup> **Exhibit C-4**, Concession Contract, Cl. 4.1.

<sup>65</sup> **Exhibit C-4**, Concession Contract, Cl. 5.1, Cl.5.2.

<sup>66</sup> **Exhibit C-4**, Concession Contract, Cl. 8.2.

111. Under the Concession Contract, the construction works for the Chinchero Airport would last a maximum of five years, and the initial earthworks would last a maximum of two years from the signing of the Contract.<sup>67</sup> If the construction works were delayed for any reason attributable to the Concession Owner, the Concession's term would be extended for the time equivalent to the delay.<sup>68</sup> If, on the other hand, the works were completed after the deadlines contemplated in the EDI, causing a delay of more than 12 months, the Concession Owner had the right to terminate the Contract for breach.<sup>69</sup>

***b. The Concession Contract's financial structure***

112. According to the Concession Contract (per the *Bases*), the construction of the Chinchero Airport would be subdivided in two stages: construction and operation.<sup>70</sup> The construction phase would, in turn, be divided into three sub-stages, each with its own financing structure.<sup>71</sup> The Concession Contract also set out a separate structure for the financing of the Project during the operation phase. However, the Tribunal will focus on the financing of the Project during the construction phase given that this is the phase to which Parties' dispute relates.

**(i) Sub-stage 1: PPO-financed earthworks**

113. The first stage of the construction works consisted mainly in earthworks at the site where the Chinchero Airport would be located.<sup>72</sup> Mr. Gutiérrez explained that given that these works required considerable levels of investment, Peru considered that financial assistance from the State at this stage was required to make the Project viable.<sup>73</sup>

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<sup>67</sup> **Exhibit C-4**, Concession Contract, Cl. 8.2.

<sup>68</sup> **Exhibit C-4**, Concession Contract, Cl. 8.2.

<sup>69</sup> **Exhibit C-4**, Concession Contract, Cl. 8.2.

<sup>70</sup> **Exhibit C-18**, Final Bidding Terms, Annex 1, Appendix 1, art. I.2.

<sup>71</sup> **Exhibit C-4**, Concession Contract, Annex 23, Appendix 1; **Exhibit RWS-2**, First Gutiérrez Damazo Statement, para. 39.

<sup>72</sup> **Exhibit C-4**, Concession Contract, Annex 23, Appendix 1; Claimants' Memorial, para. 75.1; Respondent's Counter-Memorial, para. 57.

<sup>73</sup> **Exhibit RWS-2**, First Gutiérrez Damazo Statement, para. 34.

114. For this stage of the Project, the *Bases*<sup>74</sup> and the Concession Contract contemplated that Peru would pay Kuntur Wasi on a PPO basis,<sup>75</sup> which amounted up to a maximum of US\$ 121,032,679.<sup>76</sup> Pursuant to the Concession Contract, payment under the PPO would be made every two months, based on the progress of the work as certified by OSITRAN.<sup>77</sup>

**(ii) Sub-stage 2: PAO-financed construction works**

115. This sub-stage covered all construction works after the initial period and up until the end of the Concession.<sup>78</sup> The Concession Contract established that during this stage, the Project would be co-financed by the State on a PAO basis.<sup>79</sup> This meant that Kuntur Wasi would pay for the construction works upfront and the State would pay back a portion of those costs, plus a premium, once the Chinchero Airport was in operation. The premium was supposed to compensate Kuntur Wasi for financing the Project during this phase.<sup>80</sup>
116. Under the Concession Contract, Kuntur Wasi was responsible for obtaining financing during this stage and the State would only have to start paying quarterly instalments starting six-years after the Concession had been awarded, plus interest.<sup>81</sup> Starting in year six, the PAO payments would be made quarterly over a period of 60 quarterly payments (*i.e.*, 15 years).<sup>82</sup> The quarterly PAO consisted of 1/60<sup>th</sup> of the value of the FPAO plus an applicable interest rate. As explained earlier, this amount, which represented the FPAO, “Payment Fund” or “*Fondo de Pagos del Pago por Avance de Obra*”<sup>83</sup> was US\$264,758,697.00 and corresponded to the amount that Kuntur Wasi presented in its economic proposal as the

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<sup>74</sup> **Exhibit C-18**, Final Bidding Terms, Annex 1, Appendix 1, art. I.2.

<sup>75</sup> PPO for its acronym in Spanish “*Pagos por Obras*” or payment for works.

<sup>76</sup> **Exhibit C-4**, Concession Contract, Cl. 1.85, Cl. 9.5.1, Annex 23, Appendix 2. The Contract allowed for a 20% increase if certain conditions were met (Annex 23, Appendix 2).

<sup>77</sup> **Exhibit C-4**, Concession Contract, Cl. 1.85, Cl. 9.5.1.3, Annex 23, Appendix 1.

<sup>78</sup> **Exhibit C-14**, Annex 16, Appendix 2, Cl. 2.4 (p. 316 of the PDF)..

<sup>79</sup> **Exhibit C-18**, Final Bidding Terms, Annex 1, Appendix 1, art. I.2; **Exhibit C-4**, Concession Contract, Annex 23, Appendix 1, Cl. 1.2; Claimants’ Memorial, para. 75.2; Respondent’s Counter-Memorial, para. 57.

<sup>80</sup> Respondent’s Counter-Memorial, paras. 57, 58; **Exhibit R-31**, ALG Report, Deliverable 4-B: Financial Economic Model, December 2013, p. 130.

<sup>81</sup> Claimants’ Memorial, paras. 76, 77.

<sup>82</sup> **Exhibit C-4**, Concession Contract, Annex 23, Appendix 1, Cl. 1.2.

<sup>83</sup> Claimants’ Memorial, para. 77.

maximum amount that the State would be required to pay to build the Chinchero Airport.<sup>84</sup> The formula set out in the Concession Contract was the following:<sup>85</sup>

$$PAO_{trimestral} = FPAO * \left[ \frac{i * (1 + i)^n}{(1 + i)^n - 1} \right]$$

Donde:

PAO trimestral = Cuota trimestral del PAO.  
 FPAO = Fondo de Pagos del PAO, definido en la Propuesta Económica.  
 i = Tasa de descuento trimestral para efectos del Fondo de Pagos del PAO, la misma que es equivalente a la tasa promedio ponderado anual del Cierre Financiero de la Etapa de Ejecución de Obras más un spread del 2.5%, convertida a su tasa equivalente trimestral  
 n = 60, que es el número de cuotas trimestrales en las que se pagará el PAO

117. Pursuant to this formula, the amount of the quarterly PAO would be based on two factors: the FPAO, which was fixed at US\$264,758,697.00, and variable “i.” Under the Concession Contract, variable “i” was defined as follows:

*i = Quarterly discount rate for the purposes of the PAO Payment Fund, which is equivalent to the annual weighted average rate of the Financial Clos[ure] for the Construction Stage plus a 2.5% spread, converted into its quarterly equivalent rate.*<sup>86</sup>

118. Notably, however, the Concession Contract did not specify a floor or ceiling for variable “i.” According to the Claimants, the value of the variable “i” would depend on the negotiations with the banks;<sup>87</sup> whereas the Respondent argues that it always assumed that it would be around 9.51% based on ALG’s Financial and Economic Model.<sup>88</sup> The Parties disagree on the definition of the FPAO, in particular, whether variable “i” covered the costs of obtaining financing or only construction costs. The Claimants submit that the FPAO was

<sup>84</sup> **Exhibit C-4**, Concession Contract, Annex 7, Appendix 1; Claimants’ Memorial, para. 77; Respondent’s Counter-Memorial, para. 63.

<sup>85</sup> **Exhibit C-4**, Concession Contract, Annex 23, Appendix 1.

<sup>86</sup> This is an English translation provided at para. 65 of the Respondent’s Counter-Memorial. The original Spanish reads: “i = Tasa de descuento trimestral para efectos del Fondo de Pagos del PAO, la misma que es equivalente a la tasa promedio ponderado anual del Cierre Financiero de la Etapa de Ejecución de Obras más un spread del 2.5%, convertida a su tasa equivalente trimestral.” **Exhibit C-4**, Concession Contract, Annex 23, Appendix 1.

<sup>87</sup> Claimants’ Memorial, para. 79.

<sup>88</sup> **Exhibit RWS-2**, First Gutiérrez Damazo Statement, paras. 47, 48; Respondent’s Counter-Memorial, para. 66.

intended to cover the construction costs of Sub-stage 2 only, with variable “i” covering the financing costs. The Respondent submits that the FPAO covered both, financing and construction costs, thereby subjecting both costs to the FPAO cap.<sup>89</sup>

**(iii) Sub-stage 3: non-financed construction works**

119. This sub-stage covered construction works that would not be financed by the State. It was Kuntur Wasi’s responsibility to pay for all the costs of this stage.<sup>90</sup>

**(iv) Procedure for the approval of the Concessionaire’s financial proposal**

120. As explained above, under the Concession Contract, Kuntur Wasi was responsible for financing the construction of the Chinchero Airport. Under the terms of the Contract, at least 30 days before the construction works could begin, Kuntur Wasi had an obligation to secure the Financial Closing (“*Cierre Financiero*”) of the Contract.<sup>91</sup>
121. To obtain the Financial Closing, Kuntur Wasi had to file the relevant documents evidencing that it had the necessary financing to carry out the Project.<sup>92</sup> Kuntur Wasi could prove this in two different ways: (i) by showing that it was obtaining the capital required to carry out the works from related companies; or (ii) by showing that it was borrowing the capital from Authorized Third-Party Lenders (“*Acreedores Permitidos*”).<sup>93</sup>
122. Kuntur Wasi’s failure to certify that it met the requirements for the Financial Closing meant that the MTC could, subject to OSITRAN’S opinion, terminate the Contract for breach, in accordance with Clause 15.3 of the Concession Contract.<sup>94</sup>

**(v) Endeudamiento Garantizado Permitido or EGP**

123. As explained above, under the Concession Contract, Kuntur Wasi could choose to finance the Project itself or to obtain funding from third parties. If Kuntur Wasi chose to borrow

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<sup>89</sup> Claimants’ Reply, paras. 455-488; Respondent’s Rejoinder, paras. 42-61.

<sup>90</sup> **Exhibit C-4**, Concession Contract, Annex 23, Appendix 1.

<sup>91</sup> **Exhibit C-4**, Concession Contract, Cl. 1.23.

<sup>92</sup> **Exhibit C-4**, Concession Contract, Cl. 1.1, Cl. 1.23, Cl. 9.2.

<sup>93</sup> **Exhibit C-4**, Concession Contract, Cl. 1.1, Cl. 1.23, Cl. 9.2.

<sup>94</sup> **Exhibit C-4**, Concession Contract, Cl. 9.2.1.



capital, the State would allow Kuntur Wasi to pledge the rights to the Concession; the net income obtained from the Concession, and Kuntur Wasi's shares, in favor of the Authorized Third-Party Lenders. This was the so-called *Endeudamiento Garantizado Permitido* (“**Permitted Guaranteed Indebtedness**” or “**EGP**” for its acronym in Spanish).<sup>95</sup> The EGP was defined as follows:

*[T]he indebtedness resulting from any financing or credit transactions entered into with and / or loans obtained from any of the “Authorized Creditors” in any form, and which will be used for the object of this Contract [...] and is guaranteed pursuant to Clause 10.4.1.”*<sup>96</sup>*[Tribunal’s translation]*

124. Kuntur Wasi would only be allowed to provide those guarantees, however, if its financing package received a favorable opinion by OSITRAN and the MTC’s approval. In particular, pursuant to the Contract, OSITRAN and the MTC would analyze the main financial terms of the transaction, including the principal, the interest rates, the provisions on early depreciation, emission costs, commissions, etc.<sup>97</sup>
125. The Concession Contract expressly contemplated that the scope of OSITRAN’s opinion was to review the financial terms of the EGP to make sure they did not breach the Concession Contract, whereas the MTC could only reject the request to authorize an EGP if it would cause an “economic prejudice” to the State.<sup>98</sup> Pursuant to the Concession Contract, the MTC could not refuse to approve the EGP without “justifiable cause.”<sup>99</sup>

### ***c. Termination under the Concession Contract***

126. Clause 15 of the Concession Contract set out the rules governing the termination of the Concession Contract. In particular, Clause 15 provided that the Contract could be

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<sup>95</sup> **Exhibit C-4**, Concession Contract, Cl. 10.4.

<sup>96</sup> The original Spanish reads: “[E]l endeudamiento por concepto de operaciones de financiamiento o crédito, emisión de valores mobiliarios o instrumento de deuda y/o de dinero tomado en préstamo de cualquier(a) de los Acreedor(es) Permitido(s) bajo cualquier modalidad, cuyos fondos serán destinados al cumplimiento del objeto de este Contrato [...], y se encuentra garantizado conforme lo dispuesto en el Numeral 10.4.1.” **Exhibit C-4**, Concession Contract, Cl. 1.44.

<sup>97</sup> **Exhibit C-4**, Concession Contract, Cl. 10.4.7.

<sup>98</sup> **Exhibit C-4**, Concession Contract, Cl. 10.4.7.

<sup>99</sup> The original Spanish reads: “causa justificada.” **Exhibit C-4**, Concession Contract, Cl. 1.44.

terminated by completion of the term, by mutual agreement of the Parties, for breach of contract, upon unilateral decision by the MTC, or for *force majeure* or unforeseeable circumstances.

**(i) Termination by mutual agreement of the Parties**

127. In relation to termination by mutual agreement, Clause 15.2 of the Concession Contract established that it could be terminated upon prior technical opinion of OSITRAN and of the Authorized Third-Party Lenders.<sup>100</sup> In case of termination by mutual agreement, the Concession Contract contemplated that the Parties would need to reach an agreement on how to settle their accounts, and that the terms of any such settlement would need to be reviewed and approved by OSITRAN.<sup>101</sup>
128. Furthermore, Clause 15.8.1 also provided that the “[t]ermination of the Concession creates an obligation for the Concessionaire to return the area of the Concession and other Assets of the Concession to the [MTC], in accordance with Clause Five”<sup>102</sup> [Tribunal’s translation]. However, Clause 15.2.3 of the Contract provides that “there shall be no compensation for the damages caused to the Parties by the termination of the Concession.”<sup>103</sup>

**(ii) Termination for breach of Contract**

129. Clause 15.3, on the other hand, contemplated that in case of termination for breach by the Concessionaire, Kuntur Wasi would have to compensate the MTC in an amount equal to the Performance Guarantee Bond (“*Garantía de Fiel Cumplimiento del Contrato de Concesión*”).<sup>104</sup>

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<sup>100</sup> **Exhibit C-4**, Concession Contract, Cl. 15.2.

<sup>101</sup> **Exhibit C-4**, Concession Contract, Cl. 15.2.2.

<sup>102</sup> **Exhibit C-4**, Concession Contract, Cl. 15.8.1. The original Spanish reads: “*La Caducidad de la Concesión produce la obligación del CONCESIONARIO de devolver el Area de la Cencesión que conforma el Aeropuerto así como a entregar los demás Bienes de la Concesión al CONCEDENTE, conforme a los términos de la Cláusula Quinta.*”

<sup>103</sup> **Exhibit C-4**, Concession Contract, Cl. 15.2.3. This is an English translation provided at para. 125 of the Respondent’s Counter-Memorial. The original Spanish reads: “*No se considerará monto indemnizatorio alguno por los daños que irroga la Caducidad de la Concesión a las Partes.*”

<sup>104</sup> **Exhibit C-4**, Concession Contract, Cl. 15.3.4

**(iii) Unilateral termination of the Contract by the Concession Owner**

130. Clause 15.5.1 of the Contract set out the rules governing the unilateral termination of the Contract by the Concession Owner. It established the following:

*15.5.1. For well-founded public interest reasons, the GRANTOR has the power to terminate the Concession Contract at any time, by prior written notice to the CONCESSIONAIRE at least six (6) months in advance of the term established for termination. The decision must be notified to the Allowed Creditors in the same term.*<sup>105</sup>

131. In the event of unilateral termination by the Concession Owner for public interest reasons, Clause 15.5.3 of the Contract regulates the amount to be paid to the Concessionaire. In particular, Clause 15.5.3 establishes as follows:

*15.5.3 The GRANTOR shall pay the CONCESSIONAIRE an amount equivalent to the Concession Contract's Performance Guarantee Bond in place at the time of the termination.*<sup>106</sup>

132. Clause 15.5.4 further established that in case of unilateral termination, the “amount that corresponds to this concept will be made following the procedure set out in Clause 15.4.3”<sup>107</sup> [Tribunal’s translation]. Clause 15.4.3 provides, in relevant part:

*15.4.3 For the purposes of the procedure and/or the determination of the amount to be paid by the GRANTOR to the CONCESSIONAIRE, one of the following alternatives will be applied:*

*(a) If the termination of the Contract occurs before or at the beginning of the Construction Stage, the GRANTOR shall pay the CONCESSIONAIRE, at the*

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<sup>105</sup> **Exhibit C-4**, Concession Contract, Cl.15.5.1 This is an English translation provided at para. 181 of Respondent’s Counter-Memorial. The original Spanish reads as follows: “15.5.1. Por razones de interés público debidamente fundadas, el CONCEDENTE tiene la facultad de resolver el Contrato de Concesión en cualquier momento, mediante notificación previa y por escrito al CONCESIONARIO con una antelación no inferior a seis (6) meses del plazo previsto para la terminación. En igual plazo deberá notificar tal decisión a los Acreedores Permitidos.”

<sup>106</sup> **Exhibit C-4**, Concession Contract, Cl. 15.5.3. This is an English translation provided at para. 191 of Respondent’s Counter-Memorial. The original Spanish reads: “El CONCEDENTE pagará al CONCESIONARIO un monto equivalente al de la Garantía de Fiel Cumplimiento del Contrato de Concesión que corresponda al momento en que se produzca la Caducidad.”

<sup>107</sup> The original Spanish reads: “El importe que corresponda pagar por este concepto se realizará según procedimiento indicado en el Numero 15.4.3.”

*latest within of the second semester of the Concession Year following the declaration of the termination, as compensation, general expenses incurred until the date on which the Contract is terminated, duly reviewed and approved by OSITRAN.*<sup>108</sup>

#### **d. Dispute resolution**

133. Article 16.6.1(b)(i) of the Concession Contract establishes, in relevant part, that:

*[...] For the purposes of international arbitration proceedings, in accordance with ICSID arbitration rules, the GRANTOR, on behalf of the Government of the Republic of Peru, states that the CONCESSIONAIRE shall be considered as a "National of Another Contracting State", since it is subject to foreign control as provided for in Article 25(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and the CONCESSIONAIRE agrees to be considered as such.*<sup>109</sup>

#### **(3) The Guarantee Agreement**

134. At the time the Concession Contract was signed, Kuntur Wasi and the MTC also signed a Guarantee Agreement.<sup>110</sup> In the Guarantee Agreement, Peru agreed as follows:

*2.1. Under this GUARANTEE CONTRACT, THE STATE guarantees to the CONCESSIONAIRE COMPANY, the Grantor's representations, warranties, and obligations under the Concession Contract. This guarantee is not a*

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<sup>108</sup> This an English translation provided at para. 195 of Respondent's Counter-Memorial. The original Spanish reads: "15.4.3. Para efectos del procedimiento y/o determinación del monto de liquidación a reconocer por el CONCEDENTE al CONCESIONARIO, se aplicará una de las alternativas siguientes, según corresponda: a) Si la resolución del Contrato se produce antes o en el inicio de la Etapa de Ejecución de Obras, se origina el derecho a reconocer al CONCESIONARIO por parte del CONCEDENTE, a más tardar dentro del segundo semestre del Año de la Concesión siguiente a aquel en el que fue declarada la caducidad, coma compensación, los gastos generales en que haya incurrido hasta la fecha en que surta efecto la resolución del Contrato, debidamente acreditados y reconocidos por el OSITRAN." **Exhibit C-4**, Concession Contract, Cl. 15.4.3. Clause 15.4.3 is a subsection of Section 15.4, which regulates the termination for breach of Contract by the Concession Owner.

<sup>109</sup> **Exhibit, C-4**, Concession Contract. [Tribunal's translation] The original Spanish reads: "Para efectos de tramitar los procedimientos de arbitraje internacional de derecho, de conformidad con las reglas de arbitraje del CIADI, el CONCEDENTE, en representación del Estado de la Republica del Peru, declara que al CONCESIONARIO se le considerara coma "Nacional de Otro Estado Contratante", por estar sometido a control extranjero segun lo establece el Literal b) del Numeral 2 del Artículo 25 del Convenio sobre Arreglos de Diferencias Relativas a Inversiones entre Estados y nacionales de otros Estados, y el CONCESIONARIO acepta que se le considere como tal." Claimants also rely on Clause 3 of the Guarantee Agreement, which refers to Clause 16 of the Concession Contract (Claimants' Memorial, para. 196).

<sup>110</sup> Respondent's Counter-Memorial, para. 230.

*financial guarantee.*<sup>111</sup>

135. The Guarantee Agreement authorized by President Ollanta Humala through Supreme Decree 185-201-EF, established the following:

*Section 1. Representations and Warranties*

*The safeguards and guarantees by the Government of the Republic of Peru shall be granted by means of a contract to support the representations, warranties and obligations undertaken by the Grantor, stipulated in the Concession Contract for the design, financing, construction, operation and maintenance of the new Chinchero – Cuzco International Airport, to be entered into with SOCIEDAD AEROPORTUARIA KUNTUR WASI S.A., a company organized by the Kuntur Wasi Consortium, successful bidder for the Comprehensive Projects Bid contemplated under the considerations of this Supreme Decree, conducted by the Private Investment Promotion Agency – PROINVERSIÓN.*<sup>112</sup> [Tribunal’s translation]

**(4) Kuntur Wasi’s performance under the Concession Contract**

136. As explained above, the Concession was structured as a public-private partnership, under which Kuntur Wasi was responsible for designing, obtaining financing, building, and operating the Chinchero Airport for a period of 40 years.<sup>113</sup> Among other obligations, the Concession Contract provided that Kuntur Wasi had to develop the EDI, which had to be approved by the MTC before construction of the Chinchero Airport could begin.<sup>114</sup>

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<sup>111</sup> This an English translation provided at para. 230 of Respondent’s Counter-Memorial. The original Spanish reads: “2.1. En virtud del presente CONTRATO DE GARANTÍA, EL ESTADO garantiza a LA SOCIEDAD CONCESIONARIA, las declaraciones, seguridades y obligaciones del Concedente establecidas en el CONTRATO DE CONCESIÓN. Esta garantía no constituye una garantía financiera.” **Exhibit C-49**, Guarantee Agreement, Cl. 2.1.

<sup>112</sup> **Authority CL-35**, Decreto Supremo 185-2014-EF, 27 June 2014. The original Spanish reads: “Artículo 1º.- Declaraciones y seguridades. Otórguese, mediante contrato, las seguridades y garantías del Estado de la República del Perú, en respaldo de las declaraciones, seguridades y obligaciones a cargo del Concedente, contenidas en el Contrato de Concesión para el diseño, financiamiento, construcción, operación y mantenimiento del nuevo Aeropuerto Internacional de Chinchero - Cusco, a celebrarse con SOCIEDAD AEROPORTUARIA KUNTUR WASI S.A, sociedad constituida por el Consorcio Kuntur Wasi, adjudicatario de la buena pro del Concurso de Proyectos Integrales indicado en la parte considerativa del presente Decreto Supremo, conducido por la Agencia de Promoción de la Inversión Privada – PROINVERSIÓN.”

<sup>113</sup> **Exhibit C-18**, Final Bidding Terms, March 2014, art. 1.2.78.

<sup>114</sup> **Exhibit C-4**, Concession Contract, Cl. 8.2.1.1.

137. The EDI contains the executive design of the Chinchero Airport, which includes, among others, studies on hydrogeology, geotechnics, topography, environmental impact, buildings and airport infrastructure, unitary costs, and construction planning.<sup>115</sup>
138. On 29 May 2015, Kuntur Wasi submitted the EDI to OSITRAN for its final review and approval.<sup>116</sup> OSITRAN and the MTC made several observations on the EDI, which required further work from Kuntur Wasi to modify the EDI. On 4 December 2015, OSITRAN issued a favorable opinion in relation to Kuntur Wasi's EDI,<sup>117</sup> and it was finally approved by the MTC on 7 December 2015.<sup>118</sup>
139. Kuntur Wasi carried out the following additional activities as required by the Concession Contract to begin the construction of the Chinchero Airport:<sup>119</sup>
- Obtaining the construction permit for the Chinchero Airport from the Civil Aeronautics Directorate General;<sup>120</sup>
  - Preparing the Final Detailed Environmental Impact Assessment Study for the Chinchero Airport, which was approved by the MTC;<sup>121</sup>
  - Obtaining the urban planning qualifications and construction licenses from the Chinchero and Huayllabamba districts;<sup>122</sup>

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<sup>115</sup> Claimants' Memorial, para. 70; **Exhibit CWS-3**, Mobilia Statement, para. 20; **Exhibit C-103**, *Estudio Definitivo de Ingeniería del Nuevo Aeropuerto de Chinchero Cusco*, ("EDI Resumen Ejecutivo"), 27 November 2015.

<sup>116</sup> Claimants' Memorial, para. 71; **Exhibit CWS-3**, Mobilia Statement, para. 21.

<sup>117</sup> **Exhibit C-105**, *Informe No. 074-2015-MTC/12.08.DAE*, 7 December 2015.

<sup>118</sup> **Exhibit C-5**, *Oficio No. 1553-2015-MTC/12.08*, 7 December 2015.

<sup>119</sup> Claimants' Memorial, para. 73.

<sup>120</sup> **Exhibit C-106**, *Oficio No. 88-2016-MTC/12.08*, 14 March 2016.

<sup>121</sup> **Exhibit C-107**, Letter No. 098-2015-KW, 11 April 2015; **Exhibit C-108**, *Oficio No. 1686-2015-MTC/25*, 1 June 2015; **Exhibit C-108**, *Oficio No. 1686-2015-MTC/25*, 1 June 2015.

<sup>122</sup> **Exhibit C-109**, *Resolución de Alcaldía No. 033-2016-MDCH/SG*, Municipalidad Distrital de Chinchero, 17 Marzo 2016; **Exhibit C-110**, *Resolución de Alcaldía No. 082-2016-A-MDH*, Municipalidad Distrital de Huayllabamba, 20 April 2016; **Exhibit C-111**, *Oficio No. 0405-2016-MDCH/A*, Municipalidad Distrital de Chinchero, 10 August 2016; **Exhibit C-112**, *Licencia de Construcción Modalidad "A" No. 004-2016*, Municipalidad Distrital de Huayllabamba, 6 September 2016.

- Preparing the Archeological Monitoring Plan for the Chinchero Airport, approved by the Ministry of Culture;<sup>123</sup> and
- Administering the Concession site where the Chinchero Airport would be built.

#### **D. EVENTS LEADING TO ADDENDUM NO. 1 OF THE CONCESSION CONTRACT**

##### **(1) Kuntur Wasi's May 2016 EGP Proposal**

140. As explained above, under the Concession Contract, for the State to issue guarantees in favor of the Authorized Third-Party Lenders, OSITRAN would have to issue a favorable opinion and the MTC would have to analyze and approve Kuntur Wasi's financial proposal. If this occurred, Kuntur Wasi could obtain the Financial Closing required to commence the construction works.
141. On 4 May 2016, Kuntur Wasi submitted its financial proposal for the EGP to the MTC and OSITRAN for approval ("**Kuntur Wasi's First Financial Proposal**").<sup>124</sup> Kuntur Wasi's financial proposal indicated that the quarterly PAO would be US\$14,245,809.00, where the variable "i" was set at 22.06%, with an annual interest rate of 7.89%.<sup>125</sup>
142. On 7 June 2016, OSITRAN sent Kuntur Wasi observations on the proposal, and on 5 July 2016, Kuntur Wasi addressed those observations in a letter addressed to OSITRAN.<sup>126</sup> OSITRAN again raised observations on 11 July 2016 and Kuntur Wasi responded on 14 July 2016.<sup>127</sup>
143. On 20 July 2016, OSITRAN issued a favorable opinion with respect to Kuntur Wasi's EGP, in which it concluded that the documentation submitted by Kuntur Wasi for the EGP

<sup>123</sup> **Exhibit C-113**, *Oficio No. 1699-2014-UACGD-DDC-CUS/MC*, 27 November 2014.

<sup>124</sup> Claimants' Memorial, paras. 81, 484; Claimants' Reply, para. 45; **Exhibit C-20**, Letter No. 089-2016-KW, 4 May 2016; **Exhibit CWS-1**, First Balta del Río Statement, paras. 18-20. Kuntur Wasi requested the State's approval of another EGP earlier in September 2015, but that proposal was rejected for failure to present the required documents (**Exhibit R-38**, Annex 25 to Letter No. 089-2016-KW, May 4, 2016, at p. 4). Kuntur Wasi then resubmitted a new EGP on 4 May 2016.

<sup>125</sup> Claimants' Memorial, para. 81; **Exhibit CWS-1**, First Balta del Río Statement, para. 23.

<sup>126</sup> Claimants' Memorial, para. 82; Claimants' Reply, para. 45; **Exhibit C-57**, *Oficio Circular No. 027-16-SCD-OSITRAN*, 7 June 2016; **Exhibit C-58**, Letter No. 119-2016-KW, 5 July 2016.

<sup>127</sup> Respondent's Counter-Memorial, para. 85; **Exhibit R-64**, *Oficio No. 088-16-GRE-OSITRAN*, 11 July 2016; **Exhibit R-65**, Letter No. 128-2016-KW, 14 July 2016.

approval was “in accordance with the requirements of the Concession Contract” [Tribunal’s translation] and recommended that OSITRAN’s Board of Directors issue a technical opinion in favor of Kuntur Wasi’s EGP.<sup>128</sup> On 22 July 2016, OSITRAN’s Board of Directors issued the favorable technical opinion.<sup>129</sup> In the Claimants’ view, this meant that the competent technical entity within Peru formally approved Kuntur Wasi’s financial proposal.<sup>130</sup>

144. On the Respondent’s case, Kuntur Wasi’s financial proposal never received the required approvals by the MTC because it was not compliant with the requirements set out in the Concession Contract for the calculation of the PAO formula. The Respondent points out that OSITRAN’s report – on which the Claimants’ rely – expressly noted that it had not analyzed whether the EGP proposed by Kuntur Wasi would potentially cause any economic prejudice to the State, as this examination corresponded to the MTC.<sup>131</sup> OSITRAN went on to state that although Kuntur Wasi had sent information related to the “interest and application of the PAO formula” to “facilitate the understanding of the proposal it was making,” OSITRAN would only carry out an analysis of the EGP and the guarantees, as required by Clause 10.4.7 of the Concession Contract, which “did not require the examination of the quarterly PAO or its variable “i.”<sup>132</sup>
145. On 26 July 2016, the Directorate General for Transport Concessions of the MTC sent additional observations on Kuntur Wasi’s First Financial Proposal. Among others, the MTC requested Kuntur Wasi to submit further information in relation to the legal, contractual, and financial support for Kuntur Wasi’s calculation of the “i” variable for the

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<sup>128</sup> Claimants’ Memorial, para. 82; Claimants’ Reply, para. 47; Respondent’s Counter-Memorial, para. 85; **Exhibit C-114**, *Informe No. 014-16-GRE-GAJ-OSITRAN*, 20 July 2016, paras. 228, 231.

<sup>129</sup> Claimants’ Memorial, para. 82; **Exhibit C-21**, *Oficio Circular No. 039-16-SCD-OSITRAN*, 22 July 2016.

<sup>130</sup> Claimants’ Reply, paras. 38-49.

<sup>131</sup> Respondent’s Counter-Memorial, para. 85; **Exhibit C-114**, *Informe No. 014-16-GRE-GAJ-OSITRAN*, 20 July, para. 37.

<sup>132</sup> **Exhibit C-114**, *Informe No. 014-16-GRE-GAJ-OSITRAN*, 20 July 2016, para. 38.



quarterly PAO calculation.<sup>133</sup> On 1 August 2016, Kuntur Wasi sent a letter to the MTC, attaching legal and financial reports to support its calculations.<sup>134</sup>

## **(2) The process of negotiation of Addendum No. 1 to the Concession Contract**

### ***a. Presidential elections***

146. On 28 July 2016, presidential elections were held in Peru, leading to a change in Government. The Presidency shifted from Ollanta Humala to Pedro Pablo Kuczynski. A few weeks after the general elections, in August 2016, Kuntur Wasi's representatives met with representatives of the Peruvian Government to discuss the progress in the performance of the Concession Contract and Kuntur Wasi's EGP proposal submitted to the MTC.<sup>135</sup>
147. According to the Claimants, in those meetings, the Government representatives indicated that Peru would seek a report from the *Corporación Andina de Fomento-Banco de Desarrollo de América Latina* ("CAF") and another one from the *Contraloría General de la República* (the "*Contraloría*") in relation to Kuntur Wasi's EGP.<sup>136</sup> In September 2016, the MTC requested the *Contraloría* and the CAF to issue an opinion on Kuntur Wasi's financial proposal.

### ***b. The Contraloría's October 2016 report***

148. On 12 October 2016, the *Contraloría* issued its report in relation to Kuntur Wasi's EGP. Notably, the *Contraloría* pointed out that it was necessary to determine whether the assumptions used by the consultants (*i.e.*, ALG) to calculate variable "i" had been shared with the bidders. If those documents were not part of the tender process, the *Contraloría* warned that it was possible that each bidder applied a different methodology and assumptions with regard to the calculation of that variable.<sup>137</sup> The *Contraloría* further noted that the Concession Contract did not set out any limits to variable "i" and that the

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<sup>133</sup> Claimants' Memorial, para. 83; **Exhibit C-59**, *Oficio No. 2979-2016-MTC-25*, 26 July 2016.

<sup>134</sup> Claimants' Memorial, para. 83; **Exhibit C-60**, Letter No. 134-2016-KW, 1 August 2016.

<sup>135</sup> Claimants' Memorial, para. 84; **Exhibit CWS-4**, First Vargas Loret de Mola Statement, para. 28; **Exhibit CWS-1**, First Balta del Río Statement, para. 23.

<sup>136</sup> Claimants' Memorial, para. 84; **Exhibit CWS-4**, First Vargas Loret de Mola Statement, para. 28; **Exhibit CWS-1**, First Balta del Río Statement, para. 23.

<sup>137</sup> **Exhibit C-22**, *Oficio No. 4268-2016 MTC/25*, 27 October 2016, attaching *Oficio No. 01882-2016-CG/DC*, 12 October 2016, p. 1.

Contract itself did not allow to identify the assumptions to calculate the variable.<sup>138</sup> Consequently, the *Contraloría* concluded that approving Kuntur Wasi’s proposed “i” could affect the economic equilibrium of the Concession Contract, and recommended that the MTC renegotiate the amount of the PAO payments with Kuntur Wasi.<sup>139</sup>

*c. Subsequent negotiations leading to Addendum No. 1*

149. Following the *Contraloría*’s report, Kuntur Wasi and representatives of the Peruvian Government held several meetings to seek to renegotiate the Concession Contract.<sup>140</sup> The Parties disagree on the reasons that led to the renegotiation process: The Claimants assert that Addendum No. 1 was negotiated at the request of Peru to amend the deficiencies in the Concession Contract, whereas the Respondent argues that it was Kuntur Wasi’s failure to present a viable and compliant financial proposal that led to Addendum No. 1.<sup>141</sup>
150. On 22 October 2016, the MTC sent Kuntur Wasi two financing proposals. One of those proposals contemplated important changes to the terms of the Concession Contract to cap the financing costs, while the other proposal only fixed the amount of the quarterly PAO at US\$12 million.<sup>142</sup> According to the Claimants, after receiving those proposals, Kuntur Wasi and the MTC agreed that the MTC would formally reject Kuntur Wasi’s EGP and Kuntur Wasi would propose an amendment to the Concession Contract on the basis of the recommendations contained in the *Contraloría*’s report.<sup>143</sup>
151. On 28 October 2016, Kuntur Wasi submitted an addendum to the Concession Contract which proposed a quarterly PAO of US\$12.5 million. According to the Claimants, it was possible to lower the quarterly PAO because variable “i” was dependent on market

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<sup>138</sup> **Exhibit C-22**, *Oficio No. 4268-2016 MTC/25*, 27 October 2016, attaching *Oficio No. 01882-2016-CG/DC*, 12 October 2016, p. 2.

<sup>139</sup> **Exhibit C-22**, *Oficio No. 4268-2016 MTC/25*, 27 October 2016, attaching *Oficio No. 01882-2016-CG/DC*, 12 October 2016, p. 2. Claimants’ Reply, para. 53.

<sup>140</sup> Claimants’ Memorial, para. 86; Respondent’s Counter-Memorial, para. 100.

<sup>141</sup> Claimants’ Reply, para. 50; Respondent’s Counter-Memorial, paras. 99, 100.

<sup>142</sup> Claimants’ Memorial, para. 87; Claimants’ Reply, para. 56; **Exhibit C-61**, Email from Yaco Rosas (MTC) to José Balta (Kuntur Wasi), 22 October 2016

<sup>143</sup> Claimants’ Memorial, para. 88; **Exhibit CWS-1**, First Balta del Río Statement, para. 27.

fluctuations and the interest rates had gone down since the previous proposal.<sup>144</sup> The letter sent by Kuntur Wasi to the MTC together with the proposed draft text of the amendment, stated that the intention was to provide greater clarity in relation to the PAO formula:

*According to the provisions of Clause Seventeen of the Concession Contract and Article 54(b) of the Regulations of Legislative Decree 1212, and pursuant to our mutual agreement in response to the recommendations issued by the Comptroller of the Republic on the need to have an Addendum providing greater certainty for the determination of the Quarterly PAO so that such PAO may be unequivocally calculated under market conditions for the Financial Closing, we are pleased to submit the proposed Addendum that will allow us to determine the Quarterly PAO directly based on the items contained in the formula of the original text of Annex 23, Appendix 1, paragraph 1.2(xiii)...*<sup>145</sup>

152. On 7 November 2016, the MTC notified Kuntur Wasi that its proposal of 28 October 2016 was rejected because it “was not supported technically or financially [...] and it does not comply with the requirement and agreement of the possible Allowed Creditor of the Project.”<sup>146</sup> On that same date, Mr. Balta – Kuntur Wasi’s General Manager at the time – met with Minister Vizcarra and Vice-Minister Molinelli of the MTC and the Minister of Economy and Finance, Alfredo Thorne, among others. According to the Claimants, at that meeting, Minister Vizcarra said that the MTC would propose to amend the Concession

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<sup>144</sup> Claimants’ Memorial, para. 89; Claimants’ Reply, para. 57; **Exhibit C-62**, Letter No. 183-2016-KW, 28 October 2016; **Exhibit CWS-1**, First Balta del Río Statement, paras. 28, 29; Claimants’ Reply, para. 57.

<sup>145</sup> Claimants’ Reply, para. 57; **Exhibit C-62**, Letter No. 183-2016-KW, 28 October 2016. [Tribunal’s translation] The original Spanish reads: “Al amparo de lo dispuesto en el en la Clausula Decimo Setima [sic] del Contrato de Concesión y lo dispuesto en el literal b) del Artículo 54 del Reglamento del Decreto Legislativo N° 1224, habiendo convenido con ustedes para atender las recomendaciones de la Contraloria de la Republica en presentar una Adenda a fin de dar mayor certidumbre a la detenninación de la Cuota PAO Trimestral y permitir una determinación inequivoca de dicha cuota en condiciones de mercado para el Cierre Financiero, cumplimos con presentar la propuesta de Adenda que nos permita determinar la Cuota PAO Trimestral de manera directa con base en los conceptos contenidos en la fórmula del texto original del literal xiii) del numeral 1.2 del Anexo 23-Apendice 1.” The text of the proposed amendment indicated the same, see **Exhibit C-63**, *Oficio No. 4362-2016-MTC/25*, 7 November 2016.

<sup>146</sup> Claimants’ Memorial, para. 90; Claimants’ Reply, para. 59; **Exhibit C-63**, *Oficio No. 4362-2016-MTC/25*, 7 November 2016. [Tribunal’s translation] The original Spanish reads: “... no ha presentado el sustento técnico y económico financiero del proyecto de adenda, además de no contar con el requerimiento y conformidad del posible Acreeedor Permitido del proyecto.”

Contract so that Peru would only pay as the works advanced, with a cap of US\$264,758,697.00.<sup>147</sup>

153. Also on 7 November 2016, the CAF issued a report recommending that the MTC renegotiate with Kuntur Wasi for a quarterly PAO between US\$12.4 and US\$13 million.<sup>148</sup> In particular, the CAF found:

*We note that the procedure proposed by the Concessionaire to calculate the Weighted Average Rate of Financing, a key element for the calculation of the Quarterly PAO, is not used in the financial markets to calculate the cost of financing, nor does it follow what the financial market interprets or understands as the cost of financing. In our opinion, this procedure is incorrect and significantly detracts from the cost of the [EGP] presented by the Concessionaire.*

*The Concessionaire's proposal to calculate the Average Financing Rate is intended to cover or remunerate those items that the Concessionaire did not include in its FPAO offer, due to its interpretation of this concept based on the provisions of the Concession Contract. The Concessionaire's proposal to calculate the Weighted Average Rate of Financing does not conform to the provisions of the Contest of Integral Projects for the Concession of the New International Airport of Chinchero - Cusco, and of the Concession Contract.*<sup>149</sup>

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<sup>147</sup> Claimants' Memorial, para. 91; Claimants' Reply, para. 60; **Exhibit CWS-1**, First Balta del Río Statement, paras. 32-35.

<sup>148</sup> Claimants' Memorial, para. 91; **Exhibit C-23**, *Reporte de Conclusiones y Recomendaciones*, CAF, 7 November 2016, p. 23.

<sup>149</sup> This is an English translation provided at para. 97 of Respondent's Counter-Memorial. The original Spanish reads: "Es preciso indicar que el procedimiento propuesto por la Concesionaria para calcular la Tasa Promedio Ponderado del Financiamiento, elemento clave para el cálculo del PAO Trimestral, no es utilizado en los mercados financieros para calcular el costo de un financiamiento, ni se atiene a lo que el mercado financiero interpreta o entiende como el costo de un financiamiento. En nuestra opinión dicho procedimiento es incorrecto y desvirtúa significativamente el costo del Endeudamiento Garantizado Permitido presentado por la Concesionaria."

*La propuesta de la Concesionaria para calcular la Tasa Promedio del Financiamiento tiene como objetivo cubrir o remunerar aquellas partidas que la Concesionaria no incluyó en su oferta del FPAO, debido a su interpretación de este concepto con base en lo establecido en el Contrato de Concesión. La propuesta de la Concesionaria para calcular la Tasa Promedio Ponderado del Financiamiento no se adecua a lo previsto en las bases del Concurso de Proyectos Integrales para la Concesión del Nuevo Aeropuerto Internacional de Chinchero - Cusco, y en el Contrato de Concesión."* **Exhibit C-23**, *Reporte de Conclusiones y Recomendaciones*, CAF, 7 November 2016, at p. 11.

154. A few days later, on 9 November 2016, Mr. Yaco Rosas, at that time Director General for Transport Concessions of the MTC, sent an email to Mr. Balta, attaching a document which contained the main points to be included in the addendum to the Concession Contract.<sup>150</sup>
155. On 10 November 2016, Mr. Balta wrote back to Mr. Yaco Rosas with observations on the points contained in the MTC's email of the day before.<sup>151</sup> On 14 November 2016, Kuntur Wasi submitted a draft addendum to the MTC, and some negotiations followed between the Parties in relation to the addendum.<sup>152</sup>
156. On 25 November 2016, the MTC issued a formal report rejecting Kuntur Wasi's First Financial Proposal of 4 May 2016.<sup>153</sup> The MTC's report states that:

*The procedure proposed by the Concessionaire for the calculation of the Weighted Average Rate of Financing, a key element for the calculation of the Quarterly PAO, is not used in financial markets to calculate the cost of financing, nor does it follow what the financial market interprets or understands as the cost of financing. Said procedure is incorrect and distorts the cost of the Permitted Guaranteed Indebtedness submitted by the Concessionaire.*<sup>154</sup> [Tribunals's translation]

157. The MTC's 25 November 2016 report further concluded that the proposed EGP was not in accordance with the *Bases* and the Concession Contract and that it would cause economic prejudice to the State.<sup>155</sup>

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<sup>150</sup> Claimants' Memorial, para. 94; Claimants' Reply, para. 62; **Exhibit C-64**, Email from Yaco Rosas (MTC) to José Balta (Kuntur Wasi), 9 November 2016.

<sup>151</sup> Claimants' Memorial, para. 94; **Exhibit C-65**, Email from José Balta (Kuntur Wasi) to Yaco Rosas (MTC), 10 November 2016.

<sup>152</sup> Claimants' Memorial, para. 94; Claimants' Reply, para. 63; **Exhibit CWS-1**, First Balta del Río Statement, para. 38.

<sup>153</sup> Claimants' Memorial, para. 95; Respondent's Counter-Memorial, para. 102; Claimants' Reply, para. 64; **Exhibit C-67**, *Oficio No. 4601-2016-MTC*, 25 November 2016.

<sup>154</sup> **Exhibit C-67**, *Oficio No. 4601-2016-MTC*, 25 November 2016, p. 1. The original Spanish of the *Oficio* reads: "*El procedimiento propuesto por la Concesionaria para calcular la Tasa Promedio Ponderado del Financiamiento, elemento clave para el calculo del PAO Trimestral, no es utilizado en los mercados financieros para calcular el costo de un financiamiento, ni se atiene a lo que el mercado financiero interpreta o entiende como el costo de un financiamiento. Dicho procedimiento es incorrecto y desvirtua el costo del Endeudamiento Garantizado Permitido presentado por la Concesionaria.*"

<sup>155</sup> **Exhibit C-67**, *Oficio No. 4601-2016-MTC*, 25 November 2016, pp. 1, 15.

158. On 2 December 2016, Kuntur Wasi replied to the MTC's 25 November 2016 report, objecting to Peru's position and proposing an addendum to the Contract.<sup>156</sup>
159. On 9 December 2016, a meeting was held between representatives of Kuntur Wasi and the MTC, the Ministry of Economy and Finance ("MEF") and OSITRAN to discuss the addendum to the Concession Contract.<sup>157</sup> After this meeting, the MTC send a draft addendum to Kuntur Wasi for its review, which was based on the main points laid out in Mr. Rosa's email of 9 November 2016.<sup>158</sup> This was followed by a second meeting held on 16 December 2016. According to Mr. Balta, at that meeting, the Parties agreed on a new financing structure for the Project, under which: (i) the State would make an advance payment of US\$40 million to Kuntur Wasi (to be deducted from the US\$264,758,697 co-payment for the construction phase) to fund the commencement of the construction works; and (ii) Kuntur Wasi would sign three bond letters.<sup>159</sup>
160. On 2 January 2017, the MTC sent Kuntur Wasi the final text of the addendum which would be sent to the competent authorities (*i.e.*, MEF, OSITRAN) for their opinion.<sup>160</sup> This addendum changed the financing structure of the Project, given that it established that Peru would only pay as the works advanced as approved by OSITRAN. In other words, under the terms of Addendum No. 1, Peru would now co-finance the construction works on a PPO basis, with the State making quarterly payments up to the amount of US\$265 million (*i.e.*, Kuntur Wasi's economic proposal).<sup>161</sup>
161. However, Addendum No. 1 also established that the MTC would make a US\$40 million advance payment to Kuntur Wasi within thirty days of the execution of the addendum (the "**Advance Payment**"). Addendum No. 1 contemplated that the Advance Payment was

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<sup>156</sup> Claimants' Memorial, para. 95; **Exhibit C-68**, Letter No. 195-2016-KW, 2 December 2016.

<sup>157</sup> Claimants' Memorial, para. 97; **Exhibit CWS-1**, First Balta del Río Statement, paras. 41, 42.

<sup>158</sup> Claimants' Memorial, para. 97; **Exhibit C-70**, Email from Yaco Rosas (MTC) to José Balta (Kuntur Wasi), 9 December 2016.

<sup>159</sup> Claimants' Memorial, para. 98; **Exhibit CWS-1**, First Balta del Río Statement, para. 43.

<sup>160</sup> Claimants' Memorial, para. 99; Claimants' Reply, para 70; **Exhibit C-71**, Email from Yaco Rosas (MTC) to José Balta (Kuntur Wasi), 2 de enero de 2017.

<sup>161</sup> Claimants' Memorial, para. 100; Respondent's Counter-Memorial, para. 103; **Exhibit C-24**, *Adenda No. 1 al Contrato de Concesión del Nuevo Aeropuerto Internacional de Chinchero –Cusco*, 3 February 2017 ("Addendum No. 1").

meant to finance the construction costs for Phase 2 of the Project, even if it was paid before Phase 1 begun.<sup>162</sup>

162. The amount of the Advance Payment would be counted against the FPAO of US\$265 million, and its payment by the State was conditioned on Kuntur Wasi delivering a guarantee letter (“*carta fianza*”) as Advance Payment Guarantee (“*Garantía de Adelanto*”) for the value of the Advance Payment.<sup>163</sup> Once that guarantee letter was delivered, the MTC would deposit the Advance Payment in a Trust (“*Fideicomiso*”) or in a bank account indicated by Kuntur Wasi.<sup>164</sup>

**(3) Addendum No. 1 receives support by Peru and is finally adopted**

163. In the months that ensued, several entities of the Peruvian State issued favorable reports and approved Addendum No. 1. In particular:

***a. OSITRAN’s technical opinion in favor of Addendum No. 1***

164. On 20 January 2017, OSITRAN’s Executive Board issued a technical opinion in favor of Addendum No. 1, in which it concluded that Addendum No. 1 was in accordance with Peruvian law and did not change the conditions of competition under which Kuntur Wasi had been awarded the Concession.<sup>165</sup> The OSITRAN report – approved by majority – stated as follows:

*[A]s under the proposed payment mechanism the Grantor shall not pay interest but the amount of the Pay-As-You-Work Fund proposed, the economic-financial balance is not affected, and the value of money is maintained in time, since the Grantor will pay the exact amount of the Pay-As-You-Work Fund proposed by the Concessionaire and which is a part of*

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<sup>162</sup> Respondent’s Counter-Memorial, para. 104; **Exhibit C-24**, Addendum No. 1, Cl. 3, Section 12.

<sup>163</sup> **Exhibit C-24**, Addendum No. 1, Cl. 3, Section 21.

<sup>164</sup> **Exhibit C-24**, Addendum No. 1, Cl. 3, Section 12.

<sup>165</sup> Claimants’ Memorial, para. 101; Respondent’s Counter-Memorial, paras. 105, 106; Claimants’ Reply, para. 75; **Exhibit C-72**, *Oficio Circular No. 006-17-SCD-OSITRAN*, 20 January 2017, Annexes 1 and 2.

*it's financial proposal...*<sup>166</sup>

165. However, the President of OSITRAN issued a separate opinion, where he took the view that Addendum No. 1 would materially change the economics of the Contract and the conditions of competition under which the tender was originally conducted and that, for that reason, the Addendum was not in accordance with Peruvian law.<sup>167</sup>

***b. The MEF favors the adoption of Addendum No. 1***

166. On 27 January 2017, the MEF issued a technical opinion in favor of Addendum No. 1, indicated that the changes brought about by the Addendum would save the State a substantial amount of money as compared with the financing package Kuntur Wasi had proposed under the original Contract, and concluded that they did not alter the economic equilibrium of the Contract.<sup>168</sup>

***c. President Kuczynski's television announcement in support of Addendum No. 1***

167. On 30 January 2017, President Kuczynski appeared on television to explain the benefits of Addendum No. 1. Among others, President Kuczynski was reported as having said the following in relation to Addendum No. 1:

*We have saved USD 590 million in interest that could be used for works in Cuzco to improve sanitation, roads, and housing. So, the project has been restructured; thus, we want to move forward and not be intimidated. This airport should have been built decades ago, and we are going to build it.*<sup>169</sup>

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<sup>166</sup> **Exhibit C-72**, *Oficio Circular No. 006-17-SCD-OSITRAN*, 20 January 2017, attaching the *Acuerdo No. 2009-607-17-CD-OSITRAN*, Annex 1, para. 7. [Tribunal's translation] The original Spanish reads: "[E]n la medida que con el esquema de pago propuesto, el Concedente no pagará intereses, sino el monto del Fondo de Pago por Obras propuesto, no se modifica el equilibrio económico financiero, manteniendo el valor del dinero en el tiempo, toda vez que el Concedente pagará exactamente el monto del Fondo de Pagos por Obras que fue propuesto por el Concesionario y que forma parte de su propuesta económica..."

<sup>167</sup> Respondent's Counter-Memorial, para. 106; **Exhibit C-72**, *Oficio Circular No. 006-17-SCD-OSITRAN*, attaching the *Acuerdo No. 2009-607-17-CD-OSITRAN*, 20 January 2017, Annex 3.

<sup>168</sup> Claimants' Memorial, para. 102; Respondent's Counter-Memorial, para. 107; Claimants' Reply, para. 76; **Exhibit C-73**, *Informe No. 016-2017-EF/68.01*, 27 January 2017, paras. 2.22, 2.33, 2.6-2.40.

<sup>169</sup> **Exhibit C-74**, Video published by Latina Noticias, "*Aeropuerto de Chinchero: Pedro Pablo Kuczynski se pronuncia tras suspensión de proyecto*," 30 January 2017. [Tribunal's translation] The original Spanish says: "Nos hemos ahorrado 590 millones de dólares de intereses que podrían ir para hacer obras en el Cusco de mejora de saneamiento, de pistas, de vivienda. Entonces aquí se ha saneado el proyecto, y por eso queremos ir adelante y no dejarnos intimidar. Hace décadas que se iba hacer este aeropuerto, y lo vamos a hacer."



*d. The Council of Ministers supports the decision to sign Addendum No. 1*

168. On 1 February 2017, Minister Vizcarra stated to the press that the Council of Ministers had approved the MTC's decision to sign Addendum No. 1 and continue with the Project.<sup>170</sup>

*e. The MTC recommends signing Addendum No. 1*

169. Finally, on 2 February 2017, the MTC issued its report, which recommended signing Addendum No. 1. According to the MTC report, Addendum No. 1 would save costs and did not alter the conditions under which the Project was tendered. The MTC report also stated that the changes to the Concession Contract were in line with the "public interest" and that Addendum No. 1 was the "best alternative."<sup>171</sup>

*f. Kuntur Wasi and the MTC sign Addendum No. 1*

170. On the basis of the foregoing favorable opinions and approvals, on 3 February 2017, Kuntur Wasi and the MTC signed Addendum No. 1.<sup>172</sup> The Addendum was signed before television cameras and was followed by President Kuczynski's statement showing strong support for the project.<sup>173</sup>
171. A few days later, on 9 February 2017, Minister Vizcarra continued to support Addendum No. 1 in a public appearance before a Permanent Commission of the Republic's Congress during which he stated that Addendum No. 1 "favors the State [...] we have made out best effort so that this Addendum is as favorable to the State as it can be."<sup>174</sup>

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<sup>170</sup> Claimants' Memorial, para. 104; Claimants' Reply, para. 77; **Exhibit C-75**, News article published by RPP NOTICIAS, Vizcarra: "PPK viajará este Viernes al Cusco para iniciar obras en Chinchero," 1 February 2017.

<sup>171</sup> Claimants' Memorial, para. 105; Claimants' Reply, para. 78; **Exhibit C-116**, Memorandum No. 528-2017-MTC/25, 2 February 2017, paras. 10.9, 18.14; ("Ante las generalidades del Contrato de Concesión una adenda que permita el ahorro en costos mediante un esquema de pago por avance de Obra, de manera que se evite considerar los costos de estructuración financieros e intereses intercalares que incrementen el valor de la Obra resulta lo más oportuno de acuerdo al marco legal aplicable.") See also **Exhibit C-76**, Informe No. 105-2017-MTC/25, 2 February 2017.

<sup>172</sup> Claimants' Memorial, paras. 106, 107; Respondent's Counter-Memorial, para. 108; **Exhibit C-24**, Addendum No. 1.

<sup>173</sup> Claimants' Memorial, para. 107; **Exhibit CWS-2**, First Barrenechea Statement, para. 45; **Exhibit C-95**, "PPK en Chinchero," 3 February 2017.

<sup>174</sup> **Exhibit C-117**, Video of Minister Martín Vizcarra before the *Comisión Permanente del Congreso, Congreso de la República del Perú*, 9 February 2017, minute 29.30 onwards.

## **E. PERU’S UNILATERAL TERMINATION OF THE CONCESSION CONTRACT**

### **(1) The *Contraloría*’s report of 22 February 2017 on Addendum No. 1**

172. Pursuant to Addendum No. 1, the MTC would transfer the US\$40 million Advance Payment to Kuntur Wasi within 30-days after the Addendum was signed, provided that Kuntur Wasi submitted the Advance Payment Guarantee.<sup>175</sup> However, that never occurred. The events that took place after Addendum No. 1 was signed are at the heart of the Parties’ dispute.
173. On 22 February 2017, the *Contraloría* issued a preliminary report indicating that the MTC’s commitment to provide Kuntur Wasi with the US\$40 million Advance Payment during Phase 1 of the works (instead of during Phase 2 for which it was supposed to be used) and through a bank account other than the Trust, implied a “potential risk that these funds might be used for another purpose,” despite the prohibition in Article 1.120-A of Clause 1 of Addendum No. 1. The *Contraloría* recommended that MTC analyze those risks and take appropriate action.<sup>176</sup>
174. In light of the *Contraloría*’s report, on 27 February 2017, the MTC asked Kuntur Wasi to temporarily suspend the Concession Contract.<sup>177</sup> On 2 March 2017, the MTC and Kuntur Wasi signed an agreement for the temporary suspension of the Concession Contract, which suspended the Parties’ obligations thereunder until 30 days after the *Contraloría* issued its final report, or 90 days after the *Contraloría* after the suspension was signed, whichever occurred first.<sup>178</sup>
175. On 18 May 2017 – in the context of an impeachment proceeding – Minister Vizcarra appeared before the Congress to answer questions in relation to the Chinchero Airport.<sup>179</sup>

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<sup>175</sup> **Exhibit C-24**, Addendum No. 1, Cl. 3, Section 12.

<sup>176</sup> Claimants’ Memorial, para. 111; Respondent’s Counter-Memorial, para. 109; **Exhibit C-29**, *Oficio No. 00331-2017-CG/DC*, 22 February 2017. [Tribunal’s translation] The original Spanish reads: “...representa un riesgo potencial de que el Concesionario pueda utilizar dicho monto para un fin distinto al previsto.”

<sup>177</sup> Respondent’s Counter-Memorial, para. 110; **Exhibit C-31**, *Acta de Acuerdo, Suspensión Temporal de Obligaciones Contractuales*, 2 March 2017, paras. 2.4, 3.2; **Exhibit R-75**, *Oficio No. 0813-2017-MTC/25*, 27 February 2017.

<sup>178</sup> Claimants’ Memorial, para. 113; Respondent’s Counter-Memorial, para. 110; **Exhibit C-31**, *Acta de acuerdo de Suspensión Temporal de Obligaciones Contractuales*, 2 March 2017, Section V.

<sup>179</sup> Claimants’ Memorial, para. 115; Claimants’ Reply, para. 86.

On that parliamentary session, Minister Vizcarra was asked about the legality of Addendum No.1. Minister Vizcarra said the following:

*To conclude, I would like to emphasize the absolute legality of the processes for negotiation and execution of the Addendum to the Contract, which were carried out in strict compliance with the legal framework of the PPPs [Public-Private Partnerships] with the favorable opinion of the competent entities.*

*My administration, faced with a financial closing that was clearly contrary to the interests of the State, and the economic and social disadvantages of terminating the original contract, proposes an amendment to the contract through an addendum to avoid serious economic damage to the country.*

*In addition, the prompt commencement of the construction works of the Chinchero International Airport means fulfilling a commitment undertaken with the people of Cuzco to make a 40-year long awaited dream come true. This project will contribute to the development of Cuzco and Peru.*

*[...]*

*In conclusion, a correct analysis to determine the impact of the execution of Addendum No. 1 on the Concession Contract must consider the comparison of the results of Addendum No. 1 to the results of the request for approval of the EGP made by the Concessionaire, which shows savings for USD 587 million.*

*[...]*

*The declaration of reasons of public interest requires sound grounds and the signature of several Ministers. Undoubtedly, if these reasons existed, such clause could be invoked; in the case of the “Chinchero” Airport there was no way to configure such legal issue.*

*If it were as easy as the question suggests, any contract to which the State is a party could be terminated at any time.*

*The unilateral termination of a contract must necessarily be submitted to ICSID, and if the grounds for such termination are weak, the compensation*

*to be paid by the State would be grievous for the national treasury.*<sup>180</sup>

176. However, on 19 May 2017, the *Contraloría* issued its final report on the Chinchero Airport (although it was not published until 22 May 2017).<sup>181</sup> In this report, the *Contraloría* found that Addendum No. 1 was not compliant with the regulations applicable to public-private partnerships and modified the competition terms that were set out in the tender process.<sup>182</sup> The Parties disagree on the effects of the *Contraloría*'s report and whether, in particular, it required Peru to terminate the Concession Contract.
177. On the same day the *Contraloría*'s report was published, Minister Vizcarra appeared on television stating that “we do not agree with the [*Contraloría*'s] position,” and Vice-Minister Molinelli indicated that the *Contraloría*'s report was “political, not serious” and that it lacked “technical and legal basis.”<sup>183</sup>
178. Despite these assurances, however, according to the Claimants, on 21 May 2017, Vice-Minister Molinelli called Mr. Vargas indicating that, as a result of the *Contraloría*'s report,

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<sup>180</sup> Claimants' Memorial, paras. 116, 117; Claimants' Reply, para. 87; **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, Response to Question No. 1 and 2, pp. 15-17, and Question No. 10, p. 23 [Tribunal's translation] The original Spanish reads: “Para concluir, hago hincapié en la absoluta legalidad de los procesos de negociación y suscripción de la adenda al Contrato, realizados en estricto cumplimiento del Marco legal de las APPs y contando con la opinión favorable de los entes competentes. Mi gestión, frente a un cierre financiero que a todas luces atentaba contra los intereses del Estado y las desventajas económicas y sociales de declarar la caducidad al contrato original, propone la modificación del contrato a través de una adenda, evitando así que se produzcan serios perjuicios económicos para el país. Además, el pronto inicio del Proyecto de construcción del Aeropuerto Internacional de Chinchero, es el cumplimiento del compromiso con el pueblo cusqueño de hacer realidad un anhelo esperado hace 40 años, que va contribuir con el desarrollo del Cusco y del Perú. [...] En conclusión, un análisis correcto para determinar el impacto de la suscripción de la Adenda No. 1 al Contrato de Concesión debe considerar la comparación de los resultados de la Adenda No. 1 frente a los resultados de la solicitud de aprobación del EGP que realizó el Concesionario, en el cual se concluye en un ahorro de US\$ 587 millones. [...] Declarar una razón de interés público requiere un sustento firme y la firma de varios Ministros. Sin duda si existieran esas razones se podría invocar esa cláusula, en el caso del Aeropuerto “Chinchero” no había forma de configurar una situación legal de ese tipo. Si fuera tan fácil como la pregunta sugiere cualquier contrato del Estado podría ser resuelto en cualquier momento. Caducar un contrato en forma unilateral necesariamente pasa por el “CIADI” y si el sustento es débil las indemnizaciones a cargo del Estado serían lamentables para el erario nacional.”

<sup>181</sup> Claimants' Memorial, para. 119; Respondent's Counter-Memorial, para. 112; Claimants' Reply, para. 93; **Exhibit C-30**, Audit Report No. 265-2017-CG/IMPROY-AC, 19 May 2017. The report became public on 22 May 2017.

<sup>182</sup> Claimants' Memorial, para. 119; Respondent's Counter-Memorial, para. 112; **Exhibit C-30**, Audit Report No. 265-2017-CG/IMPROY-AC, 19 May 2017, Conclusions (p. 111 of the PDF).

<sup>183</sup> Claimants' Reply, para. 94; **Exhibit C-120**, News clip from Buenos Días Perú, “Vizcarra sobre Chinchero: Decidimos dejar sin efecto contrato que desde el inicio partió mal,” 22 May 2017, minute 1:04-1:16; **Exhibit C-121**, News clip from CANAL N, “Viceministra Molinelli: Informe de Contraloría no tiene sustento técnico,” minute 00:04-00:09, 22 May 2017.

the MTC would terminate the Concession Contract and asked Mr. Vargas if they could announce that the Parties had reached an agreement for its mutual termination. According to the Claimants, Mr. Vargas refused to accept this offer.<sup>184</sup> Later that same day, Minister Vizcarra appeared on television and stated that “having analyzed Congress’ and the *Contraloría*’s position, we have informed [Kuntur Wasi] of the Government’s intention and wish is to terminate this contract and offer it again.”<sup>185</sup>

179. The following day, 22 May 2017, Minister Vizcarra resigned as Minister of Transport and Communications.<sup>186</sup> That same day, the MEF published a communication in which it heavily criticized the *Contraloría*’s conclusions. The MEF’s view was that Addendum No. 1 would save the State between US\$245 and US\$340 million, and that although it changed the original payment schedule, Addendum No. 1 would mean keeping the “distribution of risks” and the “economic equilibrium” of the Contract:<sup>187</sup>

*1. The Contraloría claims that Addendum No. 1 causes a financial loss of USD 40 million to the State. However, on the contrary, Addendum No. 1 does not cause a financial loss but rather it allows for costs savings for the State for the following reasons: [...]*

*b. The Audit Report reveals that the calculation of the financial loss by the Contraloría resulted from a comparison of Addendum No. 1 and an internal document of ProInversión (Financial Model), which was not included in the Concession Contract and was not known to the bidders. [...]*

*e. Upon appropriate comparison, Addendum No. 1 allows for an estimated saving for the State of between USD 245 million to USD 340 million.*

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<sup>184</sup> Claimants’ Memorial, para. 124; **Exhibit CWS-4**, First Vargas Loret de Mola Statement, para. 37.

<sup>185</sup> Claimants’ Memorial, para. 125; Claimants’ Reply, para. 98; **Exhibit C-35**, News article published by *Semana Económica*, “*Aeropuerto de Chinchero: Ejecutivo dejará sin efecto contrato de concesión*,” 22 May 2017. [Tribunal’s Translation] The original Spanish reads: “*Después de evaluar la posición del Congreso y de la Contraloría, les hemos hecho conocer que la voluntad y el deseo del gobierno es dejar sin efecto este contrato y lanzarlo nuevamente.*” See also **Exhibit C-34**, News clip from Cuarto Poder, “*Martín Vizcarra: “Chinchero va, pero el contrato no,”*” 21 May 2017, minute 9:13-9:32.

<sup>186</sup> Claimants’ Memorial, para. 126; **Exhibit C-36**, News article published by *El Comercio*, “*Martín Vizcarra renuncia al MTC tras dejar sin efecto contrato de Chinchero,*” 22 May 2017.

<sup>187</sup> Claimants’ Memorial, para. 120; **Exhibit C-78**, “*Comunicado en relación a observaciones realizadas por la Contraloría,*” 22 May 2017, MEF.

2. But even if the comparison of Addendum No. 1 and the Financial Model made by the Contraloría were accepted as valid, the discount rate applied does not reflect the opportunity cost for the State. Upon correction of the discount rate, Addendum No. 1 would allow for savings for the State amounting to USD 56 million rather than a USD 40 million loss.

3. The Contraloría asserts that Addendum No. 1 changes the economic-financial balance of the contract because the financial risk is transferred to the State. However, Addendum No. 1 does not alter the economic-financial balance of the Concession Contract because: [...]

c. To mitigate this problem, Addendum No. 1 amended the payment mechanism, by respecting the original financial proposal, maintaining the economic-financial balance and eliminating the excessive payment of interest.<sup>188</sup>

180. On 23 May 2017, President Kuczynski appeared on television and announced that he would not terminate the Concession Contract, but rather, would seek to amend it to take into account comments received from the Congress and the Contraloría.<sup>189</sup>

181. On 25 May 2017, Mr. Bruno Giuffra was appointed as the new Minister of Transport and Communications.<sup>190</sup>

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<sup>188</sup> Claimants' Reply, para. 94; **Exhibit C-185**, News articles published by Agencia Peruana de Noticias Andina, "MEF: adenda sobre Chinchero genera ahorro económico y no perjuicio económico", 22 May 2017. [Tribunal's translation] The original Spanish reads: "1. La CGR afirma que la Adenda N° 1 genera un perjuicio económico al Estado de US\$ 40 millones. Sin embargo, por el contrario, la Adenda N° 1 no genera un perjuicio económico, sino más bien un ahorro de costos para el Estado por los siguientes motivos: [...] b. De la lectura del Informe de Auditoría se evidencia que el cálculo del perjuicio económico realizado por la CGR se basa en una comparación entre la Adenda N° 1, con un documento interno de ProInversión (Modelo Económico), el cual, teniendo carácter Confidencial, no fue conocido por los postores ni recogido por el Contrato de Concesión [...] e. Utilizando la comparación correcta, la Adenda N° 1 genera un ahorro estimado para el Estado de entre US\$ 245 millones y US\$ 340 millones. 2. Pero incluso si tomamos como válida la comparación realizada por la CGR entre la Adenda N°1 y el Modelo Económico, la tasa de descuento aplicada no refleja el costo de oportunidad para el Estado. Corrigiendo la tasa de descuento, la Adenda N° 1 generaría un ahorro al Estado de US\$ 56 millones y no un perjuicio de US\$ 40 millones. 3. La CGR observa que la Adenda N° 1 altera el equilibrio económico financiero del contrato, basándose en que se traslada al Estado el riesgo financiero. Por el contrario la Adenda N° 1 no modifica el equilibrio económico financiero del Contrato de Concesión por los siguientes motivos: [...] c. Para mitigar dicho problema, la Adenda N° 1 cambió el esquema de pagos, respetando la propuesta económica original, manteniendo el equilibrio económico financiero y suprimiendo los pagos excesivos por los intereses."

<sup>189</sup> **Exhibit C-138**, News article published by El Comercio, "PPK afirma que aeropuerto de Chinchero "va adelante" pero con modificaciones", 23 May 2017.

<sup>190</sup> **Exhibit C-37**, Resolución Suprema No. 072-2017-PCM, 25 May 2017.

## (2) The subsequent negotiations with Minister Giuffra

182. On 24 May 2017, the MTC asked Kuntur Wasi to extend the suspension of the Concession Contract to allow for the implementation of the *Contraloría*'s recommendations contained in its report of 19 May 2017.<sup>191</sup>
183. On 31 May 2017, following exchanges between the Parties as to whether the *Contraloría*'s report was binding or not, the MTC and Kuntur Wasi signed an agreement to extend the suspension of the Concession Contract for an additional period of 90 days, starting from 1 June 2017.<sup>192</sup> What followed was a series of meetings and calls between Mr. Vargas and Minister Giuffra and other members of the Government to seek to renegotiate the terms of the Concession Contract.
184. On 1 June 2017, the opposition announced that a new motion would be filed in Congress to question Minister Giuffra about the decision to extend the suspension of the Concession Contract.<sup>193</sup>
185. On the same day, Minister Giuffra and Mr. Vargas signed a document setting out what appears to have been the terms of the discussion that had been held that day (the “**Roadmap**” or “*Hoja de Ruta*”). In that document, the Parties agreed that they would seek to renegotiate a significant number of terms of the Concession Contract, including the financing structure and the Concession's term. The evidence also shows that the Parties agreed that if the renegotiations failed, they would seek to reach an agreement for the mutual termination of the Contract.<sup>194</sup>
186. However, the Parties disagree on how events unfolded in the following days. According to Mr. Giuffra, until that point in time, Peru's position was to try to renegotiate the Concession Contract with Kuntur Wasi. The turning point occurred when Mr. Vargas communicated that Kuntur Wasi would need at least six additional months to obtain the financing for the

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<sup>191</sup> Claimant's Reply, para. 100; **Exhibits C-79**, *Oficio No. 2118-2017-MTC/25*, 24 May 2017.

<sup>192</sup> Claimant's Reply, para. 103; Respondent's Counter-Memorial, para. 118; **Exhibit C-32**, *Adenda al Acta de Suspensión Temporal de Obligaciones Contractuales*, 31 May 2017.

<sup>193</sup> Claimant's Reply, para. 105; **Exhibit C-139**, News article published by *Semana Económica*, “*Caso Chinchero: Acción Popular plantea interpelar al ministro Bruno Giuffra*”, 1 June 2017.

<sup>194</sup> **Exhibit R-16**, Letter from Minister Giuffra to Kuntur Wasi, 1 June 2017; Transcript, Day 5 (Spanish), 991-992.

Project. When asked by Counsel for the Claimants at the Hearing, Mr. Giuffra said he did not remember exactly when that conversation had taken place.<sup>195</sup> Mr. Giuffra explained that this six-month period would have introduced a significant delay to the Project and was unacceptable to the Respondent, given that Kuntur Wasi had already had three years since the Concession Contract was signed to obtain the financing. Mr. Giuffra further explained that Kuntur Wasi's request indicated to the Respondent that Kuntur Wasi would not be able to obtain the funding for the Project and therefore, any further renegotiation efforts would have been in vain.<sup>196</sup>

187. On the other hand, the Claimants refer to an announcement on 2 June 2017, by Congressman Lescano, indicating that, depending on the Government's decision with respect to Kuntur Wasi, he would impeach Minister Giuffra.<sup>197</sup> According to the Claimants, this announcement led to a telephone conversation held on 3 June 2017 (*i.e.*, two days after the *Hoja de Ruta*), between Minister Giuffra and Mr. Vargas, in which the former informed Kuntur Wasi that the MTC would terminate the Concession Contract by mutual agreement because of the "political tension between the Executive, on the one hand, and the Congress and the Contraloría on the other, was unbearable."<sup>198</sup> Mr. Giuffra denies that the termination decision was politically motivated, arguing that it was based purely on technical and formal aspects based on the circumstances of the case.<sup>199</sup>
188. On 4 June 2017, Minister Giuffra announced on television and through an MTC communiqué that "Kuntur Wasi would not participate in the construction and operation of

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<sup>195</sup> Transcript Day 5 (English), 912:20-22.

<sup>196</sup> Respondent's Counter-Memorial, paras. 121, 122; **Exhibit RWS-1**, First Giuffra Statement, paras. 9-11; Transcript, Day 5 (Spanish), 993-994:1.

<sup>197</sup> Claimants' Reply, paras. 111, 112.

<sup>198</sup> **Exhibit CWS-4**, First Vargas Loret de Mola Statement, para. 42. [Tribunal's translation] The original Spanish reads: "*la tensión política entre el Poder Ejecutivo, por un lado, y el Poder Legislativo y la Contraloría, por otro, era insostenible.*" See also Claimants' Memorial, para. 133; Claimants' Reply, paras. 29, 112; **Exhibit CWS-6**, Second Vargas Loret de Mola Statement, para. 30.

<sup>199</sup> Transcript, Day 5 (Spanish), 994:2-19.



the Chinchero International Airport” and that Kuntur Wasi and the MTC had agreed to “reach a termination agreement.”<sup>200</sup>

### (3) The MTC’s formal notice of termination of 13 July 2017

189. After the MTC’s announcement, the MTC, including Minister Giuffra, and Kuntur Wasi’s management met on several occasions to discuss the terms of the termination of the Concession Contract. In those meetings, the Parties discussed the costs that Kuntur Wasi had incurred in the development of the Project and the return of the Concession area.<sup>201</sup> According to the Claimants, at those meetings Minister Giuffra threatened Corporación América and Andino that their other concessions in the country could be jeopardized if they did not reach an agreement with Peru.<sup>202</sup>
190. On 13 July 2017, at the request of the MTC,<sup>203</sup> the MINCETUR and the MTC issued reports, confirming the public interest in building the Chinchero International Airport: The Parties disagree whether these reports serve as a sufficient basis to justify Peru’s decision to unilaterally terminate the Contract under Clause 15.5.1. The Claimants submit that these reports merely analyze *in abstracto* if the Chinchero Airport is a project of public interest; yet they do not analyze whether there were reasons of public interest to justify the unilateral termination of the Contract.<sup>204</sup> On the contrary, the Respondent submits that the public

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<sup>200</sup> Claimants’ Memorial, para. 133; **Exhibit C-40**, News article published by El Comercio, “Gobierno y Kuntur Wasi acordaron resolver contrato por Chinchero, anuncia Giuffra,” 4 June 2017. [Tribunal’s translation] The original Spanish reads: “Kuntur Wasi no participará en la construcción y operación del aeropuerto internacional de Chinchero [...] Se acordado [sic] ir por la ruta del mutuo disenso.” Attached to this news article is an MTC communiqué announcing the termination of the Contract by mutual agreement.

<sup>201</sup> Claimants’ Memorial, para. 134; **Exhibit CWS-1**, First Balta del Río Statement, para. 61; **Exhibit CWS-2**, First Barrenechea Statement, para. 54; **Exhibit CWS-4**, First Vargas Loret de Mola Statement, para. 45; Transcript, Day 5 (Spanish), 994:20-996:10.

<sup>202</sup> Claimants’ Memorial, para. 135; **Exhibit CWS-1**, First Balta del Río Statement, para. 61; **Exhibit CWS-2**, First Barrenechea Statement, para. 54; **Exhibit CWS-4**, First Vargas Loret de Mola Statement, para. 45.

<sup>203</sup> **Exhibit R-17**, *Oficio No. 050-2017-MINCETUR/DM-GA*, 13 July 2017, attaching *Informe No. 016-2017/MINCETUR/VMT/DGET/DIOT*, MINCETUR’s Opinion Regarding Public Interest of Chinchero Airport, 12 July 2017; **Exhibit R-18**, Memorandum No. 0524-2017-MTC-12.08, 13 July 2017, attaching *Informe No. 0347-2017-MTC/12.08*, MTC’s Opinion Regarding Public Interest of Chinchero Airport, 13 July 2017; **Exhibit R-19**, Memorandum No. 3410-2017-MTC/25, 13 July 2017, attaching *Informe No. 0567-2017-MTC/25*, MTC’s Legal Opinion Regarding Public Interest of Chinchero Airport, 13 July 2017.

<sup>204</sup> Claimants’ Reply, paras. 128-131.

interest reason to terminate the Contract was precisely the public interest need to build the New Airport.<sup>205</sup>

- MINCETUR report 016-2017: The MINCETUR concluded that building the Chinchero International Airport was in the public interest;<sup>206</sup>
- MTC report No. 0347-2017-MTC/12.08: which also concluded that it was necessary and in the public interest to build the Chinchero International Airport;<sup>207</sup> and
- MTC report No. 0567-2017-MTC: likewise concluded that building the Chinchero International Airport within the time limits originally contemplated was in the public interest.<sup>208</sup>

191. The Claimants also question the timing of the issuance of these reports. The Claimants submit that the MTC requested the reports on 12 July 2017, *i.e.*, one day in advance of their issuance and of Peru's notification of its unilateral termination of the Contract.<sup>209</sup> The Respondent submits that the request was formally made on 12 July 2017, but the teams of MTC and MINCETUR had discussed the contents of the reports weeks before the termination.<sup>210</sup>

192. On the same day, 13 July 2017, Peru notified Kuntur Wasi its decision to “unilaterally and irrevocably” terminate the Concession Contract for “public interest reasons.” The notification stated as follows:

*[U]nder the current circumstances, it is not possible to carry out the Project as and when originally planned, which jeopardizes attaining the public*

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<sup>205</sup> Respondent's Rejoinder, para. 152.

<sup>206</sup> **Exhibit R-17**, *Oficio No. 050-2017-MINCETUR/DM-GA*, 13 July 2017, attaching *Informe No. 016-2017/MINCETUR/VMT/DGET/DIOT*, MINCETUR's Opinion Regarding Public Interest of Chinchero Airport, 12 July 2017, p. 10.

<sup>207</sup> **Exhibit R-18**, Memorandum No. 0524-2017-MTC-12.08, 13 July 2017, attaching *Informe No. 0347-2017-MTC/12.08*, MTC's Opinion Regarding Public Interest of Chinchero Airport, 13 July 2017, p. 6.

<sup>208</sup> **Exhibit R-19**, Memorandum No. 3410-2017-MTC/25, 13 July 2017, attaching *Informe No. 0567-2017-MTC/25*, MTC's Legal Opinion Regarding Public Interest of Chinchero Airport, 13 July 2017, pp. 2, 4.

<sup>209</sup> Claimants' Reply, paras. 133-135.

<sup>210</sup> Respondent's Rejoinder, para. 151.

*purpose of providing Cuzco with a new international airport, which is of high interest for the whole nation.*

*In this scenario, the unilateral termination of the AICC Contract as provided for in paragraph 15.5.1 thereof is the solution that best aligns with the public interests involved.*<sup>211</sup>

193. Given that the Concession Contract established that the unilateral termination took effect six months after the MTC notified Kuntur Wasi of the termination, the termination of the Contract took effect on 13 January 2018.<sup>212</sup>

## **F. EVENTS THAT OCCURRED AFTER PERU’S UNILATERAL TERMINATION OF THE CONCESSION CONTRACT**

### **(1) Trato Directo**

194. On 18 July 2017, Kuntur Wasi sent a letter to the MTC formally rejecting the MTC’s decision to unilaterally terminate the Concession Contract. The letter stated that the MTC had not explained what, if any, reasons of public interest supported the Contract termination. The letter also gave notice of dispute regarding the unilateral termination of the Contract and requested the initiation of the *Trato Directo* under Clause 16.5.3.<sup>213</sup> In that same letter, Kuntur Wasi requested Peru to start amicable discussions as required under Article 10 of the BIT. Corporación América asked Peru to start amicable discussions on 11 September 2017.<sup>214</sup>

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<sup>211</sup> **Exhibit C-44**, Oficio No. 142-2017-MTC/01, 13 July 2017, p. 2. [Tribunal’s translation] The original Spanish reads: “[E]n la actual situación no es posible concretar la ejecución del Proyecto en la forma y oportunidad originalmente previstas, lo cual pone en peligro el logro de la finalidad pública de alto interés nacional de dotar al Cusco de un nuevo aeropuerto internacional. En este escenario, la solución que se encuentra más acorde con los intereses públicos involucrados es la resolución unilateral del Contrato AICC prevista en el numeral 15.5.1 del mismo.”

<sup>212</sup> **Exhibit C-4**, Concession Contract, Cl. 15.9; Respondent’s Counter-Memorial, para. 131.

<sup>213</sup> **Exhibit C-45**, Letter No. 091-2017-KW, 18 July 2017; Claimants’ Memorial, para. 141; Respondent’s Counter-Memorial, para. 133.

<sup>214</sup> **Exhibit C-47**, Letter from Corporación América to the MEF and MTC, 11 September 2017.

195. The *Trato Directo* between Kuntur Wasi, Corporación América and Peru began on 13 September 2017.<sup>215</sup>
196. On 21 December 2017, the MTC requested Kuntur Wasi to return the Concession area to the State.<sup>216</sup> On 28 December 2017, Peru requested an extension of the deadline for the *Trato Directo*, until 4 March 2018.<sup>217</sup>
197. On 9 January 2018, Kuntur Wasi replied to the MTC's request of 21 December 2017, refusing to return the Concession area to the MTC on the basis that, in Kuntur Wasi's view, the Concession Contract was still in force.<sup>218</sup> On that same day, Kuntur Wasi accepted Peru's request for an extension of the deadline for the settlement discussions.<sup>219</sup>
198. According to the Respondent, at that point in time, the discussions were not about how to move forward with Kuntur Wasi carrying out the Project, but rather about determining the amounts that were to be paid to Kuntur Wasi in connection with the termination of the Contract.<sup>220</sup> Claimants, on the other hand, explain that the Parties were still negotiating how to bring the Project forward and that the Peruvian State acted inconsistently by seeking both the return of the Concession area and the extension of the deadline for negotiations at the same time.<sup>221</sup>
199. On 12 January 2018, Peru reiterated its request that Kuntur Wasi return the Concession area and informed Kuntur Wasi that the MTC's representatives would travel to the

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<sup>215</sup> **Exhibit C-81**, Letter No. 101-2017-KW, 13 September 2017; Claimants' Memorial, para. 142; Respondent's Counter-Memorial, para. 133.

<sup>216</sup> **Exhibit C-82**, *Oficio No. 5379-2017-MTC/25*, 21 December 2017, p. 1; Claimants' Memorial, para. 143; Claimants' Reply, para. 157.

<sup>217</sup> **Exhibit C-83**, *Oficio No. 285-2017-EF/CE-36*, 28 December 2017; Claimants' Memorial, para. 143; Claimants' Reply, para. 157.

<sup>218</sup> **Exhibit C-84**, Letter No. 005-2018-KW, 9 January 2018; Claimants' Memorial, para. 144; Claimants' Reply, para. 157.

<sup>219</sup> **Exhibit C-85**, Letter No. 004-2018-KW, 9 January 2018; Claimants' Memorial, para. 144; Claimants' Reply, para. 157.

<sup>220</sup> Respondent's Counter-Memorial, para. 136.

<sup>221</sup> Claimants' Memorial, para. 143.

Concession area, together with a public notary, on 16 January 2018 so that they could be handed over the Concession area.<sup>222</sup>

200. According to the Respondent, around early January 2018, Mr. Vargas called Minister Giuffra to let him know that Kuntur Wasi was ready to hand over the Concession area. The Respondent explains that this led Minister Giuffra to organize a trip with his Vice-Minister, to personally receive the return of the Concession area.<sup>223</sup>
201. On 15 January 2018, Kuntur Wasi replied, informing Peru that it would not return the Concession area because the termination of the Contract was “unfounded, invalid and inefficient.”<sup>224</sup>
202. On 16 January 2018, the MTC’s representatives, a public notary and one of Kuntur Wasi’s representatives (Dr. Abel Flores) met at the Concession area. According to the Respondent, they attended this meeting because they had been led by Kuntur Wasi to believe that Kuntur Wasi would return the Concession area. At that meeting, however, Kuntur Wasi’s representative, Dr. Flores, refused to sign the documents needed for the exchange and to hand over the Concession area.<sup>225</sup>
203. Shortly thereafter, on 18 January 2018, Peru notified Kuntur Wasi that the *Trato Directo* had ended.<sup>226</sup>
204. On 19 January 2018, the MTC wrote to Kuntur Wasi reiterating its request that the Concession area be returned and threatened to take legal action if Kuntur Wasi persisted retaining the Concession area.<sup>227</sup> On 22 January 2018, Kuntur Wasi once again refused to follow the MTC’s demand and asked Peru to remedy a series of Contract breaches.<sup>228</sup>

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<sup>222</sup> **Exhibit C-86**, *Oficio No. 200-2018-MTC/25*, 12 January 2018; Claimants’ Memorial, para. 145.

<sup>223</sup> Respondent’s Counter-Memorial, para. 139.

<sup>224</sup> **Exhibit C-87**, Letter No. 007-2018-KW, 15 January 2018; Claimants’ Memorial, para. 145; Claimants’ Reply, para. 159.

<sup>225</sup> Respondent’s Counter-Memorial, paras. 139, 140; Claimants’ Memorial, para. 146.

<sup>226</sup> **Exhibit C-48**, *Oficio No. 010-2018-EF/CE-36*, 18 January 2018; Respondent’s Counter-Memorial, para. 141; Claimants’ Reply, para. 161.

<sup>227</sup> **Exhibit C-125**, *Oficio No. 020-2018-MTC/12*, 19 January 2018; Claimants’ Memorial, para. 148.

<sup>228</sup> **Exhibit C-88**, Letter No. 014-2018-KW, 22 January 2018; Claimants’ Memorial, para. 148.

205. On 25 January 2018, the Special Commission Representing the State in International Investment Disputes sent a formal letter to Kuntur Wasi in response to its letter of 22 January 2018, in which the Commission explained that the MTC had been forced to terminate the *Trato Directo* because the State no longer trusted that Kuntur Wasi would negotiate in good faith.<sup>229</sup>

**(2) Kuntur Wasi’s termination for breach of the Concession Contract**

206. Finally, on 7 February 2018, Kuntur Wasi sent a formal letter to the MTC informing it of the termination of the Concession Contract for breach of contract by the MTC.<sup>230</sup> On 8 February 2018, Kuntur Wasi handed over the Concession area to Peru.<sup>231</sup>

**(3) Peru finds another concessionaire**

207. In 2018, the MTC approved public tender procedures for selecting a company to carry out the Chinchero Airport Project. The MTC divided the Project into two stages: Stage 1 would be the phase in which the necessary earthworks would be carried out. Stage 2 would be the phase in which the airport would be built.<sup>232</sup>

208. On 12 November 2018, the public tender process concluded with the selection of Altesa Contratistas Generales, S.A. to complete the earthworks for the sum of approximately US\$10 million.<sup>233</sup> Stage 1 was completed on 14 October 2019.<sup>234</sup>

209. As for stage 2 of the project, Peru signed, on 24 October 2019, a State-to-State “Technical Assistance Contract” with South Korea for the construction of the project.<sup>235</sup> Under this contract, South Korea will (i) review and revise the engineering study prepared by Kuntur

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<sup>229</sup> **Exhibit R-70**, *Oficio No. 013-2018- EF/CE-36*, 25 January 2018.

<sup>230</sup> Claimants’ Memorial, paras. 149, 460; Claimants’ Reply, para. 163; **Exhibit C-89**, Letter No. 018-2018-KW, 7 de febrero de 2018.

<sup>231</sup> **Exhibit C-126**, *Acta de reversión de los Bienes de la Concesión del Nuevo Aeropuerto Internacional de Chinchero-Cusco*, 8 February 2018.

<sup>232</sup> Respondent’s Counter-Memorial, paras. 142, 143.

<sup>233</sup> Respondent’s Counter-Memorial, para. 143; **Exhibit R-48**, MTC “Aide Memoire,” 9 January 2020, para. 7; **Exhibit R-49**, News article published by RPP Noticias, “*Aeropuerto Chinchero: Movimiento de tierras iniciará en diciembre*,” 13 November 2018, p. 2. The US dollar amount was calculated using the conversion rate of 1:0.28855 (PEN:USD). See **Exhibit R-50**, Oanda Currency Converter, available at [www1.oanda.com/currency/converter](http://www1.oanda.com/currency/converter).

<sup>234</sup> **Exhibit R-48**, MTC “Aide Memoire,” 9 January 2020, p. 3; Respondent’s Counter-Memorial, para. 143.

<sup>235</sup> **Exhibit R-48**, MTC “Aide Memoire,” 9 January 2020, p. 5; Respondent’s Counter-Memorial, para. 145.

Wasi; (ii) provide advice on the selection process for a new contractor; (iii) assist in the management of the Project contracts; and (iv) assist in the commencement of operations at the Airport.<sup>236</sup> According to the Respondent, construction of the new Chinchero International Airport is expected to be completed by 2024.<sup>237</sup>

**(4) Criminal investigations against Kuntur Wasi's and Corporación América's employees**

210. Shortly after Addendum No. 1 was signed, on 10 February 2017, the MTC asked the *Fiscalía* to open an investigation into the events leading to the Concession Contract, as a result of the *Contraloría*'s findings on the 22 February 2017 report.<sup>238</sup>
211. On 3 March 2017, the General Attorney for Corruption Offenses asked the *Fiscalía* that the investigations be extended to cover the events leading to Addendum No. 1 and that everybody involved in Addendum No. 1 be investigated, including Minister Vizcarra himself as well as Kuntur Wasi's and Corporación América's officials.<sup>239</sup>
212. As a result of these investigations, in March 2017, Kuntur Wasi's representatives had to hand over the following documents to the General Prosecutor: (i) Kuntur Wasi's share register; (ii) the minutes of board of directors' meetings; (iii) the minutes of the shareholders' meetings; (iv) its inventories and balances for the years 2014 to 2016; (v) forms; (vi) purchase records from 2014 to 2017; (vii) sales records for the years 2014 to 2017; (viii) the company journal for the period 2014 to 2017 and (ix) the general company ledger for the same period.<sup>240</sup> Also in March 2017, the *Fiscalía* ordered the search of

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<sup>236</sup> Respondent's Counter-Memorial, para. 145; **Exhibit R-48**, MTC "Aide Memoire," 9 January 2020, at p. 5.

<sup>237</sup> Respondent's Counter-Memorial, para. 146.

<sup>238</sup> **Exhibit C-128**, Video published by Diario Correo, "Procuraduría del MTC lleva caso Chinchero a la Fiscalía," 24 February 2017; **Exhibit C-127**, News article published by GESTIÓN, "Vizcarra: denunciaremos a los funcionarios que realizaron el primer contrato de Chinchero," 9 February 2017; Claimants' Memorial, paras. 150, 151.

<sup>239</sup> **Exhibit C-129**, News article published by GESTIÓN, "Procuraduría Anticorrupción denunció a Vizcarra por adenda de Chinchero," 4 March 2017; Claimants' Memorial, para. 152; Respondent's Counter-Memorial, paras. 148, 149.

<sup>240</sup> Claimants' Memorial, paras. 162, 658.

Kuntur Wasi's offices.<sup>241</sup> Later that same year, the *Fiscalía* requested that the right to bank secrecy of Kuntur Wasi, [REDACTED] be lifted.<sup>242</sup>

213. On 10 October 2017, the *Fiscalía* decided to extend the scope of the preliminary investigations [REDACTED] to include possible money laundering.<sup>243</sup>
214. However, [REDACTED] appealed before the Peruvian Courts to seek the protection of their fundamental rights on the grounds that the request was not sufficiently reasoned as required by Peruvian criminal laws.<sup>244</sup> Both the court of first instance and the appeals court confirmed – in January 2018 – that [REDACTED] rights had been violated, and urged the Prosecutor to explain in greater detail the facts, circumstances and legal consequences of the events that were being investigated.<sup>245</sup>
215. In February 2018, one month before Minister Vizcarra became President, the criminal investigations against him were closed.<sup>246</sup>
216. On 31 January 2019, [REDACTED] was called to testify in the criminal proceeding, with [REDACTED] testifying on 21 January 2019 and [REDACTED] on 24 April and 11 June 2019.<sup>247</sup>
217. On 23 August 2019, the *Fiscalía* decided to close the investigation related to the Concession Contract but decided to formally start preliminary investigations against [REDACTED]

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<sup>241</sup> Claimants' Memorial, para. 163.

<sup>242</sup> Claimants' Memorial, para. 164.

<sup>243</sup> Claimants' Memorial, para. 155.

<sup>244</sup> Claimants' Memorial, para. 157; **Exhibit C-130**, *Expediente* [REDACTED]

<sup>245</sup> **Exhibit C-130**, [REDACTED]; **Exhibit C-163**, [REDACTED]; Claimants' Memorial, paras. 158-160.

<sup>246</sup> **Exhibit C-28**, [REDACTED]; Claimants' Memorial, para. 169.

<sup>247</sup> Claimants' Memorial, para. 165.



[REDACTED] in relation to Addendum No. 1 under the change of “collusion.”<sup>248</sup> The Prosecutor also decided to transfer the investigation for money laundering to the Prosecutor for Money Laundering Offenses.<sup>249</sup>

218. Also, as part of the preliminary investigations, certain Kuntur Wasi officials [REDACTED] [REDACTED] who required judicial authorization to travel were required to periodically check in with the Prosecutor’s Office and to pay a bond to ensure that they would not flee during the investigation.<sup>250</sup>
219. On 16 January 2020, the *Fiscalía* closed the investigation against Kuntur Wasi and Corporación América’s representatives.<sup>251</sup>

#### IV. JURISDICTION

220. Peru argues that the Tribunal lacks jurisdiction over (A) the BIT claims, because Kuntur Wasi (*i.e.*, Sociedad Aeroportuaria Kuntur Wasi S.A.) is not controlled by an Argentine company and, thereby, is not an Argentine investor under BIT nor under the ICSID Convention and thus, it cannot be a claimant in this arbitration; and (B) the contractual claims, because Corporación América -- the only foreign investor entitled to appear before this Tribunal -- is not a party to either the Concession Contract or the Guarantee Agreement, and Kuntur Wasi -- which is a party to those contracts and may raise contractual claims -- is not a proper claimant in this arbitration.

##### A. THE TRIBUNAL’S JURISDICTION OVER KUNTUR WASI’S TREATY CLAIMS

<sup>248</sup> Claimants’ Memorial, para. 166 referring to Exhibit C-131, [REDACTED]

[REDACTED] Exhibit C-132, [REDACTED]

[REDACTED]. Exhibit C-131 and C-132 are the same document.

<sup>249</sup> Claimants’ Memorial, para. 167; Claimants’ Reply, para. 169; Exhibit C-131, [REDACTED]

[REDACTED] Exhibit R-55, News article published by El Comercio, [REDACTED]

<sup>250</sup> Claimants’ Memorial, paras. 168, 659, 660.

<sup>251</sup> Exhibit R-55, News article published by El Comercio, [REDACTED]

## (1) The Parties' Positions

### a. The Respondent's Position

221. The Respondent's first jurisdictional objection concerns Kuntur Wasi's standing to bring claims under the BIT. In particular, the Respondent asserts that the Claimants have failed to prove that Kuntur Wasi – a Peruvian entity – is a protected investor under the BIT and the ICSID Convention by virtue of foreign control.<sup>252</sup>
222. On the Respondent's case, both the ICSID Convention and the BIT permit a Peruvian company to bring a dispute to ICSID arbitration against Peru only where the claimants can prove actual or effective "foreign control."<sup>253</sup> Control may exist by reason of the percentage of shares held, legal rights conferred in instruments or agreements, or a combination of these, and the specific voting rights that the share ownership confers.<sup>254</sup>
223. The Respondent acknowledges that reference to Article 25(2)(b) of the ICSID Convention in the Concession Contract and in the Guarantee Agreement indicates that at the time of signing, the Parties agreed to treat Kuntur Wasi as a foreign national for purposes of the ICSID Convention.<sup>255</sup> However, according to the Respondent, the Claimants must prove both that Kuntur Wasi is actually controlled by Corporación América and that Peru consented to treat Kuntur Wasi as an Argentine company for purposes of the ICSID Convention and the BIT.<sup>256</sup>
224. On the Respondent's case, the Claimants have failed to prove control in their own pleaded case. First, the Respondent argues that "negative control" or veto power does not suffice

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<sup>252</sup> Respondent's Counter-Memorial, para. 154.

<sup>253</sup> Respondent's Counter-Memorial, paras. 155, 156.

<sup>254</sup> Respondent's Counter-Memorial, paras. 159-161.

<sup>255</sup> Respondent's Rejoinder, para. 203.

<sup>256</sup> Respondent's Counter-Memorial, paras. 157, 163, citing **Exhibit RL-9**, *Vacuum Salt Products Limited v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 (hereinafter *Vacuum Salt v. Ghana*), para. 36 ("[T]he parties' agreement to treat Claimant as a foreign national 'because of foreign control' does not ipso jure confer jurisdiction."); **Exhibit RL-10**, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001 (hereinafter *Autopista v. Venezuela*), paras. 110-126 (determining whether the U.S. owner of a Venezuelan company in fact controlled that company notwithstanding the parties' agreement to treat such a company as a foreign company for the purposes of Article 25(2)(b) of the ICSID Convention); Respondent's Rejoinder, para. 201.

to establish foreign control.<sup>257</sup> According to the Respondent, having veto power only means that Kuntur Wasi cannot take any affirmative corporate decision without the agreement and consent of both Andino and Corporación América; and therefore, neither of them “effectively controls” the company in terms of the BIT. In the Respondent’s view, the affirmative power to govern and manage the local company (and not merely a veto right over certain decisions) is the international law standard for control applicable to this dispute.<sup>258</sup>

225. The Respondent’s main arguments against Corporación América’s alleged control over Kuntur Wasi are the following:<sup>259</sup>

- a. Corporación América’s lack of a controlling shareholding in Kuntur Wasi: Corporación América has always held the same percentage of shares as Andino and has always nominated the same number of board members.<sup>260</sup> Kuntur Wasi’s own corporate documents show that 50% voting power is insufficient to direct significant corporate decisions, which must be approved with a qualified majority of 67% of the voting shares during shareholder meetings.<sup>261</sup>
- b. Corporación América’s lack of authority to control Kuntur Wasi’s corporate decisions: The fact that decisions of the Board of Directors require the approval of three out of four directors, while Corporación América only had the power to appoint two directors, and therefore, any significant decisions would require the approval by Andino’s directors, shows that Corporación América has never had the power to control Kuntur Wasi’s corporate decisions.<sup>262</sup>
- c. Corporación América’s lack of managerial or operational control over Kuntur Wasi at any level<sup>263</sup>: According to the Respondent, the fact that Corporación América had

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<sup>257</sup> Respondent’s Counter-Memorial, para. 165.

<sup>258</sup> Respondent’s Rejoinder, paras. 205 *et seq.*

<sup>259</sup> Respondent’s Rejoinder, para. 203.

<sup>260</sup> Respondent’s Counter-Memorial, para. 165.

<sup>261</sup> Respondent’s Counter-Memorial, para. 166.

<sup>262</sup> Respondent’s Counter-Memorial, para. 166.

<sup>263</sup> Respondent’s Rejoinder, paras. 231 *et seq.*

the technical knowledge and experience to advance the Chinchero Airport Project and that Kuntur Wasi would not have been chosen in the tender process without Corporación América carries no legal weight and does not prove control within the meaning of the ICSID Convention or the BIT.<sup>264</sup> Furthermore, even on the Claimants' own case, the two individuals most responsible for the Project's progress were Mr. Arruda and Mr. Mobilia, both employees of Corporación América, who had no apparent role in Kuntur Wasi (such as managing or directing Kuntur Wasi employees), nor did they take actions on behalf of Kuntur Wasi.

Rather, the facts show that Andino managed Kuntur Wasi, given that Andino: (i) identified the Chinchero Airport Project; (ii) selected Corporación América as its partner; (iii) recommended that Mr. José Balta, Andino's Chief Financial Officer at the time, served as Kuntur Wasi's General Manager; (iv) conducted Kuntur Wasi's outreach to the Peruvian State; and (v) Mr. Vargas, Andino's CEO, was the Chairman of Kuntur Wasi's *Directorio*.<sup>265</sup>

226. In the Respondent's view, if a foreign company is to "control" a domestic company through its knowledge and expertise as the Claimants argue, the foreign company must use its knowledge and experience to manage or direct the actions of the domestic company. In other words, the "controlling" company must lend this expertise to the domestic company, for example by appointing managers or directors that govern the domestic company, thus utilizing the expertise of the controlling company.<sup>266</sup> Yet, in this case, the Claimants have not presented evidence that Corporación América in fact exerted influence over the management of Kuntur Wasi.<sup>267</sup>
227. Moreover, according to the Respondent, the Claimants have not identified a single case where a tribunal held that a foreign investor controlled a local company through knowledge, expertise, and management where the foreign company (i) did not own a

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<sup>264</sup> Respondent's Counter-Memorial, para. 167.

<sup>265</sup> Respondent's Rejoinder, para. 235.

<sup>266</sup> Respondent's Rejoinder, para. 236.

<sup>267</sup> Respondent's Rejoinder, para. 244.

majority of shares in the domestic company; and (ii) did not appoint the majority of the domestic company's board of directors.<sup>268</sup>

228. The Respondent also denies that the BIT Protocol, on which the Claimants rely, is helpful to their case on jurisdiction.<sup>269</sup> In particular, the Respondent argues that the BIT Protocol indicates that control may be found to exist, among others, when there is a “[a] direct or indirect percentage of shareholding in the capital of a juridical person that permits an effective control such as, in particular, a shareholding in the capital greater than half.”<sup>270</sup> Yet, Corporación América holds only 50% of Kuntur Wasi's shares, which is not “greater than half.”
229. Another factor that indicates control under the BIT Protocol is “[d]irect or indirect possession of the quantity of votes that permits to have a dominant position in the corporate bodies or decisively influence the operation of the legal entity.”<sup>271</sup> In this case, a 50% holding cannot be considered to confer a dominant position since the other shareholder, Andino, possess the same number of shares, and therefore, Corporación América does not have the power to “decisively influence” the operation of Kuntur Wasi.
230. As a result, the Respondent argues that the only foreign investor and legitimate Claimant entitled to appear before this Tribunal is Corporación América, and Kuntur Wasi must be dismissed from the proceeding.<sup>272</sup>

***b. The Claimants' Position***

231. The Claimants assert that the Tribunal has jurisdiction over the Claimants' treaty claims as well as over Kuntur Wasi's claims arising from the Concession Contract and the Guarantee Agreement.<sup>273</sup> In the Claimants' view, the basis for the Tribunal's jurisdiction over Kuntur

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<sup>268</sup> Respondent's Rejoinder, paras. 237-243.

<sup>269</sup> Respondent's Rejoinder, paras. 224 *et seq.*

<sup>270</sup> Respondent's Counter-Memorial, para. 161.

<sup>271</sup> Respondent's Counter-Memorial, para. 162. According to the Respondent, the Board of Directors' composition reflects this power equality (two directors for each shareholder, while three are required for approving resolutions).

<sup>272</sup> Respondent's Counter-Memorial, para. 170.

<sup>273</sup> Claimants' Memorial, paras. 170 *et seq.*

Wasi's claims is found in Articles 1(2)(c) and Article 10 of the BIT, Article 25(2)(b) of the ICSID Convention and Clause 16.6.1 of the Concession Contract.<sup>274</sup>

232. With respect to the Respondent's jurisdictional objection in relation to Kuntur Wasi's treaty claims, the Claimants argue that Kuntur Wasi satisfies the requirements to bring a claim under Article 10 of the BIT, in particular because:

- (i) the dispute relates to Kuntur Wasi's protected investments and Peru's breaches of the BIT;<sup>275</sup>
- (ii) the dispute is between an investor of one Contracting Party against the other Contracting Party.<sup>276</sup> According to the Claimants, Kuntur Wasi is a protected investor because, although it is an entity constituted under the laws of Peru, it is effectively controlled by Corporación América, an Argentinean legal entity;<sup>277</sup>
- (iii) Kuntur Wasi observed the six-month period to amicably settle the dispute (the dispute was notified on 18 July 2017 and the Request for Arbitration was filed on 21 June 2018);<sup>278</sup> and
- (iv) Kuntur Wasi has not submitted its dispute to domestic courts.<sup>279</sup>

233. The Claimants also assert that Kuntur Wasi meets the requirements of Article 25(2)(b) of the ICSID Convention because:

- (i) there is a legal dispute between the Parties arising directly out of the Concession Contract, the Guarantee Agreement and the BIT;<sup>280</sup>

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<sup>274</sup> Claimants' Memorial, paras. 172, 177, 183, 190.

<sup>275</sup> Claimants' Memorial, para. 199.

<sup>276</sup> Claimants' Memorial, para. 200.

<sup>277</sup> Claimants' Memorial, para. 201.

<sup>278</sup> Claimants' Memorial, para. 202.

<sup>279</sup> Claimants' Memorial, para. 203.

<sup>280</sup> Claimants' Memorial, para. 186.

- (ii) both Peru and Kuntur Wasi consented to submit disputes under the BIT and disputes under the Concession Contract to ICSID;<sup>281</sup> and
  - (iii) the dispute is between Peru, which is a contracting state to the ICSID Convention, and Kuntur Wasi, who Peru consented would be treated as a “national of another State”<sup>282</sup> for purposes of Article 25(2)(b) of the ICSID Convention by virtue of foreign control.<sup>283</sup>
234. With respect to the element of “control” under Article 25(2)(b) of the ICSID Convention, the Claimants acknowledge that they must demonstrate *both* that the host State has consented to treat domestic incorporated entities that are controlled by foreign nationals as protected investors (subjective criterion) *and* that the local entity is, in fact, foreign controlled (objective criterion).<sup>284</sup>
235. With respect to the subjective criterion, relying on an opinion by Professor Schreuer, the Claimants argue that Peru agreed to treat Kuntur Wasi as a foreign investor through Clause 16.6.1(b)(i) of the Concession Contract, Clause 3 of the Guarantee Agreement and Article 1(2)c) of the BIT.<sup>285</sup> The Claimants’ position with respect to the legal value of Clause 16.6.1 of the Concession Contract varied throughout their pleadings. At first, the Claimants – relying on the opinion of Prof. Schreuer – argued that this contractual acknowledgement is not enough by itself to prove control, but it creates “a strong presumption in favour of foreign control”<sup>286</sup> given that it presupposes that Peru considered, at the time of signing the Concession Contract, that Kuntur Wasi was, in fact, controlled by a foreign entity.<sup>287</sup>

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<sup>281</sup> Claimants’ Memorial, para. 188.

<sup>282</sup> Claimants’ Memorial, para. 192; **Exhibit C-4**, Concession Contract, Cl. 16.6.1(b).

<sup>283</sup> Claimants’ Memorial, paras. 187, 206.

<sup>284</sup> Claimants’ Memorial, para. 211; Claimants’ Reply, para. 193.

<sup>285</sup> Claimants’ Reply, paras. 196-199; Claimants’ Rejoinder on Jurisdiction, paras. 36 *et seq.*

<sup>286</sup> **Exhibit CER-5**, Schreuer Report, para. 155: “... this clause represents a recognition by Peru of the fact that Kuntur Wasi is controlled by Corporación América for purposes of Article 25(2)(b) of the ICSID Convention. This recognition creates a strong presumption in favour of foreign control that is difficult to challenge by the State that has agreed to it.”

<sup>287</sup> Claimants’ Reply, paras. 203-205; Claimants’ Rejoinder on Jurisdiction, paras. 35-42. According to the Claimants, Peru has unequivocally and consistently recognized that Corporación América controls Kuntur Wasi, not only through Clause 16 of the Concession Contract but also because Peru again adopted the same arbitration clause when it negotiated the Addendum, and it never raised any objection to Corporación América’s control until this arbitration.

In this context, the Claimants also argued that where there is an express agreement to treat a local entity as “foreign,” coupled with the extensive definition of control under the relevant BIT, tribunals should be less *rigorous* in relation to the concept of control.<sup>288</sup> However, in subsequent pleadings, the Claimants escalated this argument to an estoppel allegation, claiming that Peru cannot contest the fact that it agreed and recognized that Kuntur Wasi should be deemed as a foreign investor for the purposes of ICSID arbitration.<sup>289</sup>

236. With respect to the objective criterion, the Parties’ disagreement concerns whether Kuntur Wasi was *effectively* foreign controlled.<sup>290</sup> In this regard, the Claimants argue that:

- (i) The ICSID Convention purposefully does not define “control” and that there is nothing either in the negotiating history of the ICSID Convention nor in its context, object and purpose that would require affirmative control (“*control afirmativo*”) or effective control (“*control efectivo*”) as the Respondent contends.<sup>291</sup>
- (ii) With respect to the Concession Contract, the Claimants acknowledge that the Concession Contract does not contain any definition of control for purposes of Clause 16.6.1(b)(i).<sup>292</sup>
- (iii) As for the BIT, the Claimants argue that Article 1(2) of the BIT sets out a broad definition of “investor” and that the BIT Protocol (which is an integral part of the BIT with equal legal value) establishes that the element of control is satisfied if the foreign entity exercises “*control efectivo*” or holds a dominant position (“*posición determinante*”). According to the Claimants, having a majority shareholding is one of the ways in which effective control may be had, but it is not a formal requirement for control and even less to prove that Corporación América has a “*posición determinante*.” The Claimants further argue that the BIT Protocol allows the Tribunal

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<sup>288</sup> Claimants’ Reply, para. 221.

<sup>289</sup> Claimants’ Rejoinder on Jurisdiction, paras. 35-50.

<sup>290</sup> Claimants’ Reply, paras. 198-202.

<sup>291</sup> Claimants’ Reply, paras. 207 *et seq*; Claimants’ Rejoinder on Jurisdiction, paras. 54 *et seq*.

<sup>292</sup> Claimants’ Reply, para. 220.



to consider any reasonable control criteria, given that it uses the expression “among others” (“*entre otros*”) before listing the examples and that “*control afirmativo*” is not a requirement for establishing either “*control efectivo*” or a “*posición determinante*.”<sup>293</sup>

237. Turning to the facts of the case, the Claimants argue that Corporación América “decisively influences” Kuntur Wasi within the meaning of the second example listed in the BIT Protocol.<sup>294</sup> In particular, the Claimants rely on the following facts to sustain their argument that Corporación América has always been able to exercise “decisive influence” over Kuntur Wasi:

- (1) Formal corporate structure and composition of the board indicate that Kuntur Wasi’s decisions required Corporación América’s approval: Corporación América has always held 50% of Kuntur Wasi’s shares and has always been able to designate two out of four directors to the *Directorio*. Given that all corporate decisions required 67% of the voting shares, Corporación América’s approval has been necessary for all decisions within Kuntur Wasi and therefore, Corporación América has had “negative control” (“*control negativo*”) over Kuntur Wasi.<sup>295</sup>

On the Claimants’ case, the fact that Mr. Vargas (President of the *Directorio*) and Mr. Balta, General Manager of Kuntur Wasi, were both Andino’s employees, does not alter the fact that Corporación América had to approve all decisions within Kuntur Wasi.<sup>296</sup>

- (2) Operational management and technical expertise: Relying on Prof. Schreuer’s opinion, the Claimants argue that investment treaty tribunals have considered the foreign investor’s ability to direct the decisions of the local entity on the basis of

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<sup>293</sup> Claimants’ Reply, paras. 215-219; Claimants’ Rejoinder on Jurisdiction, paras. 60 *et seq.*

<sup>294</sup> Claimants’ Reply, paras. 228-232; Claimants’ Rejoinder on Jurisdiction, paras. 63 *et seq.*

<sup>295</sup> Claimants’ Memorial, para. 215; Claimants’ Reply, paras. 217, 226, 227, 232-238; Claimants’ Rejoinder on Jurisdiction, paras. 79, 80, 101.

<sup>296</sup> Claimants’ Rejoinder on Jurisdiction, paras. 81-83.

experience and know-how as indicative of foreign control.<sup>297</sup> To prove operational management, the Claimants rely on the fact that Corporación América was the only shareholder with the required technical expertise and know-how to win the bidding process and to carry out the construction and operation of the Chinchero Airport.<sup>298</sup> According to the Claimants, by requiring that Corporación América have a Minimum Ownership Interest (“*Participación Mínima*”) in the project of at least 25% of the shares from the date of the Concession Contract until at least 5 years from the commencement of the Operational Stage of the Chinchero Airport, Peru implicitly acknowledged that Corporación América managed Kuntur Wasi.<sup>299</sup>

The Claimants further allege that Kuntur Wasi was a special purpose vehicle created exclusively for purposes of constructing and managing the airport and that, without Corporación América’s participation, it would never have been able to meet that purpose.<sup>300</sup> In fact, under the Concession Contract – drafted unilaterally by Peru – Corporación América was the entity required under the Concession Contract to carry out the main obligations related to the management of the Chinchero Airport.<sup>301</sup> In practice, this was indeed the case as Corporación América was also the shareholder that led Kuntur Wasi’s compliance with the obligations under the Concession Contract, such as the EDI and obtaining the required financing.<sup>302</sup>

The Claimants deny the Respondent’s argument that the two individuals most responsible for the Project’s progress (Mr. Arruda and Mr. Mobilia) acted at all times as employees of Corporación América and not through Kuntur Wasi. According to the Claimants, even though the preparation of the EDI and the negotiations to obtain

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<sup>297</sup> Claimants’ Reply, paras. 242, 243, citing **Exhibit CER-5**, Schreuer Report, para. 80; **Exhibit CL-159**, *Compagnie d’Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on Jurisdiction (hereinafter *Compagnie d’Exploitation v. Gabon*), 19 December 2005, para. 40.

<sup>298</sup> Claimants’ Rejoinder on Jurisdiction, paras. 84 *et seq.*

<sup>299</sup> Claimants’ Reply, para. 259.

<sup>300</sup> Claimants’ Rejoinder on Jurisdiction, paras. 87, 110 *et seq.*

<sup>301</sup> Claimants’ Reply, paras. 240 *et seq.*; Claimants’ Rejoinder on Jurisdiction, para. 88.

<sup>302</sup> Claimants’ Rejoinder on Jurisdiction, para. 91.

financing were led by Corporación América, both actions were closely coordinated with Kuntur Wasi.<sup>303</sup>

Finally, according to the Claimants, by requiring that only Corporación América (and not Andino) undertake “not to prevent, by any actions or omissions, Kuntur Wasi from conducting its usual business and particularly any activities involved in the execution of the Concession Contract,”<sup>304</sup> Peru further acknowledged that Corporación América was the only shareholder that could direct Kuntur Wasi’s actions.

238. For all of the above, the Claimants conclude that Corporación América controls Kuntur Wasi within the meaning of the BIT and the ICSID Convention.<sup>305</sup>

## **(2) The Tribunal’s Analysis**

239. The Tribunal is of the view that Kuntur Wasi is a “national of another Contracting State” within the meaning of Article 25(2)(b) of the ICSID Convention as well as an entity that is “effectively controlled” by a juridical person of another State Party under Article 1 (2)(c) of the BIT and its Protocol. As such, the Tribunal has jurisdiction over the claims brought by Kuntur Wasi in these proceedings.
240. The following sections detail the analysis of the Tribunal of these issues. At the outset, the Tribunal notes that these issues raise questions of international law and treaty interpretation.

### ***a. Under the ICSID Convention***

241. The starting point for the Tribunal’s analysis is the ICSID Convention. Article 25 of the ICSID Convention provides in relevant part:

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<sup>303</sup> Claimants’ Rejoinder on Jurisdiction, paras. 93-97.

<sup>304</sup> Claimants’ Reply, para. 260; Claimants’ Rejoinder on Jurisdiction, para. 89, citing to **Exhibit C-43**, Agreement between Corporación América and Kuntur Wasi, 30 June 2014, Cl. 2.1. [Tribunal’s translation] The original Spanish reads: “...no impedir, con sus actos u omisiones, que KUNTUR WASI desarrolle normalmente sus actividades y, en especial, aquellas que impliquen la ejecución del Contrato de Concesión.”

<sup>305</sup> Claimants’ Reply, para. 262; Claimants’ Rejoinder on Jurisdiction, para. 124.

*Article 25*

*(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

*(2) “National of another Contracting State” means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and;*

*(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. (Emphasis added).*

242. There is no dispute over any of the elements of Article 25 other than the ultimate one: whether Kuntur Wasi is a “national of another Contracting State” within the second part of Article 25(2)(b). This provision, as other tribunals have observed, constitutes an exception to the general rule that a national of a Contracting State cannot bring claims against that State. In considering this issue, the Tribunal will first assess the significance of the Parties’ agreement in Clause 16.6.1 of the Concession Contract that Kuntur Wasi is a national of another Contracting State by virtue of being under foreign control.

243. The specific language of the Concession Contract, Article 16.6.1(b), is as follows:

*The GRANTOR, on behalf of the Government of the Republic of Peru, states*

*that the CONCESSIONAIRE shall be considered as a "National of Another Contracting State", since it is subject to foreign control as provided for in Article 25(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and the CONCESSIONAIRE agrees to be considered as such.*<sup>306</sup>

244. This language, which appears within the clause of the Concession Contract submitting legal disputes to ICSID arbitration, is manifestly designed with Article 25(b)(2) of the Convention in mind. Indeed, it references that provision explicitly, and uses the precise language of the Convention. It therefore seems evident that its purpose was to express the Parties' agreement to treat Kuntur Wasi as a national of Argentina for purposes of any investment dispute such as this one.
245. This agreement and declaration of the Respondent is reinforced by the Guarantee Agreement, which first affirms, *inter alia*, all the declarations of the Concessionaire in the Concession Contract in the following terms:

*2.1 Under this GUARANTEE CONTRACT, THE STATE guarantees to the CONCESSIONAIRE COMPANY, the Grantor's representations, warranties, and obligations under the Concession Contract. This guarantee is not a financial guarantee.*<sup>307</sup>

246. The question, therefore, is whether such a clause, reinforced by the Guarantee Agreement, is sufficient to meet the requirements of Article 25(2)(b) of the Convention, which by its terms includes two elements: consent to arbitration, and the existence of foreign control at the time of that consent. Both the Parties, the Claimants' uncontroverted expert, Professor Schreuer, and prior decisions interpreting this provision, seem to be in agreement that it

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<sup>306</sup> **Exhibit C-4**, Concession Contract, Cl. 16.6.1(b). [Tribunal's translation] The original Spanish reads: "*Para efectos de tramitar los procedimientos de arbitraje internacional de derecho, de conformidad con las reglas de arbitraje del CIADI, el CONCEDENTE, en representación del Estado de la República del Perú, declara que al CONCESIONARIO se le considerará como "Nacional de Otro Estado Contratante", por estar sometido a control extranjero según lo establece el Literal b) del Numeral 2 del Artículo 25 del Convenio sobre Arreglos de Diferencias Relativas a Inversiones entre Estados y nacionales de otros Estado, y el CONCESIONARIO acepta que se le considere como tal.*"

<sup>307</sup> **Exhibit C-49**, Guarantee Agreement, Cl. 2.1. This is an English translation provided at para. 230 of the Respondent's Counter-Memorial. The original Spanish reads: "*2.1 En virtud del presente CONTRATO DE GARANTIA, EL ESTADO garantiza a LA SOCIEDAD CONCESIONARIA, las declaraciones, seguridades y obligaciones del Concedente establecidas en el CONTRATO DE CONCESION. Esta garantía no constituye una garantía financiera*"

does not, although both the Claimants' expert and key decisions indicate that it should be given presumptive effect with respect to the issue of foreign control. As Professor Schreuer has stated (in reference to Clause 16.6.1(b)(i) of the Concession Contract):

*154. This clause in the Concession Contract between Peru and Kuntur Wasi, is an unequivocal agreement that, because of foreign control, the parties have agreed that Kuntur Wasi should be treated as a national of another Contracting State for the purposes of Article 25(2)(b) of the ICSID Convention.*

*155. At the same time, this clause represents a recognition by Peru of the fact that Kuntur Wasi is controlled by Corporación América for purposes of Article 25(2)(b) of the ICSID Convention. This recognition creates a strong presumption in favour of foreign control that is difficult to challenge by the State that has agreed to it.*<sup>308</sup>

247. The *Vacuum Salt v. Ghana* decision, on which the Respondent relies heavily in its submissions, and a seminal decision interpreting Article 25(2)(b), stated as follows:

*[T]he parties' agreement to treat Claimant as a foreign national "because of foreign control" does not ipso jure confer jurisdiction. The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so.*<sup>309</sup>

248. The Tribunal in *Vacuum Salt v. Ghana* went on to conclude that:

*[T]he existence of consent to an arbitration clause such as [the one in that case] in circumstances such that jurisdiction could be premised only on the second clause of Article 25(2)(b) raises a rebuttable presumption that the "foreign control" criterion of the second clause of Article 25(2)(b) has been satisfied on the date of consent.*<sup>310</sup>

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<sup>308</sup> Exhibit CER-5, Schreuer Report, paras. 154, 155.

<sup>309</sup> Exhibit RL-9, *Vacuum Salt v. Ghana*, para. 36.

<sup>310</sup> Exhibit RL-9, *Vacuum Salt v. Ghana*, para. 38.

249. The *Autopista v. Venezuela* jurisdictional decision, also relied upon by the Respondent, did not use the language of presumption, but instead used to similar effect language of deference absent evidence of abuse:

*[I]t is the task of the Tribunal to determine whether the parties have exercised their autonomy within the limits of the ICSID Convention, i.e. whether they have defined foreign control on the basis of reasonable criteria. For this purpose, the Tribunal has to review the concrete circumstances of the case without being limited by formalities. However, as long as the definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused (for example in cases of fraud or misrepresentation), the Arbitral Tribunal must enforce the parties' choice.*<sup>311</sup>

250. The Tribunal finds the approach of treating the Concession Contract's provisions as presumptive and therefore rebuttable by facts demonstrating the lack of any reasonable basis for the parties' designation to be an appropriate one.<sup>312</sup> The references to "abuse" by the *Autopista v. Venezuela* tribunal, and Professor Schreuer's own opinion, suggest that the Parties' agreement would have to constitute "an unreasonable selection of nationality that cannot be sustained by any rational interpretation of the facts."<sup>313</sup>
251. Several arguments have been raised by Respondent regarding the facts and circumstances that in this case could rebut the presumption of foreign control. Principal among these is the argument that negative control is not sufficient to establish control. The Respondent also takes issue with the other facts and circumstances that have been put forth by the Claimants as indicia of control. The Tribunal will consider each in turn.
252. First, there is no dispute on the factual record that Corporación América exercises power over the adoption of Kuntur Wasi's corporate decisions. Corporación América owns, or owned during the relevant period, 50% of the stock of Kuntur Wasi, and had the right to

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<sup>311</sup> **Exhibit RL-10**, *Autopista v. Venezuela*, para. 116. In that case, the Tribunal respected the parties' choice to limit the inquiry to direct shareholding, finding that it constituted a reasonable test for control (paras. 120-211). This Tribunal is not so restricted.

<sup>312</sup> **Exhibit CER-5**, Schreuer Report, para. 155

<sup>313</sup> **Exhibit CL-154**, C. Schreuer, L. Malintoppi, A Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (2d ed., 2009), Art. 25, para. 815.

appoint, and did appoint, 50% of the members of the Board of Directors of the company (two out of four). It had the power, under the constitutive documents of Kuntur Wasi, to block virtually any important decision of the company, by virtue of the shareholder and Board of Directors supermajority voting provisions, including the requirement that decisions of the Board of Directors require the approval of three out of four directors.<sup>314</sup>

253. However, Corporación América could not affirmatively drive decisions of Kuntur Wasi through those channels, because the other 50% shareholder, Andino, possessed the equal power to approve or block such decisions, whether in shareholder or Board of Directors meetings. Indeed, Corporación América’s power via its shareholding and the Board of Directors are mirrored by Andino’s. What Corporación América could block, Andino could also block.
254. In the view of the Tribunal, “control” for purposes of the ICSID Convention does not turn on majority shareholding but means, as stated by Professor Schreuer, the “actual power to steer the investment”<sup>315</sup> of an enterprise through whatever power (including blocking power) and authority that party may possess. While it is possible that negative control may in some cases be sufficient to achieve such a result, where blocking power is shared equally by two shareholders, as is the case here, that power would seem to fall short even of negative control. Under the formal governance provisions of Kuntur Wasi, the concerted actions of both shareholders would be necessary to take those formal decisions. It is possible, of course, that Corporación América directed those formal actions, but we do not have evidence on the record to that effect. Accordingly, Corporación América’s power to block decisions by the shareholders or the Board of Kuntur Wasi cannot, on the facts of this case, suffice to satisfy the Convention requirement.
255. That does not mean, however, that the inquiry must stop with the formal governance of the company. As Professor Schreuer’s report, discussing the history of this provision of the

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<sup>314</sup> **Exhibit C-17**, Constitutive Documents of Kuntur Wasi, 11 June 2014, art. 29, (requiring the presence of 67% of the voting shares for a quorum to be established for shareholder meetings), art. 30 (requiring approval by 67% of the voting shares), art. 48 (quorum for directors is half plus one), art. 51 (the vote of three members of the Board required to adopt a matter).

<sup>315</sup> **Exhibit CER-5**, Schreuer Report, para. 88.



Convention, and cases make clear, the standard for control is not a formalistic or formulaic one that looks solely at share ownership or governance at the Board level, or even with formal management. Rather, it is a flexible standard that looks at all the relevant facts and circumstances concerning the operation and management of the enterprise, including expertise and know-how that may lead to operational control.<sup>316</sup>

256. Under all the relevant facts and circumstances of this case, the Tribunal is satisfied that the presumption of foreign control established by the stipulation in the Concession Contract is not rebutted.
257. The Tribunal finds several facts to be relevant on the issue of foreign control. First, it is important to note that Kuntur Wasi is effectively a special purpose vehicle, established solely for the purposes of carrying out the Concession Contract. This is apparent from the constitutive documents (*estatutos*) of Kuntur Wasi, which state that:

*ARTICLE 2. PURPOSE. THE PURPOSE OF THE COMPANY SHALL BE SOLELY AND EXCLUSIVELY THE EXERCISE OF THE RIGHTS AND THE PERFORMANCE OF THE DUTIES UNDER THE CONCESSION CONTRACT FOR THE DESIGN, FINANCING, TAX REGISTRATION, OPERATION AND MAINTENANCE OF THE NEW CHINCHERO – CUZCO INTERNATIONAL AIRPORT (AICC) (HEREINAFTER, THE CONCESSION CONTRACT), AS WELL AS OTHER DUTIES SET FORTH THEREIN, IN THE CAPACITY AS CONCESSIONAIRE OF THE*

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<sup>316</sup> **Exhibit CER-5**, Schreuer Report, paras. 53, 80; **Exhibit RL-9**, *Vacuum Salt v. Ghana*, para. 43. As the Tribunal stated: “Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no “formula.” It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholding would virtually preclude the existence of such control. How much is “enough,” however, cannot be determined abstractly. Thus, in the course of the drafting of the Convention, it was said variously that “interests sufficiently important to be able to block major changes in the company” could amount to a “controlling interest” (Convention History, Vol. 11, 447); that “control could in fact be acquired by persons holding only 25 percent of” a company's capital (id., 447-48); and even that “51% of the shares might not be controlling” while for some purposes “15% was sufficient” (id., 538). As Amerasinghe has said, “the concept of ‘control’ is broad and flexible... . [T]he question is... whether the nationality chosen represents an exercise of a reasonable amount of control to warrant its choice on the basis of a reasonable criterion.” C.F. Amerasinghe, *Jurisdiction Ratione Personae Under The Convention On The Settlement Of Investment Disputes Between States and Nationals Of Other States*, 1974-1975 *Brit. Y.B. Int’l L.* 227, 264-65.”

258. Its sole business, therefore, is the construction and operation of the Chinchero Airport. This makes any distinction between the business of the company and the Project covered by the Concession Contract an academic one – in fact they are coterminous and congruent.
259. It is also uncontroverted that, of the company’s two shareholders, only one of them – Corporación América – possessed the relevant expertise in the construction and operation of airports. Andino’s business was historically entirely different,<sup>318</sup> and its selection rested on the perceived benefits of having a local shareholder for projects in Peru.<sup>319</sup> The need for local management also drove the selection of Kuntur Wasi’s management.<sup>320</sup>
260. It is clear from the bidding documents that a bidder that did not have expertise in airport construction and operation would not be technically qualified to participate in the project.<sup>321</sup> Indeed, all the bidders who were pre-qualified on technical grounds possessed such qualifications. These technical qualifications were a “gating” issue. Lacking such qualifications, Andino alone could not have been awarded the Concession Contract, much less pre-qualified and been given the opportunity to bid. Corporación América’s participation was essential to the process.
261. It is also undisputed that Corporación América was the consortium member qualified as the “Strategic Investor” in recognition of its essential technical expertise in relation to the Concession Contract’s execution (both the building of the project and the operation of the

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<sup>317</sup> **Exhibit C-17**, Constitutive Documents of Kuntur Wasi, 11 June 2014, art. 2. [Tribunal’s translation] The original Spanish reads: “*ARTICULO 2° OBJETO=== LA SOCIEDAD TIENE POR OBJETO DEDICARSE ÚNICA Y EXCLUSIVAMENTE AL EJERCICIO DE LOS DERECHOS Y OBLIGACIONES RELATIVOS AL CONTRATO DE CONCESIÓN PARA EL DISEÑO, FINANCIAMIENTO, CONSTREGISTRO [sic] UNICO DE CONTRIBUYENTECIÓN [sic], OPERACIÓN Y MANTENIMIENTO DEL NUEVO AEROPUERTO INTERNACIONAL DE CHINCHERO – CUSCO (AICC) (EN ADELANTE, EL “CONTRATO DE CONCESIÓN”), Y OTRAS OBLIGACIONES ESTABLECIDAS EN ÉSTE, TENIENDO LA CALIDAD DE CONCESIONARIO DEL ESTADO DE LA REPUBLICA DEL PERÚ.*”

<sup>318</sup> See, e.g., **Exhibit CWS-4**, First Vargas Loret de Mola Statement, through para. 26.

<sup>319</sup> Indeed, the two shareholders already had experience with this model with their prior airport ventures in Peru. See, e.g., **Exhibit CWS-4**, First Vargas Loret de Mola Statement, paras. 10-18.

<sup>320</sup> See, e.g., **Exhibit CWS-2**, First Barrenechea Statement, para. 36.

<sup>321</sup> **Exhibit C-18**, Final Bidding Terms, March 2014, art. 5.1 (defining the technical and operational requirements for bidders).

airport upon its completion).<sup>322</sup> “Strategic Investors” were precluded by the standard contract terms established by Peru from disposing of their interest in the concessionaire during the entire period of construction and for 5 years from the commencement of the “operation phase.”

262. Clause 3.2.1(b) of the Concession Contract, required that the *estatutos* of the Concessionaire contain the following restriction, among others:

*A restriction to the free transfer, disposition or encumbrance of shares or interests representing the Minimum Ownership Interest of the Strategic Investor(s) in the CONCESSIONAIRE, to third parties or other partners of the CONCESSIONAIRE until the end of the Works Execution Stage or for at least five (05) Years as from the beginning of the Operation Stage, as applicable pursuant to the technical-operational requirements informed by the Strategic Investor(s) in the Bidding stage, except for the provisions of Section 10.4.1 (c) regarding the possibility of encumbering the Minimum Ownership Interest from the beginning of the Concession for the purposes of obtaining financing.*<sup>323</sup>

263. Peru thus locked in Corporación América’s participation in Kuntur Wasi for a period of years and took steps in the Concession Contract to ensure that, at least during the period

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<sup>322</sup> **Exhibit C-4**, Concession Contract, Cl. 1.68 defines “Strategic Investor” as follows: “*Inversionista(s) Estratégico(s)*’, es el integrante del CONCESIONARIO que acredita los requisitos técnico - operativos de precalificación establecidos en las Bases y que es titular de por lo menos la Participación Mínima en el CONCESIONARIO”; **Exhibit C-18**, Final Bidding Terms, March 2014, art. 5.1, defined the technical and operational requirements that bidders must meet, and went on to define “Strategic Investor” in art. 5.1.4 on the basis of those requirements.

<sup>323</sup> **Exhibit C-4**, Concession Contract, Cl. 3.2.1. b). This transfer restriction appears in art. 16 of **Exhibit C-17**, Constitutive Documents of Kuntur Wasi, 11 June 2014. [Tribunal’s translation] The original Spanish reads: “*Una restricción a la libre transferencia, disposición o gravamen de acciones o participaciones que representen la Participación Mínima del(os) Inversionista(s) Estratégico(s) en el CONCESIONARIO, a terceros o a otros socios del CONCESIONARIO hasta el término de la Etapa de Ejecución de Obras o hasta por lo menos cinco (05) Años contados desde el inicio de la Etapa de Operación, según corresponda a los requisitos técnico - operativos acreditados por el(los) Inversionista(s) Estratégico(s) en la etapa de Concurso, salvo por lo previsto en el Literal c) del Numeral 10.4.1 de la Cláusula Décima respecto de la posibilidad de gravar la Participación Mínima desde el inicio de la Concesión con la finalidad de obtener financiamiento.*”

relevant to this case, it would maintain a significant stake in the project – “skin in the game.”<sup>324</sup>

264. There was also evidence adduced, principally by fact witnesses both in written testimony and at the Hearing, that Corporación América provided key expertise and know-how to the Concession Contract’s execution prior to its termination, including in connection with the engineering study that was completed (EDI) and the financing.<sup>325</sup> Although the Respondent argued this expertise was not shown to have been provided on behalf of Kuntur Wasi, in the Tribunal’s view, that argument relies on formalism that is not required by the relevant standard. It is plain from the evidence their efforts were in furtherance of the Concession Contract and therefore part of Kuntur Wasi’s *raison d’être*.
265. The Respondent has argued based on *Vacuum Salt v. Ghana* that the technical role played by certain Corporación América personnel is not probative on the issue of control. But as Professor Schreuer points out, a number of tribunals have found know-how and expertise to be relevant to the issue of control.<sup>326</sup> Moreover, a careful examination of *Vacuum Salt* reveals key factual differences between the foreign shareholder there and Corporación América’s position in Kuntur Wasi. The tribunal in *Vacuum Salt* concluded that, when all the relevant facts and circumstances were considered, the foreign investor did not exercise decisive influence over the company. But in *Vacuum Salt*, the foreign shareholder held only 20% of the local entity’s shares. It was not the largest shareholder or even in a coequal position with another shareholder as is the case here; rather, a local shareholder held the

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<sup>324</sup> The fact that the Concession included the exclusive right to operate the Airport once it was built reinforces the importance of the role of the Strategic Investor. It is difficult to imagine that Peru would have been willing to give operating rights to a Concessionaire lacking such qualifications. Thus, more than financing capacity, the know-how and experience of the Strategic Investor in the field of airport development and operation emerges as critical to the scheme the specific concession.

<sup>325</sup> See, e.g., **Exhibit CWS-1**, First Balta del Río Statement, paras. 9, 11; **Exhibit CWS-2**, First Barrenechea Statement, paras. 23-26, 35-39; **Exhibit CWS-3**, Mobilia Statement, paras. 13-26; **Exhibit CWS-4**, First Vargas Loret de Mola Statement, paras. 23, 24.

<sup>326</sup> **Exhibit CER-5**, Schreuer Report, paras. 81-89, citing **Exhibit RL-10**, *Autopista v. Venezuela*; **CL-159**, *Compagnie d’Exploitation v. Gabon*; **CL-162**, *United Utilities (Tallinn) B.V. and Aktiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019.

largest block of shares, 31%. The local shareholder also held key management roles as well, roles to which the foreign shareholder's technical activities were subordinate.<sup>327</sup>

266. Finally, Corporación América's negative control of Kuntur Wasi, while not sufficient in and of itself to establish control, is also a relevant consideration in the totality of the facts and circumstances. Such negative control, when coupled with the other circumstances set forth above, becomes managerial in fact. Negative control in the formal governance aspects of the Company does not preclude the existence of control at the end of the day and in fact may well contribute to it. And while we do not have direct evidence on the record indicating that Corporación América drove concerted decision-making by the shareholders, the Board of Directors, and management, neither do we have evidence on the record that they did not, or that the other shareholder, Andino, disagreed with them or blocked their decisions, and there is sufficient circumstantial evidence to support the inference that Corporación América did so.

267. For these reasons, the Tribunal concludes that the facts and circumstances put forward by the Respondent are not sufficient to rebut the presumption created by the provisions of the Concession Contract, reinforced by the Guarantee Agreement, that Kuntur Wasi is under the control of Corporación América. The Tribunal considers therefore that Kuntur Wasi is a "national of another Contracting State" within the meaning of the ICSID Convention based on the totality of the facts and circumstances.

***b. Under the BIT***

268. Article 1(2)(c) of the BIT treats as an "investor" for purposes of the BIT:

*[A]ny legal person established in accordance with the law of any country which is effectively controlled by natural or legal persons of the other Contracting Party.*<sup>328</sup> (Emphasis added).

269. The BIT Protocol elaborates on this requirement with the following provisions:

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<sup>327</sup> **Exhibit RL-9**, *Vacuum Salt v. Ghana*, para. 53.

<sup>328</sup> **Exhibit C-50**, Perú-Argentina BIT, art. 1(2)(c). [Tribunal's translation] The original Spanish reads: "[T]oda persona jurídica establecida de conformidad con la legislación de cualquier país que esté efectivamente controlada por personas físicas o jurídicas de la otra Parte Contratante."

*Ad. Article 1, paragraph (2), (c). The Contracting Party in whose territory investments take place may request proof of control invoked by investors of the other Contracting Party. Any of the following facts, among others, may be considered as evidence of control:*

*(i) a percentage of direct or indirect shareholding in the capital of a legal person which permits effective control, such as, in particular, a shareholding of more than half;*

*(ii) direct or indirect holding of such number of votes as makes it possible to exercise a determining position in corporate bodies or to influence decisively the functioning of the legal person.*<sup>329</sup>

270. The key question is therefore whether Kuntur Wasi is “effectively controlled” by Corporación América, and whether the proof that has been submitted is evidence of such control.
271. The plain language of the BIT, particularly the use of the term “effectively” in relation to “controlled” would seem to make it clear that the standard, as with the ICSID Convention, is a functional rather than a formalistic one. And the BIT Protocol’s “*entre otros*” language reinforces that view, as it indicates that effective control can be established by a variety of circumstances. In the Tribunal’s view, and contrary to the Respondent’s argument, it is not limited in its scope by the fact that the subparagraphs that follow refer to matters such as share ownership or formal management. That enumeration virtually exhausts the formal governance mechanisms, and there would be no need for the “*entre otros*” language if a wider scope were not contemplated. Moreover, the functional interpretation is reinforced by the “decisive influence” language of subparagraph (ii), which suggests that is the key consideration.

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<sup>329</sup> **Exhibit C-50**, Perú-Argentina BIT, art. 1(2)(c). [Tribunal’s translation] The original Spanish reads: “*Ad. Art. 1, párrafo 2) (e): La Parte Contratante en cuyo territorio las inversiones tienen lugar puede solicitar la prueba del control invocado por los inversores de la otra Parte Contratante. Cualquiera de los siguientes hechos, entre otros, pueden ser considerados como evidencia del control: i) un porcentaje de participación directa o indirecta en el capital de una persona jurídica que permita un control efectivo, tal como, en particular, una participación en el capital superior a la mitad; ii) la posesión directa o indirecta de una cantidad de votos que permita tener una posición determinante en los órganos societarios o influir de manera decisiva en el funcionamiento de la persona jurídica.*”

272. Although the Concession Contract’s provision discussed above regarding foreign control is framed in terms of the ICSID Convention, and not the BIT, the common link between the two is the element of control. Thus, for the same reasons that have led the Tribunal to conclude that Kuntur Wasi satisfies the requirements of Article 25(2)(b) of the Convention, the Tribunal concludes that Kuntur Wasi is also effectively controlled by a juridical person of another Contracting Party, namely, Corporación América, for purposes of the BIT.
273. The Tribunal considers that for purposes of the BIT, as was the case with the ICSID Convention, the Concession Contract provision, reinforced by the Guarantee Agreement, is presumptive evidence of effective control in fact. It also considers that while the power of negative control alone is not effective control for purposes of the BIT, negative control, when coupled with the other facts and circumstances discussed above, does not preclude, and in on the facts of this case contributes to, the establishment of effective control of Kuntur Wasi by Corporación América.
274. For all these reasons, the Tribunal concludes that Kuntur Wasi is effectively controlled by Corporación América and therefore qualifies as an “investor” [of another contracting Party] under the BIT.
275. The Respondent’s jurisdictional objection therefore fails, and the claims asserted by Kuntur Wasi are therefore claims that can be heard by this Tribunal.
276. Given this conclusion, the Tribunal finds it unnecessary to consider the estoppel arguments advanced by the Claimants, except to note that such arguments, especially given the existence of the Guarantee Agreement, have considerable force on the facts of this case in terms of the elements of a promise and reliance.

**B. THE TRIBUNAL’S JURISDICTION OVER CORPORACIÓN AMÉRICA’S CONTRACTUAL CLAIMS**

## (1) The Parties' Positions

### a. The Respondent's Position

277. The Respondent acknowledges that Corporación América qualifies as a protected investor under the BIT.<sup>330</sup> However, according to the Respondent, since Corporación América is not a party to the Concession Contract (or the Guarantee Agreement), it cannot bring contract claims before an ICSID tribunal.<sup>331</sup> According to the Respondent, the Concession Contract clearly sets out that only disputes between the “Parties” to the Concession contract may be referred to ICSID:

*[When] non-technical disputes arise which involve an amount greater than Thirty Million and 00/100 Dollars (US\$30,000,000.00) or its equivalent in national currency, the Parties will try to resolve such dispute through direct negotiations . . . If the Parties are not able to reach agreement during the direct negotiations period referred to in the foregoing paragraph, the disputes will be resolved through international arbitration administered through the International Centre for Settlement of Investment Disputes. . . .*  
(Emphasis omitted).<sup>332</sup>

278. In this case, the Parties to the Contract are the MTC and Kuntur Wasi; Corporación América not being a Party to the Concession Contract, cannot bring any claims under it.<sup>333</sup> And the same is true for the Guarantee Agreement.

279. Nor can Corporación América assert contractual claims by virtue of an umbrella clause, as, according to the Respondent: (i) there is no umbrella clause in the Peru-Argentina BIT, (ii) an umbrella clause cannot be introduced by means of the MFN clause, and (iii) even in the hypothetical case that the umbrella clause was introduced into the BIT, the umbrella clause

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<sup>330</sup> Respondent's Counter-Memorial, para. 170.

<sup>331</sup> Respondent's Counter-Memorial, para. 171.

<sup>332</sup> Respondent's Counter-Memorial, para. 172, citing **Exhibit C-4**, Concession Contract, Cl. 16.6.1(b)(i). This is an English translation provided at para. 172 of the Respondent's Counter-Memorial. The original Spanish reads: “[Cuando] las Controversias No-Técnicas que tengan un monto involucrado superior a Treinta Millones y 00/100 Dólares (USD 30 000 000,00) o su equivalente en moneda nacional, las Partes tratarán de resolver dicha controversia vía trato directo [...] En caso las Partes no se pusieran de acuerdo dentro del plazo de trato directo referido en el párrafo precedente, las controversias suscitadas serán resueltas mediante arbitraje internacional de derecho administrado por el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones...”

<sup>333</sup> Respondent's Counter-Memorial, paras. 173.



would not apply to commitments made by the MTC under the Concession Contract or the Guarantee Agreement because Corporación América is not a party to either of these.<sup>334</sup>

280. As a result, while Corporación América qualifies as a foreign investor and as a legitimate Claimant entitled to appear before this Tribunal, the Tribunal only has jurisdiction to hear Corporación América's treaty-based claims.

***b. The Claimants' Position***

281. The Claimants argue that Corporación América is not bringing claims under the Concession Contract *per se*, but rather, is bringing an umbrella-clause claim based on the contractual obligations that Peru entered into *vis-à-vis* Kuntur Wasi, by virtue of applying the BIT's MFN clause (Clause 3(1) of the BIT). In the Claimants' view, the Respondent's objection is not properly a "jurisdictional objection," but rather one on the merits pertaining to the scope of the BIT's MFN and umbrella clauses.<sup>335</sup>
282. According to the Claimants, the MFN clause contained in Article 3(1) of the BIT, is broad and does not set out any prohibitions or limitations on what guarantees may be "imported" through its application, as the Respondent suggests.<sup>336</sup> The Claimants assert that the Respondent has not presented proof that Peru ever showed any intention to exclude an umbrella clause from the BIT and that the Respondent's interpretation seeks to give more weight to an omission rather than the express terms of the BIT (which contains an MFN clause).<sup>337</sup>
283. The Claimants acknowledge that there is a divide in the caselaw between tribunals that support using MFN clauses to bring in procedural standards and those that consider that they should be limited to substantive standards.<sup>338</sup> However, in this case, the Claimants

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<sup>334</sup> Respondent's Counter-Memorial, paras. 174, 175. The Respondent illustrates this "privity requirement of the umbrella clause" citing **Exhibit RL-14**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December, 2012, para. 214; **Exhibit CL-61**, *Impregilo S.p.A v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 185; **Exhibit CL-76**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (hereinafter *Azurix Corp. v. Argentina*), para. 384.

<sup>335</sup> Claimants' Reply, para. 181, footnote 172.

<sup>336</sup> Claimants' Reply, para. 851.

<sup>337</sup> Claimants' Reply, para. 853.

<sup>338</sup> Claimants' Reply, paras. 857 *et seq.*

argue that they are only asserting that substantive rights can be “imported” by application of the MFN clause.

284. Finally, the Claimants also dismiss the Respondent’s argument that Corporación América cannot rely on the umbrella clause because it is not privy to the Concession Contract and the Guarantee Agreement. According to the Claimants, the text of the umbrella clause of the Thailand – Peru BIT relates generally to obligations “into which it may have entered with regard to investments”)”<sup>339</sup> and therefore, it does not require that the contractual obligations must have been entered into with respect to the particular investor.<sup>340</sup> According to the Claimants, investment treaty tribunals faced with this question in the past, such as the *Casualty v. Argentina*, the *Enron v. Argentina* or the *Supervisión y Control v. Costa Rica* tribunals, have supported the Claimants’ interpretation of similarly worded umbrella clauses.<sup>341</sup>

## (2) The Tribunal’s Analysis

285. Because the Tribunal has found that it has jurisdiction over the claims brought by Kuntur Wasi under both the ICSID Convention and the BIT, it sees no need to address here whether Corporación América, notwithstanding its lack of contractual privity, can maintain claims under the Concession Contract and Guarantee Agreement, via the BIT’s MFN clause.<sup>342</sup>

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<sup>339</sup> Claimants’ Reply, para. 871, citing **Exhibit CL-112**, BIT between Peru and Thailand, art. 4(e).

<sup>340</sup> Claimants’ Reply, paras. 871-876.

<sup>341</sup> Claimants’ Reply, paras. 873-875, citing **Exhibit CL-148**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (hereinafter *Casualty v. Argentina*), para. 297; **Exhibit CL-249**, *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (hereinafter *Enron v. Argentina*), para. 277; **Exhibit CL-236**, *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID case No. ARB/12/4, Award, 18 January 2017 (hereinafter *Supervisión y Control v. Costa Rica*), para. 287.

<sup>342</sup> While these issues were raised by the Respondent in connection with its objection to jurisdiction, the Respondent described them as “consequences” of the asserted lack of jurisdiction over Kuntur Wasi’s claims rather than jurisdictional *in se* (Respondent’s Counter-Memorial, para. 170). The Tribunal agrees that this is not a jurisdictional issue, but in its view, a question of admissibility and/or application of the BIT’s MFN clause and the interpretation of any provisions incorporated by virtue of that clause and therefore need not be addressed here.

## V. LIABILITY

286. The Claimants make ten claims under the Concession Contract, the Guarantee Agreement and Peruvian law, as follows:

1. Peru's unilateral termination of the Concession Contract was contrary to the terms of the Contract and Peruvian law;
2. Peru acted in bad faith and its conduct was inconsistent with the promises and commitments made to the Claimants;
3. Kuntur Wasi's termination of the Concession Contract was valid and has consequences under Peruvian law;
4. Peru's failure to make the Advance Payment constituted a breach of its obligations under the Concession Contract, as amended;
5. Peru's requests that Kuntur Wasi return the Concession area were wrongful;
6. Peru breached the Concession Contract by benefiting from the EDI without paying for it;
7. Peru repudiated the Concession Contract;
8. Peru breached the Concession Contract by failing to observe the Guarantee Agreement;
9. Peru acted with *dolo* and *culpa inexcusable*; and
10. Peru's actions caused damage to the image, honor and good reputation of Kuntur Wasi and its shareholders.

287. The Claimants also make multiple claims under the BIT, which are summarized in paragraph 599 *infra*. Section A of this Part of the Decision will address the contractual and Peruvian law claims in the order set forth above, while Section B will address the BIT and international law claims.

**A. PERU’S ALLEGED BREACH OF THE CONCESSION CONTRACT, THE GUARANTEE AGREEMENT AND PERUVIAN LAW**

**(1) Peru’s unilateral termination of the Concession Contract was contrary to the terms of the Concession Contract and Peruvian law**

***a. The Parties’ Positions***

**(i) The Claimants’ Position**

288. The Claimants’ first claim on the merits is that Peru breached the Concession Contract by declaring its unilateral termination without cause. According to the Claimants, Clause 15.5.1 of the Contract allowed Peru to unilaterally terminate the Contract for public interest reasons.<sup>343</sup> However, the Claimants argue that the Contract did not permit the termination of the Contract at will; rather, the MTC had to establish that there was a well-founded public interest reason to do so.<sup>344</sup>

289. The Claimants argue that under Peruvian law, the unilateral termination of the Concession Contract for public interest reasons must comply with the following requirements: (i) there must be a public interest justifying the termination; (ii) the request for termination must be reasoned; and (iii) the decision to terminate must be reasonable and proportional. In the Claimants’ view, the Respondent did not comply with any of the above requirements, and therefore, its decision to terminate the Concession Contract unilaterally was arbitrary, illegal, invalid and constitutes, *per se*, a breach of the Concession Contract.<sup>345</sup>

***(a) The termination was not based on any public interest reason***

290. First, as to requirement (i) above that unilateral termination be based on a public interest reason, the Claimants argue that although it is for the State to determine what is in the public interest in each circumstance, this determination must be made in accordance with the applicable laws.<sup>346</sup> In this regard, the Claimants point to various laws that had established that building the Chinchero Airport was in fact in the public interest. In particular, the Claimants refer the Tribunal, among others, to Article 2 of Law 27528,

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<sup>343</sup> Claimants’ Memorial, para. 316.

<sup>344</sup> Claimants’ Memorial, para. 225.

<sup>345</sup> Claimants’ Memorial, para. 226.

<sup>346</sup> Claimants’ Memorial, para. 229.

according to which the Chinchero Airport Project was declared “of public necessity and use” (“*de necesidad y utilidad pública*”) and was considered “as being of the highest priority” (“*de la más alta prioridad*”),<sup>347</sup> and to Emergency Decree No. 039-2010 of 9 June 2010; consequently, the Peruvian Government declared that the Chinchero Airport was a project of priority and of national interest.<sup>348</sup> According to the Claimants, these laws and regulations prove that the Peruvian State had repeatedly expressed that construction of the Chinchero International Airport was in the public interest.

291. Furthermore, in Claimants’ view, the public interest behind the Chinchero Airport is precisely what led to Addendum No. 1.<sup>349</sup> This is evidenced by the MTC’s report issued in relation to Addendum No. 1. Thereby, the MTC pointed out that:

*The Grantor is driven to make this contractual amendment by the need to take measures in the Public Interest, that is [...] that the city of Cuzco - Chinchero has airport infrastructure in the short term...*<sup>350</sup>

292. Likewise, the Claimants rely on the report issued by the MEF on 27 January 2017, in which it concluded that Addendum No. 1 would result in “significant costs savings for the Grantor,”<sup>351</sup> and on the OSITRAN report of 20 January 2017 favorable to Addendum No. 1, which, in the Claimants’ view, confirmed the public interest in the Project.<sup>352</sup> The Claimants further point to several public statements made by President Kuczynski, Mr. Martín Vizcarra (by then Minister of Transport and Communications), the MTC and the MEF in early 2017, confirming that Addendum No. 1 would result in significant benefits and savings to the Peruvian State and was, therefore, in the public interest.<sup>353</sup>

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<sup>347</sup> **Exhibit CL-5**, *Ley 27528, Ley que dispone la actualización de Estudios Definitivos y la Construcción del Aeropuerto de Chinchero, en el Departamento del Cusco*, 4 October 2001, art. 2; Claimants’ Memorial, para. 230. [Tribunal’s translation]

<sup>348</sup> **Exhibit CL-6**, *Decreto de Urgencia No. 039-2010*, 9 June 2010, art. 1; Claimants’ Memorial, para. 231.

<sup>349</sup> Claimants’ Memorial, paras. 234-235.

<sup>350</sup> **Exhibit C-76**, *Informe No. 105-2017-MTC/25*, 2 February 2017, para. 5.17. [Tribunal’s translation]

<sup>351</sup> **Exhibit C-73**, *Informe No. 016-2017-EF/68.01*, 27 January 2017, para. 2.22; Claimants’ Memorial, para. 237. [Tribunal’s translation]

<sup>352</sup> **Exhibit C-72**, *Oficio Circular No. 006-17-SCD-OSITRAN*, attaching the *Acuerdo No. 2009-607-17-CD-OSITRAN*, 20 January 2017; Claimants’ Memorial, paras. 238.

<sup>353</sup> Claimants’ Memorial, paras. 239-245.

293. On the other hand, the Claimants argue that the termination of the Concession Contract on 13 July 2017 was not grounded on public interest reasons, but was rather a “completely arbitrary decision with no grounds or justification whatsoever and contrary to prior express statements made by the Peruvian authorities who claimed public interest as the basis for approval of Addendum No. 1...”<sup>354</sup> According to the Claimants, the Respondent tries to justify the termination of the Concession Contract on multiple grounds, none of which has any basis:

- (i) Kuntur Wasi’s attempt to “game the system” through its financial proposal, leading the State to lose confidence in Kuntur Wasi’s ability to construct the Chinchero Airport;<sup>355</sup>
- (ii) Kuntur Wasi’s failure to secure financing after Addendum No. 1 was adopted, which meant that Kuntur Wasi would not be able to timely build the Chinchero Airport;<sup>356</sup>
- (iii) The Contraloría’s report, which made it impossible to continue with the Project with Kuntur Wasi under the terms of the Addendum;<sup>357</sup>
- (iv) The events that took place after the Contraloría’s report justified the termination of the Concession Contract.<sup>358</sup>

294. In relation to (i) above, the Claimants argue that up until this arbitration, Peru never complained of Kuntur Wasi’s alleged misconduct and that the allegation is unfounded.<sup>359</sup> First, to support this argument, the Claimants point out that the fact that Addendum No. 1 was approved and signed means that any discussion related to the EGP process under the

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<sup>354</sup> Claimants’ Memorial, para. 247. [Tribunal’s translation] The original Spanish reads: “Lo que motiva al Concedente para realizar la presente modificación contractual, es la necesidad de adoptar medidas que aseguren el Interés Público, esto es, [...] que la ciudad de Cusco – Chinchero cuente en el corto plazo con una infraestructura aeroportuaria...”

<sup>355</sup> Claimants’ Reply, para. 36.

<sup>356</sup> Claimants’ Reply, para. 117.

<sup>357</sup> Claimants’ Reply, para. 92.

<sup>358</sup> Claimants’ Reply, paras. 425-445.

<sup>359</sup> Claimants’ Reply, paras. 38-49.

Concession Contract became moot.<sup>360</sup> According to the Claimants, any argument related to the sufficiency or adequacy of Kuntur Wasi's First Financial Proposal is irrelevant in light of the fact that Addendum No. 1 changed the economic structure of the Concession Contract.<sup>361</sup>

295. Secondly, the Claimants also point out that, in any event, Kuntur Wasi's financial proposal was reasonable. According to the Claimants, the FPAO was meant to cover only the construction costs but not the cost of financing.<sup>362</sup> The Claimants rely on Annex 23 of the Concession Contract which established that "Sub-Stage 2, consisting in the Execution of Works to be co-financed out of the Payment Fund of the PAO"<sup>363</sup>; and on Clause 1.2.iii of Appendix 23, which set out that "the aggregate amount of the valuations of the Milestone or Milestone subject to Co-financing progress shall determine the Payment Fund of the PAO."<sup>364</sup> On the Claimants' view, if the FPAO is the sum of the co-financed amounts for each step of the works, it is clear that the FPAO was only meant to cover construction costs.<sup>365</sup>
296. The PAO, on the other hand, was meant to compensate Kuntur Wasi for both the construction and the costs of financing.<sup>366</sup> According to the Claimants, the Concession Contract required Kuntur Wasi to obtain financing from day one and the State would only begin paying after the sixth year of construction, through 60 quarterly payments.<sup>367</sup> It was, on the Claimants' view, obvious that this negative carry implied that the State would have to pay interest to Kuntur Wasi for having financed the Project for five years.<sup>368</sup> Kuntur Wasi also claims that, in addition to interest payments, Peru had to pay for other expenses incurred in relation to the financing, such as financial costs, legal costs, insurance costs,

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<sup>360</sup> Claimants' Reply, paras. 176-170.

<sup>361</sup> Claimants' Reply, para. 177; paras. 450-452.

<sup>362</sup> Claimants' Reply, paras. 459, 460.

<sup>363</sup> **Exhibit C-4**, Concession Contract, Annex 23 – Appendix 1, p. 542. [Tribunal's translation]

<sup>364</sup> **Exhibit C-4**, Concession Contract, Annex 23 – Appendix 1, cl. 1.2.iii. [Tribunal's translation]

<sup>365</sup> Claimants' Reply, paras. 454-459.

<sup>366</sup> Claimants' Reply, para. 461.

<sup>367</sup> Claimants' Reply, paras. 462, 264.

<sup>368</sup> Claimants' Reply, para. 465.

costs related to the *fideicomiso*, classification costs, costs related to the structuring of bids, general costs derived from the financing transactions, commissions, etc.<sup>369</sup>

297. On the Claimants' case, the fact that the formula to calculate the PAO set out in Annex 23, Appendix 1 of the Concession Contract did not provide a fixed number, nor a floor or ceiling for variable "i" (and instead just provided a general definition connecting it to Kuntur Wasi's cost of financing plus a spread of 2.5%) is indicative that it was always intended to compensate Kuntur Wasi for its cost of financing.<sup>370</sup>
298. The Claimants further point out that the Concession Contract does not define the terms "annual weighted average rate at Financial Closing of the Works Execution Stage" or "2.5% spread" contained in the formula to calculate the PAO.<sup>371</sup> According to the Claimants, during the tender, the *Contraloría* warned PROINVERSIÓN that there was no ceiling on variable "i" and therefore, on the quarterly PAO; and PROINVERSIÓN expressly replied that this was the intended design of the Concession and that both concepts would be defined at a later stage during the financial closing.<sup>372</sup> The Claimants rely on the following answer provided by PROINVERSIÓN to potential bidders to the question of what costs were included in the PPO and the PAO:<sup>373</sup>

*With regard to question (i), the PPO covers exclusively Earthworks as defined in the Concession Contract. Meanwhile, the PAO is not associated to any items, rather this is the amount required by the Concessionaire based on its target return or other criteria as deemed convenient.*<sup>374</sup>

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<sup>369</sup> Claimants' Reply, para. 466.

<sup>370</sup> Claimants' Reply, paras. 471, 472.

<sup>371</sup> Claimants' Reply, para. 474. [Tribunal's translation]

<sup>372</sup> Claimants' Reply, para. 475, citing **Exhibit C-213**, *Informe Previo No. 00027-2014-CG/CPRE*, 7 April 2014. pp. 27, 28 and 46, numeral 2.12; **Exhibit C-217**, *Oficio No. 126-2014/PROINVERSION/DE*, 14 April 2014, numeral 2.

<sup>373</sup> Claimants' Reply, para. 489-494.

<sup>374</sup> **Exhibit R-84**, Memorandum No. 60 regarding Chinchero's Tender Process, 17 January 2014, question 105. [Tribunal's translation] The original Spanish reads: "En relación a la consulta (i), el PPO comprende exclusivamente el Movimiento de Tierras, conforme a lo definido en el Contrato de Concesión. Por su parte, el PAO no está asociado a ninguna partida, puesto que constituye el monto que requiere el Concesionario en función de su rentabilidad objetivo u otros criterios que juzgue conveniente."



299. On the Claimants' case, this answer supports its interpretation that the PAO was intended to cover Project costs other than construction costs.
300. The Claimants also emphasize that earlier versions of the Concession Contract contained a PAO formula which only included the FPAO and an "interest rate" ("*tasa de interés*") yet the latter was substituted in the final version of the Concession Contract with a "quarterly discount rate" ("*tasa de descuento trimestral*,"") which indicates that it was to cover more than just interest.<sup>375</sup>
301. Moreover, Kuntur Wasi explains that the cost of financing that it was offered by the banks, *i.e.*, 7.89%, was reasonable and that variable "i" escalated to 19.56% only because of the long period of negative carry set out in the Concession Contract.<sup>376</sup>
302. Finally, the Claimants object to the Respondent's reliance on the ALG Model and the OSITRAN report 057/2013, which allegedly should have put the Claimants on notice that the PAO was not intended to cover financing costs. The Claimants assert that the ALG Model was confidential and never shared with them up until this arbitration (something which, according to the Claimants, the Respondent does not dispute). The Claimants also argue that the OSITRAN report 057/2013 contains inconsistent statements which contradict the Concession Contract as well as incomplete quotes; and is not binding, intended to complement the Concession Contract, or directed at the bidders.<sup>377</sup>
303. The Claimants also point out that OSITRAN approved Kuntur Wasi's financial proposal and that neither the *Contraloría* nor the CAF ever suggested at the time that the Concession Contract should be terminated or that there had been any breach or wrongdoing on the part of Kuntur Wasi.<sup>378</sup> Rather, these institutions only recommended that variable "i" should be

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<sup>375</sup> Claimants' Reply, para. 476. [Tribunal's translation]

<sup>376</sup> Claimants' Reply, paras. 479 *et seq.*

<sup>377</sup> Claimants' Reply, paras. 495 *et seq.*

<sup>378</sup> Claimants' Reply, para. 178, 49, 93.

renegotiated because of an ambiguity in the Concession Contract.<sup>379</sup> In fact, the Claimants argue that Peru itself questioned the *Contraloría*'s report at the time it was issued.<sup>380</sup>

304. Likewise, the Claimants argue that the Respondent never complained of the Claimants' alleged misconduct in relation to its financial proposal during the negotiation of Addendum No. 1.<sup>381</sup> According to the Claimants, Addendum No. 1 was not motivated by Kuntur Wasi's breach, but rather because the State wanted to change the financial structure of the Concession Contract. During the negotiation of Addendum No. 1, it was Peru that proposed changing the financial structure altogether to a system in which Kuntur Wasi would not have to co-finance the works during Stage 2 and therefore, any discussions concerning variable "i" became futile. In Claimants' view, the evidentiary record in the arbitration proves that Addendum No. 1 was not signed at the request of or to benefit Kuntur Wasi (which lost the spread of 2.5%); but rather it was requested, designed and drafted by Peru.<sup>382</sup>
305. In this sense, the Claimants refer, among others, to the fact that Minister Vizcarra himself acknowledged that the Contract itself did not set out how variable "i" should be calculated:

*The MTC, in my care and strictly in accordance with the recommendations made by the Contraloría General de la República:*

*1. Confirmed through ProInversión, by Official Notice No. 372-2016/PROINVERSIÓN/DE dated 26 October 2016, that indeed the financial reports issued by the Global Consultant [Consultor Integral] were NOT made available to the bidders.*

*According to the Contraloría General de la República, such circumstance might lead to each bidder applying different methods and input to prepare their proposals, as said documents were not included as part of the*

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<sup>379</sup> Claimants' Reply, para. 14, 52-54.

<sup>380</sup> Claimants' Reply, paras. 92-95; **Exhibit C-185**, News article published by Agencia Peruana de Noticias Andina, "MEF: Adenda sobre Chinchero genera ahorro económico y no perjuicio económico," 22 May 2017; **Exhibit C-120**, News clip from Buenos Días Perú, "Vizcarra sobre Chinchero: Decidimos dejar sin efecto contrato que desde el inicio partió mal," 22 May 2017; **Exhibit C-121**, News clip from CANAL N, "Viceministra Molinelli: Informe de Contraloría no tiene sustento técnico," 22 May 2017.

<sup>381</sup> Claimants' Reply, para. 15.

<sup>382</sup> Claimants' Reply, paras. 17, 18, 50 *et seq.*

*information available under the promotion process of the project at stake...*<sup>383</sup>

*To calculate the quarterly payment, based on the offer made by the bidder (co-financing for USD 264.8 million), a rate is required. As the Concession Contract does not stipulate a maximum rate to be used, Kuntur Wasi, endorsed by the contract of July 2014, had the possibility of using any rate for the Financial Closing. This is the rate that defined the amount of the co-financing quarterly payment by the State.*<sup>384</sup>

306. Furthermore, the Claimants rely on the fact that all competent Peruvian entities (such as OSITRAN, MTC, MEF) and officials (President Kuczynsky, Minister Vizcarra, etc.) had ample opportunity to raise issues with Kuntur Wasi's financial proposal or with Addendum No. 1, and they never did so.<sup>385</sup> To support this allegation, the Claimants point out, among others, that on 18 May 2017, Minister Vizcarra appeared before the Congress in the context of an impeachment, right after Addendum No. 1 was approved, and confirmed that there was no public reason justifying the unilateral termination of the Concession Contract.<sup>386</sup>

*...To declare reasons of public interest requires sound grounds and the signature of several Ministers. Undoubtedly, if such [public interest] reasons existed, such clause [15.5] could be invoked; in the case of the "Chinchero" Airport there was no way to configure such legal issue.*

*The unilateral termination of a contract must necessarily be submitted to*

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<sup>383</sup> Claimants' Reply, para. 270; Claimants' Reply, para. 270, citing **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 31. [Tribunal's translation] The original Spanish reads: "El MTC, bajo mi gestión, siguiendo estrictamente las recomendaciones de la Contraloría General de la República: 1. Confirmó a través de ProInversión, mediante Oficio No. 372- 2016/PROINVERSIÓN/DE del 26 de octubre de 2016, que, efectivamente, los informes financieros del Consultor Integral NO fueron de conocimiento de los postores. Para efectos de la Contraloría General de la República, esta situación podría generar que cada postor aplique metodologías y supuestos diferentes para formular sus propuestas, en tanto dichos documentos no formaban parte de la información disponible como parte del proceso de promoción del referido proyecto... Para calcular el pago trimestral, considerando la oferta del postor (USD 264,8 millones de cofinanciamiento), se requiere el uso de una tasa. Dado que el Contrato de Concesión no establece el valor de una tasa máxima a utilizar, Kuntur Wasi, con el aval del contrato suscrito en julio de 2014, tenía la posibilidad de presentar cualquier tasa para realizar el Cierre Financiero. Esta tasa es la que definía el valor del pago trimestral del cofinanciamiento por parte del Estado."

<sup>384</sup> Claimants' Reply, para. 270; Claimants' Reply, para. 270, citing **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, pp. 50, 51. [Tribunal's translation]

<sup>385</sup> Claimants' Reply, paras. 20, 22, 74-81, 448 *et seq.*

<sup>386</sup> Claimants' Reply, paras. 8, 9, 82 *et seq.*

*ICSID, and if the grounds [for such termination] are weak, the compensation to be paid by the State would be grievous for the national treasury...*

*Unilaterally terminating the contract would have taken the Government of Peru to an arbitration proceeding at the International Centre for Settlement of Investment Disputes (ICSID). In the event Peru did not prevail in such proceeding, compensation to be paid to Kuntur Wasi would amount, at least, to USD 8 million plus lost profit under the contract (USD 264.8 million), among other items.*<sup>387</sup>

307. According to the Claimants, Minister Vizcarra’s speech before Congress expressed the formal position of the Peruvian Government at the time, which was that it was in the public interest that Kuntur Wasi build the Chinchero Airport and that there was no justification for terminating the Contract.<sup>388</sup> The Claimants rely on Minister Vizcarra’s statements, which in their view, are binding on Peru and constitute contemporaneous evidence that support its position in this case. On the Claimants’ case, Minister Vizcarra’s statements are binding on Peru because he was, at the time of the statements, the Minister of Transport, which is the highest authority in relation to the Concession Contract, and because the statements were made in the context of an impeachment before Congress. The Claimants argue that, under Peruvian law, public entities have an obligation to provide accurate and trustworthy information and cannot contradict their own previous actions “*actos propios*.”<sup>389</sup> The Claimants therefore conclude that pursuant to the principles of “legitimate

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<sup>387</sup> Claimants’ Reply, paras. 8, 265, citing **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, pp. 23, 24; Claimants’ Memorial, paras. 248-250. [Tribunal’s translation] The original Spanish reads: “... Declarar una razón de interés público requiere un sustento firme y la firma de varios Ministros. Sin duda si existieran esas razones [de interés público] se podría invocar esa cláusula [15.5], en el caso del Aeropuerto “Chinchero” no había forma de configurar una situación legal de ese tipo.

*Caducar un contrato en forma unilateral necesariamente pasa por el “CIADI” y si el sustento [para la terminación] es débil las indemnizaciones a cargo del Estado serían lamentables para el erario nacional...*

*Haber roto unilateralmente el contrato hubiese implicado que el Estado incurra en un arbitraje en el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI). De perder el caso, la indemnización a Kuntur Wasi incluiría, por lo menos, US\$ 8 millones por indemnización, más el lucro cesante del contrato (US\$ 264.8 mm) entre otros.”*

<sup>388</sup> Claimants’ Reply, paras. 8-10, 263 *et seq.*

<sup>389</sup> In the context of the jurisdictional objection, the Claimants use the term “estoppel” as an English alternative to the doctrine of *actos propios* (for example, Claimants’ Rejoinder on Jurisdiction, paras. 35-50). The Claimants also refer to *actos propios* in the context of Minister’s Vizcarra’s statements before Congress and its impact on Peru’s alleged breach of the Concession Contract. The Tribunal will only use the original Spanish term for the doctrine of *actos propios*.

expectations” (“*confianza legítima*”), good faith and “*actos propios*,” those statements are binding.<sup>390</sup>

308. On the Claimants’ case, Minister Giuffra’s announcement, on 4 June 2017 – in the midst of the negotiations with Kuntur Wasi – that “Kuntur Wasi [would] not be involved in the construction or operation of the Chinchero International Airport”<sup>391</sup> and that Kuntur Wasi had agreed to terminate the Contract, was caused by the political pressure to which he was subject.<sup>392</sup> That the termination was led by political pressure is, in the Claimants view, further evidenced by the fact that following Minister Giuffra’s statement, the opposition announced that it would no longer file a motion against Minister Giuffra.<sup>393</sup>
309. In relation to point (ii)<sup>394</sup> above, *i.e.*, the Respondent’s assertion that the Contract was terminated because of Kuntur Wasi’s failure to secure the financing needed for the works, the Claimants argue that this allegation is an *ex post facto* construct and unfounded.<sup>395</sup> The Claimants argue that had this been the real reason for the termination of the Contract, the formal notice would have mentioned it.<sup>396</sup> In fact, according to the Claimants, there is not a single contemporaneous document in support of the position that the reason for the termination was the supposed delay caused by Kuntur Wasi’s failure to secure financing.<sup>397</sup> None of the reports issued on 13 July 2017 at the request of the MTC recommended terminating the Concession Contract: the scope of these reports was limited to assessing the public interest in constructing the Chinchero Airport.<sup>398</sup>

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<sup>390</sup> Claimants’ Reply, paras. 264, 272-292.

<sup>391</sup> Claimants’ Memorial, para. 257. [Tribunal’s translation] The original Spanish reads: “Kuntur Wasi no participará en la construcción y operación del aeropuerto internacional de Chinchero.”

<sup>392</sup> Claimants’ Reply, para. 27; **Exhibit C-40**, News article published by El Comercio, “*Gobierno y Kuntur Wasi acordaron resolver contrato por Chinchero, anuncia Giuffra*,” 4 June 2017.

<sup>393</sup> Claimants’ Memorial, para. 258.

<sup>394</sup> See para. 293 *supra*.

<sup>395</sup> Claimants’ Reply, paras. 117 *et seq.*

<sup>396</sup> Claimants’ Reply, para. 119.

<sup>397</sup> Claimants’ Reply, para. 120.

<sup>398</sup> Claimants’ Reply, paras. 33, 123 *et seq.*

310. Furthermore, the Claimants also point out that Minister Vizcarra expressly acknowledged that Kuntur Wasi had not breached the Concession Contract and that the State therefore could not terminate the Contract for breach:

*Throughout the contract amendment process, the feasibility of terminating the Concession Contract for breach of the Concessionaire (Financial Closing) or upon a unilateral decision of the Grantor (MTC) was considered.*

*It was determined that it was not possible to invoke the first ground mentioned above because, as previously stated, the Concessionaire presented the Permitted Guaranteed Indebtedness.*

*As for termination upon unilateral decision, this implied paying the Concessionaire an amount equivalent to the amount of the Performance Bond of the Concession Contract amounting to USD 8.687 million, plus the claims for lost profits that may amount to numbers similar to the Project's construction cost, among other items. Therefore, the conclusion was that executing an Addendum would be more convenient.<sup>399</sup>*

311. In relation to point (iii),<sup>400</sup> in other words, the Respondent's assertion that given the *Contraloría's* report, it had no option but to terminate the Contract,<sup>401</sup> the Claimants explain that under Peruvian law, the *Contraloría* was not competent to order the termination of the Concession Contract.<sup>402</sup> The *Contraloría* could only provide recommendations intended to either improve the quality of State actions or to take administrative or legal actions against

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<sup>399</sup> Claimants' Reply, para. 269, citing **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 28. [Tribunal's translation] The original Spanish reads: "En el proceso de modificación contractual se analizó la factibilidad de optar por la caducidad del Contrato de Concesión, por incumplimiento de obligaciones a cargo del Concesionario (Cierre Financiero) o por decisión unilateral del Concedente (MTC). En el primer caso, se determinó que no era factible invocar dicha causal ya que, como anteriormente he señalado, el Concesionario presentó el Endeudamiento Garantizado Permitido. En el segundo caso, optar por la decisión unilateral implicaba pagar al Concesionario un monto equivalente al de la Garantía de Fiel Cumplimiento del Contrato de Concesión ascendente a US\$ 8 millones 687 mil, más las peticiones de lucro cesante que pueden llegar a cifras similares al valor de la construcción del Proyecto, entre otros conceptos. Por lo que se concluyó que era más conveniente suscribir la Adenda."

<sup>400</sup> See para. 293 *supra*.

<sup>401</sup> Claimants' Reply, para. 398.

<sup>402</sup> See also **Exhibit CD-4**, Ms. Quiñones' presentation, pp. 21, 22; Claimants' Closing Statement Presentation, p. 36.

public employees for their actions.<sup>403</sup> Decisions taken by entities in charge of “investment projects” such as the MTC are not subject to the *Contraloría*’s control; rather they enjoy a certain degree of discretion under Peruvian law to “opt for a well-founded administrative decision deemed as the most convenient alternative within the framework established by law.”<sup>404</sup>

312. According to the Claimants, that the MTC was not bound by the *Contraloría*’s recommendations is evidenced by the fact that the MTC had, on previous occasions, exercised its discretion and taken actions that were contrary to the *Contraloría*’s recommendations.<sup>405</sup> And in any event, the *Contraloría*’s report never recommended the termination of the Concession Contract.<sup>406</sup>
313. In response to the Respondent’s assertion in point (iv)<sup>407</sup> above that the events that occurred between June and July 2017 justified the termination of the Concession Contract, the Claimants argue that neither the suspension of obligations, nor the document “Possible Solutions” (document *Alternativas de Solución* dated 1 June 2017, the “**Roadmap**” or “**Hoja de Ruta**”), nor the six-month period allegedly requested by Kuntur Wasi to obtain financing, justify the termination.<sup>408</sup>

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<sup>403</sup> Claimants’ Reply, paras. 399-403. See also **Exhibit CD-4**, Ms. Quiñones’ presentation, pp. 21, 22: “*El Informe Final de la Contraloría [...] [n]o tiene ninguna incidencia en cuanto a la validez o legalidad del Contrato de Concesión y su Adenda 1.*”

<sup>404</sup> **Exhibit CD-4**, Ms. Quiñones’ presentation, pp. 21, 22. [Tribunal’s translation] The Claimants also argue that the laws relied on by Peru are inapposite, as they were not in force when the *Contraloría* issued its report. See also Claimants’ Reply, paras. 405, 406, 416 *et seq.*; Transcript, Day 9 (Spanish), 2117:5-15; Transcript, Day 8 (English), 1678:1-19: Ms. Quiñones stated that the Organic Law for the National Control System (**Exhibit R-73**), “prohibits issuing recommendations having to do with decisions that are under the discretion of other agencies,” so that “if there is a recommendation that is counter, or runs counter to the organic law for the National Control System, that recommendation does not have to be complied with mandatorily, and it is not binding. And even more, when it comes to PPPs, because there is a Law on PPPs that says that the *Contraloría*’s opinions are not binding either.” The Spanish transcript reads: “...*Ley Orgánica del Sistema Nacional de Control le prohíbe emitir recomendaciones vinculadas a, éste, decisiones que son discrecionales de otros órganos*” [entonces] “*si hay una recomendación que va en contra de la Ley del Sistema Nacional de Control, esa recomendación no es de obligatorio cumplimiento y no es vinculante. Y máxime en lo 4 que se refiere a la ley de APP, porque hay una ley especial, que es la ley de APP, que 6 establece que las opiniones de Contraloría no 7 tienen — no son vinculantes tampoco.*” Transcript, Day 8 (Spanish), 1902:18-22, 1903:1-7.

<sup>405</sup> Claimants’ Reply, paras. 408, 409. Transcript, Day 9 (Spanish), 2115:1-2114.

<sup>406</sup> Claimants’ Reply, paras. 411 *et seq.* Transcript, Day 9 (Spanish), 2120:7-10.

<sup>407</sup> See para. 293 *supra*.

<sup>408</sup> Claimants’ Reply, para. 425.

314. The Claimants take issue with Peru's assertion that because the MTC report of 13 July 2017 indicated that "they [were] temporarily suspended with no apparent provision for the obligations to be normally resumed once the suspension [was] terminated"<sup>409</sup>, it was justified in terminating the Contract. The Claimants explain that the fact that the obligations were suspended after the Contraloría's report does not indicate that either Party had the right to terminate the Contract.<sup>410</sup> Moreover, Clause 4.3.1 of the Concession Contract expressly established that any suspension would be temporary and that the Parties had an obligation to seek to resume their obligations as soon as possible.<sup>411</sup>
315. According to the Claimants, the Roadmap of 1 June 2017 does not set out any obligations and it certainly does not amount to a waiver of the Claimants' rights under the Concession Contract. The scenarios contemplated in the Roadmap were the basis for negotiations and required further agreement by the Parties. In any event, the Claimants argue that the State did not really engage in any negotiations with Kuntur Wasi as set out in the Roadmap given that it decided in less than three days thereafter that it would terminate the Contract.<sup>412</sup>
316. Furthermore, according to the Claimants, had the Roadmap been binding, it would not have been necessary for Peru to unilaterally terminate the Concession Contract: it would have been enough to invoke the alleged agreement reached on 1 June 2017. The Claimants also point out that, none of the reports issued by the MTC and the MINCETUR on 13 July 2017, which on Respondent's case provide the basis for the termination, mention the *Roadmap*.<sup>413</sup>
317. Finally, the Claimants also deny having requested an additional six months after the Roadmap was signed to obtain financing, and argue that, even if that was the case, six months would have been a reasonable time to obtain financing.<sup>414</sup>

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<sup>409</sup> Claimants' Reply, para. 426. [Tribunal's translation] The original Spanish reads: "se encuentran suspendidas temporalmente sin que aparentemente se hubiese previsto la continuación normal de las obligaciones una vez que dicha suspensión concluya."

<sup>410</sup> Claimants' Reply, para. 427.

<sup>411</sup> Claimants' Reply, para. 429.

<sup>412</sup> Claimants' Reply, paras. 435 *et seq.*

<sup>413</sup> Claimants' Reply, paras. 440, 441.

<sup>414</sup> Claimants' Reply, paras. 443, 444.



***(b) Peru did not provide any explanation for the termination***

318. Secondly, as explained above under point (ii),<sup>415</sup> the Claimants argue that under the Concession Contract and Peruvian law, the request for termination must be reasoned. In this regard, the Claimants argue that Clause 15.5.1 required that any unilateral termination of the Concession Contract be “well-founded” (“*debidamente fundada*”).<sup>416</sup> This is also a requirement set out in Peruvian law and by the Constitutional Court, which limits the exercise of public functions.<sup>417</sup> Under Peruvian law, it is well established that the State must give sufficient reasoning for its decisions and, in particular, the reasoning must: (a) identify the particular public interest that is affected and how the public decision will solve the problem;<sup>418</sup> (b) be clear and to the point, in other words, it cannot be abstract;<sup>419</sup> and (c) be accurate and consistent with reality.<sup>420</sup>
319. In Claimants’ view, the MTC’s official communication to Kuntur Wasi of 13 July 2017 did not contain any explanation as to the “public interest” supporting the decision to terminate the Concession Contract, and therefore does not meet any of the above-mentioned requirements. To recall, the notification stated as follows:

*“[U]nder the current circumstances, it is not possible to carry out the Project as and when originally planned, which jeopardizes attaining the public purpose of providing Cuzco with a new international airport, which is of high interest for the whole nation.*

*In this scenario, the unilateral termination of the AICC Contract as provided for in paragraph 15.5.1 thereof is the solution that best aligns with the public*

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<sup>415</sup> See para. 289 *supra*.

<sup>416</sup> Claimants’ Reply, paras. 297 *et seq.* [Tribunal’s translation]

<sup>417</sup> Claimants’ Memorial, paras. 265, 266.

<sup>418</sup> Claimants’ Memorial, para. 270; **Exhibit CL-11**, *Corte Superior de Justicia de Lima, Quinta Sala Especializada en lo Contencioso Administrativo, Sub Especialidad en Temas de Mercado, Municipalidad Metropolitana de Lima c. INDECOPI y Centrica Entertainment S.A.C.*, File No. 4649-2017, Resolution No. 22, 1 July 2019. P. 15.

<sup>419</sup> Claimants’ Memorial, para. 270; **Exhibit CL-12**, *Tribunal Constitucional del Perú, María Jesus Bustamante Agüero y otros c. Octavo Juzgado Transitorio Especializado en lo Contencioso Administrativo de Lima, Segunda Sala Especializada en lo Contencioso Administrativo de Lima, y Sala de Derecho Constitucional y Social Permanente de la Corte Suprema de Justicia de la República*, File No. 05608-2013-PA/TC, Judgment, 16 April 2014, para. 31; **Exhibit CL-13**, *Corte Suprema de Justicia de la República, Eliseo Matías Alvarado García c. Municipalidad Distrital de Comas*, Cassation No. 194-2017 Lima Norte, 17 March 2019, para. 8.

<sup>420</sup> Claimants’ Memorial, para. 270; **Exhibit CL-3**, *Tribunal Constitucional del Perú*, File No. 0090-2004-AA/TC, Judgment, 5 July 2004, para. 13. See also Claimants’ Reply, paras. 316 *et seq.*

320. The Claimants argue that the MTC’s decision does not refer to any public interest that is affected by the Concession Contract, but rather only states that the Chinchero Airport was of “public interest” (“*interés público*”) and was threatened by the “current circumstances” (“*situación actual*”) and that “it [was] not possible to carry out the Project” (“*no es posible concretar la ejecución*”).<sup>422</sup> The MTC did not mention, however, what circumstances it was referring to; why the execution of the Project was impossible; nor why the termination of the Contract was the solution to the alleged problem.<sup>423</sup> Furthermore, the MTC’s communication only contains empty allegations that are neither founded nor clear.<sup>424</sup>
321. According to the Claimants, the fact that MTC had issued an extensive report of 83 pages when Addendum No. 1 was approved contrasts with the scant reasoning provided by the MTC in its communication to terminate the Concession Contract; they argue that such radical change of the State’s official position should have been explained by the MTC.<sup>425</sup> On the Claimants’ case, Peru has been trying to play around with the concept of “*interés público*” to its benefit in this arbitration.<sup>426</sup>
322. The Claimants also allege that none of the reports of 13 July 2017 issued by the MTC and the MINCETUR – which were never shared with the Claimants up until this arbitration and on which the Respondent relies – address whether it was in the public interest to terminate the Concession Contract; rather, they only address whether constructing the Chinchero Airport was indeed in the public interest.<sup>427</sup> This is also expressly acknowledged by Minister Giuffra, who stated that he requested these reports from the MTC and the

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<sup>421</sup> **Exhibit C-44**, Oficio No. 142-2017-MTC/01, 13 July 2017, p. 2. [Tribunal’s translation] The original Spanish reads: “[E]n la actual situación no es posible concretar la ejecución del Proyecto en la forma y oportunidad originalmente previstas, lo cual pone en peligro el logro de la finalidad pública de alto interés nacional de dotar al Cusco de un nuevo aeropuerto internacional. En este escenario, la solución que se encuentra más acorde con los intereses públicos involucrados es la resolución unilateral del Contrato AICC prevista en el numeral 15.5.1 del mismo.”

<sup>422</sup> Claimants’ Memorial, para. 273. [Tribunal’s translation]

<sup>423</sup> Claimants’ Memorial, paras. 273, 274.

<sup>424</sup> Claimants’ Memorial, para. 276; Claimants’ Reply, paras. 123-142.

<sup>425</sup> Claimants’ Reply, paras. 308-311.

<sup>426</sup> Claimants’ Reply, para. 307.

<sup>427</sup> Claimants’ Reply, paras. 126-132, 313-315, 339-343.

MINCETUR to confirm “whether the construction of the Chinchero Airport still served the public interest.”<sup>428</sup>

323. The Claimants also point out that the Respondent’s argument that these reports were the basis for its decision must fail because of the chronology of how events unfolded. In particular, the Claimants refer to the fact that the MTC only requested the reports on 12 July 2017, that is, one day before they were issued, and that it is not credible that the MTC analyzed the reports, issued the formal notice of termination, sent it to a public notary and then to the Claimants, all in a single day.<sup>429</sup>
324. According to the Claimants, all of this “fast track” contrasts with the reports issued in relation to Addendum No. 1, which specifically addressed whether signing the Addendum was in the public interest.<sup>430</sup> In the Claimants’ view, if the State were to change its view in such a radical way, the least one could expect was that the reports would explain why it was no longer in the public interest to continue with the Concession Contract. Yet, there is not a single document that analyses this.<sup>431</sup>
325. Finally, the Claimants also argue that the MTC’s communication, in further breach of Peruvian law, contains false statements and is therefore arbitrary. In particular, the Claimants take issue with the MTC’s statement that “it [was] not possible to carry out the Project” (“*no es posible concretar la ejecución*”).<sup>432</sup> According to the Claimants, they always made their best efforts to finalize the execution of the Chinchero Airport as originally contemplated in the Contract and complied with the Contract and negotiated in good faith with the State when required.<sup>433</sup> The Claimants argue that terminating the Concession Contract and appointing a new concessionaire would not have resulted in a reduction of time or costs, and Peru was well aware of this when the MTC issued the

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<sup>428</sup> Claimants’ Reply, para. 129, citing **Exhibit RWS-1**, First Giuffra Statement, para. 20. [Tribunal’s translation] The original Spanish reads: “*si aún era de interés público construir el Aeropuerto de Chinchero.*”

<sup>429</sup> Claimants’ Reply, paras. 135-139.

<sup>430</sup> Claimants’ Reply, para. 133, 139.

<sup>431</sup> Claimants’ Reply, paras. 139, 140.

<sup>432</sup> Claimants’ Memorial, para. 279. [Tribunal’s translation]

<sup>433</sup> Claimants’ Memorial, para. 280.

communication.<sup>434</sup> In fact, had Peru not terminated the Concession Contract, Addendum No. 1 contemplated that the works would have begun by April 2017. Yet, Peru's unilateral termination of the Contract and the subsequent opening of a new tender process, have caused significant delays and increased costs to the State.<sup>435</sup>

326. In response to the Respondent's argument that Peruvian law did not require it to provide the reasons for its decision to terminate the Concession Contract, the Claimants assert that Peru's position in relation to Clause 15.5.1 of the Concession Contract is contrary to both a literal and a systemic interpretation, as required by Article 169 of the Peruvian Civil Code. In particular, the Claimants argue that if a decision does not contain the reasoning on which it is based, it is not "*debidamente fundada*" as required by Clause 15.5.1 of the Concession Contract.<sup>436</sup> A systemic interpretation of the Concession Contract also indicates that reasons must be given. In particular, the Claimants rely on the fact that: (a) Clause 15.5.1 requires that the unilateral termination must be notified in advance and in writing; (b) Clause 15.5.2 requires that the communication must be signed by the ministry responsible for addressing "such a matter of public interest" ("*tal problema de interés público*");<sup>437</sup> and (c) other clauses in the Concession Contract which refer to the terms "well-founded" ("*debidamente fundada*") expressly require a supported reasoning of the decision.<sup>438</sup> According to the Claimants, this is also a requirement under Peruvian law applicable to all acts of the administration.<sup>439</sup>

327. The Claimants also take issue with the Respondent's position that Peruvian Administrative Law (and the requirements set out in the LPAG in particular) is not applicable to the MTC's

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<sup>434</sup> Claimants' Memorial, para. 289. See also **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 24: "Cabe señalar que postergar el proyecto generaría altos costos sociales y económicos para el Estado, debido a que se tendría que volver a iniciar el proceso de concurso público para construir el aeropuerto, ya sea mediante un APP o como Obra Pública. Se estima un tiempo promedio de 4-5 años para iniciar las obras del aeropuerto en ambas modalidades, contar con el aeropuerto en operación en ambas modalidades, según lo indicado en los siguientes cuadros es el tiempo que se perdería."

<sup>435</sup> Claimants' Memorial, paras. 285-289.

<sup>436</sup> Claimants' Reply, paras. 322, 323.

<sup>437</sup> Claimants' Reply, para. 323. [Tribunal's translation]

<sup>438</sup> Claimants' Reply, paras. 324, 325.

<sup>439</sup> Claimants' Reply, para. 328 *et seq.* According to the Claimants, there is no distinction between different types of clauses for the unilateral termination of contracts under Peruvian law.

actions in relation to the Concession Contract. The Claimants' position is that the Concession Contract is a "legal relationship under public law" ("*relación jurídica de derecho público*") and that it relates to a concession, which is an "*administrative act*" ("*acto administrativo*"); and as such, it is governed by the rules set out in the Concession Contract itself and also in public administrative laws.<sup>440</sup> This means that the requirements of administrative law pertaining to public acts are equally applicable to the MTC's acts in relation to the Concession Contract.<sup>441</sup>

328. The Claimants further object to the Respondent's assertion that the State has full discretion in defining what is the public interest and what not, and that this determination is not arbitrable.<sup>442</sup> According to the Claimants, Peru's view does not have any legal or contractual basis. The Concession Contract unequivocally sets out – in Clauses 15.5.1, 15.8.7 and 16.2.1 – that disputes related to the termination for public interest reasons, including a dispute related to whether there was a public interest, can be submitted to arbitration.<sup>443</sup> Accepting the Respondent's interpretation of Clause 15.5.1 would deprive the requirement that the State provide "well-founded reasons of public interest" of any effect.<sup>444</sup> The Claimants also assert that the Respondent's expert, Dr. Ferrando, cannot point to a single source under Peruvian law that supports its views, simply because Peruvian Law requires that decisions taken in the public interest can be submitted to dispute resolution.<sup>445</sup>

***(c) Peru's termination decision was neither rational nor proportional***

329. Thirdly and finally, the Claimants argue that Peru's decision to terminate the Concession Contract was neither rational nor proportional, as required by Peruvian law.<sup>446</sup> The Claimants point out that under Peruvian law, public authorities are allowed to terminate

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<sup>440</sup> Claimants' Reply, paras. 348-352. [Tribunal's translation]

<sup>441</sup> Claimants' Reply, paras. 354, 355.

<sup>442</sup> Claimants' Reply, paras. 380-382.

<sup>443</sup> Claimants' Reply, paras. 384-388.

<sup>444</sup> Claimants' Reply, para. 389. [Tribunal's translation]

<sup>445</sup> Claimants' Reply, paras. 389 *et seq.*

<sup>446</sup> Claimants' Memorial, para. 291; **Exhibit CL-3**, *Tribunal Constitucional del Perú*, File No. 0090-2004-AA/TC, Judgment, 5 July 2004, para. 36; **Exhibit CL-16**, *Tribunal Constitucional del Perú*, *Caso Compañía Cervecería Ambev Perú S.A.*, File No. 1209-2006-PA/TC, Judgment, 14 April 2006; para. 55.

concession contracts unilaterally, provided that the termination is necessary and proportional to achieve the intended public interest.<sup>447</sup> To analyze whether a Government measure is proportional, national courts look at: (1) whether the measure is well suited to meet its intended purpose; (2) whether the measure is necessary (*i.e.*, it is the least harmful alternative); and (3) whether the measure is proportional. In this case, the Claimants argue that the MTC's decision to terminate the Concession Contract did not comply with the above requirements.<sup>448</sup>

330. According to the Claimants, the MTC's decision to terminate the Concession Contract was neither suited to the intended purpose nor necessary to achieve said purpose, which allegedly was to reduce costs and time in constructing the Chinchero Airport.<sup>449</sup> To the contrary, the Claimants point out that the Respondent was well aware, at the time it terminated the Contract, that having to find another concessionaire would significantly delay the Project.<sup>450</sup> Indeed, the Claimants point out that whereas under Addendum No. 1 the works would have begun in April 2017, it wasn't until October 2019 that Peru signed a contract with the Government of Korea for the technical assistance with the Project, and it was envisaged that the contract for the commencement of the earthworks would not be signed before June 2020.<sup>451</sup>
331. Furthermore, the Claimants also argue that terminating the Concession Contract did not result in savings to the State, but rather the opposite, since Peru not only would have to pay compensation to Kuntur Wasi but also would be required to spend additional resources to adapt Kuntur Wasi's EDI and find another concessionaire.<sup>452</sup> According to Kuntur Wasi, the construction of the Project under Addendum No. 1 would have cost the State US\$ 410

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<sup>447</sup> Claimants' Memorial, para. 292; **Exhibit CL-15**, *Tribunal Constitucional del Perú, Expediente 2488-2004-AA/TC*, 10 October 2006.

<sup>448</sup> Claimants' Memorial, para. 293.

<sup>449</sup> Claimants' Memorial, paras. 294, 295, 298, 299.

<sup>450</sup> Claimants' Memorial, para. 296, citing **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 24; Claimants' Reply, paras. 143 et seq.

<sup>451</sup> Claimants' Reply, paras. 145-148.

<sup>452</sup> Claimants' Memorial, para. 300.

million, whereas now, pursuant to the contract signed with the Government of Korea, it will cost a total of US\$ 770 million.<sup>453</sup>

332. As to whether the measure is proportional *stricto sensu*, Kuntur Wasi further alleges that, to the extent the termination of the Concession Contract did not result in any benefit to the State, the measure could not be deemed proportional.<sup>454</sup>
333. Finally, the Claimants also reject the Respondent's argument that it is not necessary to analyze the reasonableness or the proportionality of the MTC's decision.<sup>455</sup> According to the Claimants, all decisions of public entities, when they create obligations or impose restrictions, must be limited to the competence of the entity, be proportional and adjusted to the public interest which the measure pursues.<sup>456</sup> On the Claimants' case, not only was the MTC's termination of the Concession Contract not founded on public interest reasons; it was actually motivated by Minister Vizcarra's and Minister Giuffra's wish to avoid political pressure.<sup>457</sup> This, on the Claimants' case, constitutes a misuse of powers.<sup>458</sup>

## **(ii) The Respondent's Position**

334. The Respondent argues that the Concession Contract allows for the unilateral termination of the Contract by the MTC for public interest reasons, which is precisely what the MTC did.

### ***(a) Peru terminated the Concession Contract for public interest reasons***

335. The Respondent argues that the construction of the Chinchero International Airport has been declared an urgent and public necessity in Peru since 2001. This was reconfirmed by the State in 2010 and then again in 2017, when the State and the MINCETUR concluded

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<sup>453</sup> Claimants' Reply, para. 149.

<sup>454</sup> Claimants' Memorial, para. 301.

<sup>455</sup> Claimants' Reply, para. 360.

<sup>456</sup> Claimants' Reply, para. 367.

<sup>457</sup> Claimants' Reply, paras. 371 *et seq.*

<sup>458</sup> Claimants' Reply, para. 372.

that the construction of the Chinchero Airport was an “urgent and public necessity Project.”<sup>459</sup>

336. On the Respondent’s case, the termination of the Concession Contract was well founded on public interest grounds because, by 2017, Kuntur Wasi had proven to be a deficient partner to build the Airport, as it was not able to put together a reasonable financial package to complete the construction of the Airport and this had caused significant delays.<sup>460</sup> In particular, the Respondent relies on two facts to sustain that it was in the public interest to terminate the Concession Contract.
337. First, the Respondent argues that by mid-2017, Kuntur Wasi submitted a financial package that was unreasonable and would have caused an economic prejudice to the State.<sup>461</sup> According to the Respondent, under both the *Bases* and the Concession Contract, the FPAO was the “agreed limit” or “cap” which represented the net value maximum amount the State would have to pay for the construction of the Project.<sup>462</sup> In the Respondent’s view, contrary to the Claimants’ argument that the FPAO was only meant to cover the construction costs, the FPAO was not tied to any work, task or activity.<sup>463</sup> According to the Respondent, the definition of the FPAO in paragraph 45 of the *Bases*, does not support the Claimants’ argument that the FPAO was limited to construction costs, nor does Clause 1.54 or Annex 23 of the Concession Contract. Those instruments merely define the FPAO as the net value amount that serves as the basis for the calculation of the quarterly payments.<sup>464</sup>
338. The Respondent acknowledges that PROINVERSIÓN clarified during the tender process – in an answer to the bidders – that the PAO was not limited to construction costs but corresponded to the amount each bidder needed to be co-financed by the State.<sup>465</sup>

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<sup>459</sup> Respondent’s Counter-Memorial, para. 187.

<sup>460</sup> Respondent’s Counter-Memorial, para. 188.

<sup>461</sup> Respondent’s Rejoinder, para. 41.

<sup>462</sup> Respondent’s Counter-Memorial, para. 62; Respondent’s Rejoinder, paras. 44, 45.

<sup>463</sup> Respondent’s Rejoinder, paras. 42, 43.

<sup>464</sup> Respondent’s Rejoinder, paras. 45-47; **Exhibit C-18**, Final Bidding Terms, Annex No. 7; **Exhibit C-4**, Concession Contract, Cl. 1.54.

<sup>465</sup> Respondent’s Rejoinder, para. 50, citing **Exhibit R-84**, Memorandum No. 60 regarding Chinchero’s Tender Process, 17 January 2014, questions 60, 91, 102, 105.



According to the Respondent, however, the fact that PROINVERSIÓN only stated that the PAO was not limited to construction costs – and did not state the same in relation to the FPAO – does not mean that the FPAO and the PAO were to be comprised of different costs: in Respondent’s view, the PAO is the FPAO multiplied by the interest rate (*i.e.*, the borrowing rate of the concessionaire) divided by 60.<sup>466</sup>

339. Moreover, according to the Respondent, it would have been absurd for the State to select the bidder on the basis of the lowest FPAO and then allow the bidder to charge the State for unlimited additional costs through the PAO. This is contrary to both the way in which the tender process was designed and the very function of public procurement processes.<sup>467</sup>
340. Respondent argues that under the Claimants’ interpretation of the Contract, the fact that the concept “weighted average rate of return” was not defined in the Contract did not mean that it was unconstrained. According to the Respondent, the fact that Appendix 1 of Annex 23 defines variable “i” as the “*tasa de descuento trimestral*” essentially means the interest rate and therefore, that the weighted average rate would be the weighted average interest rate that the concessionaire would be able to obtain for its financing.<sup>468</sup>
341. Finally, the Respondent also argues that bidders knew or should have known that PROINVERSIÓN’s assumption – based on ALG’s Financial Model – was that variable “i” would yield a borrowing interest rate of 7.01% plus a spread of 2.50%. In particular, the Respondent argues that bidders had access to OSITRAN’s opinion on the final version of the Concession Contract, which included an explanation of the State’s understanding of the variables of the quarterly PAO formula.<sup>469</sup> While recognizing that OSITRAN’s opinion is not binding, the Respondent argues nonetheless that it was “very relevant” as it provided

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<sup>466</sup> Respondent’s Rejoinder, para. 51.

<sup>467</sup> Respondent’s Rejoinder, para. 57.

<sup>468</sup> Respondent’s Rejoinder, paras. 59 *et seq.*

<sup>469</sup> Respondent’s Rejoinder, para. 65, 66; **Exhibit R-57**, *Informe No. 057-13-GRE-GS-GAJ-OSITRAN*, OSITRAN’s Technical Opinion Regarding the Final Version of the Contract, 27 December 2013, para. 108, 109.

bidders with a direct means of understanding the State's reading and plans for the application of key economic terms of the Contract,<sup>470</sup> and it was publicly available.<sup>471</sup>

342. Secondly, the Respondent also explains that as a result of the *Contraloría*'s reports, the Contract could not be executed under the terms of Addendum No. 1, unless the Parties managed to reach an agreement to amend certain terms. According to the Respondent, the *Contraloría* had the authority to oversee the use of public funds in Peru and to review decisions of State entities to determine whether they would harm the Peruvian Treasury (under Law 27785).<sup>472</sup> In this case, the *Contraloría* report found that the modifications to the Contract included in Addendum No. 1 violated Peruvian law given that they changed the competitive terms of the tender process and the financial structure of the Contract.<sup>473</sup> For this reason, the *Contraloría* urged the MTC to reestablish the original economic balance of the Contract.<sup>474</sup>
343. According to the Respondent, the decision to modify the financial structure and reallocate the financial risks of the Project, and to change the terms of the competition on which the bidders submitted their bid, were not ones as to which the MTC had discretion.<sup>475</sup> Under Peruvian law, any amendment to the Concession Contract would have had to maintain the "financial-economic balance" ("*equilibrio económico financiero*") and the "the terms of the promotion process" ("*condiciones del proceso de promoción*").<sup>476</sup> Therefore, the *Contraloría*'s audit report was binding, and not following the *Contraloría*'s findings could have resulted in criminal, civil and administrative procedures against the Government officials involved in the acts that led to the *Contraloría*'s findings.<sup>477</sup>

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<sup>470</sup> Respondent's Rejoinder, para. 68.

<sup>471</sup> Respondent's Rejoinder, para. 71.

<sup>472</sup> Transcript, Day 9 (English), 1944:2-6.

<sup>473</sup> **Exhibit RD-1**, Respondent's Opening Statement Presentation, slide 65.

<sup>474</sup> Respondent's Closing Statement Presentation, p. 58; Transcript, Day 9 (English), 1947:6-9.

<sup>475</sup> Transcript, Day 9 (English), 1944:13-17.

<sup>476</sup> Transcript, Day 9 (English), 1944:17-22. [Tribunal's translation]

<sup>477</sup> Respondent's Closing Statement Presentation, p. 59; Transcript, Day 9 (English), 1947:19-1948:1. The Respondent also points out that in its final report, the *Contraloría* concluded that it suspected criminal misconduct and recommended that the report be sent to the "*Órgano Instructor Competente*" and to the "*Procuraduría*" to initiate sanctioning and legal proceedings. (Transcript, Day 9 (English), 1948:6-12)

344. After the *Contraloría*'s report, the Parties engaged in negotiations and agreed that, if they did not manage to agree on the amendment of certain terms, they would mutually terminate the Contract. On Respondent's case, by mid-2017, it became clear that the Parties could not reach any such agreement because Kuntur Wasi informed the Respondent that it would need six additional months to obtain financing under the newly negotiated terms.<sup>478</sup> This led the Respondent to believe that Kuntur Wasi would never be able to build the Chinchero Airport, and left the MTC with no option but to unilaterally terminate the Concession Contract. On Respondent's view, had the MTC not terminated the Concession Contract, the Project would still be paralyzed.<sup>479</sup>
345. In response to the Claimants' argument that any discussion relating to Kuntur Wasi's financial proposal is irrelevant because of Addendum No. 1, the Respondent argues that this is a relevant fact because it provides context to the dispute in this arbitration. It shows, in Respondent's view, that Kuntur Wasi attempted to charge an excessive and unreasonable interest rate to the State and that it had financial issues from the very beginning of the Concession.<sup>480</sup>
346. With respect to Minister Vizcarra's statements before the Congress in relation to the Concession Contract and Addendum No. 1, the Respondent asserts that Minister Vizcarra was merely defending a policy position and his preferred policies from congressional attack; but that his statements do not represent a definitive interpretation of the Concession Contract or Peruvian law and should have no persuasive value for the Tribunal.<sup>481</sup>

***(b) The MTC's communication of July 2017 was sufficiently motivated***

347. According to the Respondent, it is in this context that the MTC's communication of July 2017 must be read. The Respondent argues that the MTC's communication "explained that Kuntur Wasi's inability to execute the Project under the terms granted in the Concession,

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<sup>478</sup> Respondent's Counter-Memorial, paras. 56, 57.

<sup>479</sup> Respondent's Counter-Memorial, paras. 205-208.

<sup>480</sup> Respondent's Rejoinder, para. 27.

<sup>481</sup> Respondent's Counter-Memorial, para. 376.

jeopardized the fulfilment of the public interest of building the Airport”<sup>482</sup> and therefore, the MTC had no choice but to terminate the Contract to continue its pursuit of building the Airport.

348. In response to the Claimants’ argument that Peruvian law required the termination to be duly motivated, reasonable and proportional, the Respondent argues that this standard applies only to “administrative acts,” where the State uses its *ius imperium*. However, when a State enters into a concession contract such as the one at issue in this case, the State is acting as a commercial party and its acts are only assessed in accordance with the terms of the Contract itself. Therefore, the Tribunal does not need to determine whether the MTC’s termination of the Contract was reasonable, proportional or duly justified in accordance with Peruvian law. On Respondent’s case, the Claimants own actions evidence that they did not regard the MTC’s termination of the Contract as an administrative act given that they never sought to challenge the termination before the entity that issued the act – *i.e.*, the normal recourse against administrative acts – but rather used the contractual resources available under the Contract.<sup>483</sup>
349. Furthermore, according to the Respondent and its Peruvian law expert, Dr. Ferrando, Clause 15.5.1 of the Concession Contract does not require the State to provide “individualized, justified and developed” reasons for terminating the Contract.<sup>484</sup> Rather, Dr. Ferrando explains that the requirement in Clause 15.5.1 for there to be “well-founded” (*debidamente fundadas*) public interest reasons means that such public reasons must exist and must have merit, but the MTC does not need to prove them at the moment it gives notice to the Concessionaire that it is terminating the Contract. The Respondent further argues that the Claimants were or should have been fully aware of this provision in the Contract, as it was included in the Concession Contract which Kuntur Wasi signed as part of its bid to win the Concession.<sup>485</sup>

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<sup>482</sup> Respondent’s Counter-Memorial, para. 190.

<sup>483</sup> Respondent’s Counter-Memorial, paras. 200-203; **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 14, 85.

<sup>484</sup> Respondent’s Counter-Memorial, para. 183.

<sup>485</sup> Respondent’s Counter-Memorial, para. 184; **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 15, 58, 136.

350. Dr. Ferrando further explains in his report that the concept of public interest has not been defined in Peruvian law or in the Contract, but it has been developed in Peruvian doctrine and jurisprudence. According to such doctrine and jurisprudence, to determine whether something is in the “public interest,” the State analyses the circumstances on a case-by-case basis and determines what will create a general benefit for its population. Importantly, Dr. Ferrando argues that it is up to the State alone to determine its own priorities and what is in the “public interest.”<sup>486</sup>
351. Nevertheless, the Respondent argues that, even if the termination was considered an administrative act, it would have been reasonable, proportional and duly justified in light of the circumstances. In particular, in the Respondent’s view, the following circumstances evidence that the termination was proportional and reasonable:
352. By mid-2017 Kuntur Wasi had proven a deficient partner to build and operate the Chinchero Airport. In particular, the Respondent refers to the fact that the Claimants first submitted a financial package that was unreasonable and caused an economic prejudice to the State. This paralyzed the Project and caused significant delays in the initiation of the construction of the Project.<sup>487</sup>
353. The Respondent also explains that as a result of the *Contraloría*’s reports, the Contract could not be executed under the terms of Addendum No. 1 unless the Parties managed to reach an agreement to amend certain terms. The Parties engaged in negotiations and agreed that, if they did not manage to agree on the amendment of certain terms, they would mutually terminate the Contract. On the Respondent’s case, by mid-2017, it became clear that the Parties could not reach any such agreement because Kuntur Wasi informed the Respondent that it would need six additional months to obtain financing under the newly negotiated terms.<sup>488</sup>

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<sup>486</sup> Respondent’s Counter-Memorial, para. 186; **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 16, 97-105.

<sup>487</sup> Respondent’s Counter-Memorial, para. 205; Respondent’s Rejoinder, paras. 23-27.

<sup>488</sup> Respondent’s Counter-Memorial, paras. 205-208.

*b. The Tribunal's Analysis*

354. The parties have discussed at length the requirements necessary for the Peruvian State to legitimately terminate the Concession Contract for reasons of public interest. Clause 15.5.1 regulates this ground for termination in the following terms:

*For well-founded public interest reasons, the GRANTOR has the power to terminate the Concession Contract at any time, by prior written notice to the CONCESSIONAIRE at least six (6) months in advance of the term established for termination. The decision must be notified to the Allowed Creditors in the same term.*<sup>489</sup>

355. The Claimants argue, on the basis of the clause cited above, that Peru was not entitled to terminate the Concession Contract at its sole discretion, but rather it was authorized to terminate such contract only upon “well-founded public interest reasons.” According to Kuntur Wasi, this means that it was possible to terminate the Contract provided that: (i) there was a public interest, (ii) the decision was grounded, and (iii) the decision was reasonable and proportionate.<sup>490</sup>
356. The Respondent holds, instead, that the Peruvian Government is entitled to terminate the Concession Contract as long as (i) there is a reason of public interest and (ii) such reason actually exists.<sup>491</sup>
357. The Peruvian Government argues that termination was an action required to attain the public interest, *i.e.*, building the Chinchero Airport, since, in light of various post-Contract award circumstances, Kuntur Wasi would have proven to be a deficient partner to complete such Project.<sup>492</sup> Although the Claimants do not object to the fact that the prompt construction of the Chinchero Airport was indeed the public interest underlying the Project,

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<sup>489</sup> **Exhibit C-4**, Concession Contract, Cl. 15.5.1. This is an English translation provided by the Respondent at para. 181 of its Counter-Memorial. The original Spanish reads: “*Por razones de interés público debidamente fundadas, el CONCEDENTE tiene la facultad de resolver el Contrato de Concesión en cualquier momento, mediante notificación previa y por escrito al CONCESIONARIO con una antelación no inferior a seis (6) meses del plazo previsto para la terminación. En igual plazo deberá notificar tal decisión a los Acreedores Permitidos.*”

<sup>490</sup> See para. 289 *supra*.

<sup>491</sup> See para. 349 *supra*.

<sup>492</sup> Respondent’s Counter-Memorial, paras. 187, 188, 204, 205.

the Claimants object that termination of the Concession Contract was the necessary means to meet such interest.<sup>493</sup>

358. Thus, the Parties agree in that the legitimate termination of the Concession Contract, pursuant to Clause 15.5.1, implies at least the existence of a public interest that justifies the termination. It is clear to the Tribunal that, in addition to the existence of proper grounds for the decision, the appropriate time to execute the action and ultimately the reasonableness and proportionality of the measure, termination must be supported by an actual reason of *public interest*. Otherwise, termination would be groundless and as such would amount to a violation of the Concession Contract.
359. Thus, the Tribunal has to determine, above all, whether the Peruvian Government's decision to terminate the Concession Contract early was justified by adequate reasons of public interest. For the sake of order, the analysis of this matter will be structured upon the basis of the circumstances that, according to Peru, would prove that Kuntur Wasi was not suitable to carry out the Project, *i.e.*, precisely the reason of public interest claimed by the Respondent.<sup>494</sup> Such circumstances are as follows: (i) Kuntur Wasi's inability to submit a reasonable financing proposal, (ii) invalidity of Addendum No. 1, and (iii) Kuntur Wasi's need for an additional six-month term to obtain financing.<sup>495</sup>
360. Upon an analysis of these facts, this section concludes, in subsection (iv), that the Respondent did not prove the circumstances under which Kuntur Wasi might be considered as a deficient contractor to carry out the Project. Therefore, the reasons of public interest asserted by Peru did not suffice to support the early termination of the Concession Contract as provided in Clause 15.5.1.

#### **(i) Financing Proposal**

361. Under the Concession Contract, Kuntur Wasi had the duty to submit to the Grantor, 30 days prior to the commencement of the Works, a proposal for the financing of the

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<sup>493</sup> Claimants' Memorial, paras. 263, 265.

<sup>494</sup> Respondent's Counter-Memorial, para. 204.

<sup>495</sup> See para. 336 *supra*.

construction of the Project.<sup>496</sup> Pursuant to the terms of the Contract, the financing mechanism was the so-called EGP. Upon authorization of the EGP submitted by Kuntur Wasi, the Financial Closing would be complied with (*supra*, para. 121).<sup>497</sup>

362. Kuntur Wasi submitted its first financing proposal to the MTC on 17 September 2015. This proposal was rejected by OSITRAN on 7 December 2015 for failure to present the required documents.<sup>498</sup> In May 2016, Kuntur Wasi submitted a second financing proposal.<sup>499</sup> After a series of comments and corrections, OSITRAN issued a favourable technical opinion in July 2016.<sup>500</sup> However, the proposal was rejected by the MTC which considered that the proposal would cause financial damage to the Peruvian Government (*supra*, para. 152). The issue was then to properly determine the EGP in accordance with the Bidding Terms and the Concession Contract.
363. The background described above indicates that there was a regulatory vacuum in the Concession Contract which may have led to different interpretations by Kuntur Wasi and the Peruvian Government, particularly with regard to variable “i” used in the formula to calculate the total amount of the EGP.
364. Such uncertainty is also reflected by the fact that according to the *Contraloría*, the CAF, the expert Finnerty and the statements made by Minister Vizcarra at the time, the Concession Contract did not contain a clear definition of the “i” rate.<sup>501</sup> This is particularly

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<sup>496</sup> **Exhibit C-4**, Concession Contract, Cl. 1.44 and 10.4.7.

<sup>497</sup> **Exhibit C-4**, Concession Contract, Cl. 1.23.

<sup>498</sup> The request was made by Letter No. 246-2015-KW, dated 17 September 2015 (**Exhibit R-71**). This request was rejected by *Oficio No. 134-15-GRE* dated 7 December 2015 (**Exhibit R-38**).

<sup>499</sup> **Exhibit C-20/C-194**, Letter No. 089-2016-KW, 4 May 2016.

<sup>500</sup> **Exhibit C-57**, *Oficio Circular No. 027-16-SCD-OSITRAN*, 7 June 2016; **Exhibit C-58**, Letter No. 119-2016-KW, 5 July 2016; **Exhibit R-64**, *Oficio No. 088-16-GRE-OSITRAN*, 11 July 2016; **Exhibit R-65**, Letter No. 128-2016-KW, 14 July 2016; **Exhibit C-114**, *Informe No. 014-16-GRE-GAJ-OSITRAN*, 20 July 2016.

<sup>501</sup> **Exhibit C-23**, *Reporte de Conclusiones y Recomendaciones*, CAF, 7 November 2016, p. 4: “The Concession Contract does not define the annual weighted average rate of the Financial Closing applicable to the Works Execution Stage (hereinafter, “Financing Average Rate”), nor does said Contract provide for a procedure or formula to calculate such rate. This derives into a contractual vacuum subject to the interpretation of the parties.” [Tribunal’s translation] The original Spanish reads: “*El Contrato de Concesión no define que es la tasa promedio ponderado anual del Cierre Financiero de la Etapa de Ejecución de Obras (en adelante “Tasa Promedio del Financiamiento”), ni establece un*



clear in the conclusion of the *Contraloría*'s report issued in connection with the request for approval of the EGP submitted by Kuntur Wasi:

*The generality of the terms of the Contract, as it has been drafted and without any limits having been set in this respect, does not allow for an identification of the inputs applicable for calculation of the "i" Rate...*<sup>502</sup>

365. The records of the case show that the Peruvian Government had certain expectations about the value that the "i" rate would have. It can be assumed that the procedural bases were designed on the assumption that the EGP would be calculated using the average interest rates available in the market at the time of the bidding process.<sup>503</sup>
366. The Tribunal considers that these expectations of the Peruvian Government were not part of the bidding terms, and therefore cannot be considered binding on the Claimants. Indeed, Peru based the formula for calculating the financial package on ALG's Financial Economic Model. However, this model was confidential and was not disclosed to the participants in the bid (*supra*, para. 95).
367. Even if some considerations of the ALG's Financial Economic Model were disclosed in OSITRAN's opinion on the Concession Contract,<sup>504</sup> it follows from the MTC's conduct

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*procedimiento o fórmula para calcularla. Esto genera un vacío contractual que está sujeto a la interpretación de las partes.*" Also in this respect, the First Finnerty Report explains the following: "The interest rate "i" ("Quarterly PAO Interest Rate"), however, was not explicitly determined as part of the competitive bidding process that ultimately identified the Company that would be given the concession to build and operate the Chinchero Airport (the "Concessionaire"). [...] The Quarterly PAO Interest Rate was to be determined as part of the financing proposal (the "EGP Proposal") that Kuntur Wasi would submit to the MTC for approval" (**Exhibit RER-3**, First Finnerty Report, para. 19). Further in this regard, Minister Vizcarra stated that: "As the Concession Contract does not stipulate a maximum rate to be used, Kuntur Wasi, endorsed by the contract of July 2014, had the possibility of using any rate for the Financial Closing." [Tribunal's translation] The original Spanish reads: "*Dado que el Contrato de Concesión no establece el valor de una tasa máxima a utilizar, Kuntur Wasi, con el aval del contrato suscrito en julio de 2014, tenía la posibilidad de presentar cualquier tasa para realizar el Cierre Financiero.*" (Claimants' Reply, para. 270, citing to **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, pp. 49 y 50. See also Claimants' Reply, paras. 20-22, 448 *et seq.*).

<sup>502</sup> **Exhibit C-22**, Oficio No. 4268-2016 MTC/25, 27 October 2016, p. 2 (p. 4 of the PDF). [Tribunal's translation] The original Spanish reads: "*La generalidad del Contrato, tal como ha quedado redactado y sin haberse planteado límites al 118ro proyecto, no permite identificar los supuestos aplicables para la estimación de la Tasa 'i'.*"

<sup>503</sup> Respondent's Rejoinder, para. 65.

<sup>504</sup> **Exhibit R-35**, Publication of OSITRAN's Technical Opinion of the Final Version of the Contract, *El Peruano*, 7 January 2014.

after the *Contraloría*'s report of October 2016 that the issue of variable "i" was not relevant to determine whether Kuntur Wasi was a deficient partner for the execution of the Project.

368. The MTC rejected Kuntur Wasi's economic proposal as detrimental to the Peruvian State.<sup>505</sup> Clause 10.4.7 of the Contract allowed the MTC to "deny the request for authorization of the Permitted Guaranteed Indebtedness based on the economic prejudice that said terms could cause."<sup>506</sup> The decision not to authorize the EGP proposal was reasoned and informed to Kuntur Wasi by an Official Notice of 25 November 2016.<sup>507</sup>
369. Peru was not only entitled to reject the proposal in the terms it did. The Contract also empowered Peru to declare early termination for the Concessionaire's failure to comply with its obligation of securing financing. Indeed, clause 15.3.2(m) authorized the Grantor to early terminate the Concession Contract due to "[n]on-compliance with the Financial Closing for reasons attributable to the CONCESSIONAIRE, in accordance with the provisions of clause 9."<sup>508</sup> Clause 9, in turn, states that "[i]f the CONCESSIONAIRE has not evidenced the Financial Closing, such failure shall be considered a breach by the CONCESSIONAIRE and therefore the GRANTOR, after a report issued by OSITRAN,

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<sup>505</sup> **Exhibit C-67**, *Oficio No. 4601-2016-MTC*, 25 November 2016.

<sup>506</sup> [Tribunal's translation] The original Spanish reads: "...negar la solicitud de autorización del Endeudamiento Garantizado Permitido basándose en el perjuicio económico que dichos términos podrían ocasionarle." In this regard, the Contract defines the EGP as "the indebtedness main terms, including principal amounts, interest rate(s), amortization provisions, costs of issue, commissions, advance payment penalties, insurance, taxes, among others, [which] shall require the approval of the GRANTOR, subject to the prior opinion of OSITRAN. The GRANTOR may not deny approval without justifiable cause." [Tribunal's translation] The original Spanish reads: "los principales términos del endeudamiento, incluyendo los montos del principal, la tasa o tasas de interés, disposiciones sobre amortización, gastos de proyecto, comisiones, penalidades por pago anticipado, seguros, impuestos, entre otros, requerirán la aprobación del CONCEDENTE, previa opinión del OSITRÁN. El CONCEDENTE no podrá negar la aprobación sin mediar causa justificada." (**Exhibit C-4**, Concession Contract, Cl. 1.44). In other words, Peru reserved the right to reject the proposal, among other reasons, based on the financial terms of the offer. Clause 10.4.7 on the authorization of the EGP expressly provides such right.

<sup>507</sup> *Informe No. 1135-2016-MTC* of 25 November 2016 outlines the grounds for the unfavourable opinion issued by said authority with regard to the EGP request. Such report is attached as **Exhibit C-67**, *Oficio No. 4601-2016-MTC*, 25 November 2016, whereby the decision to reject the EGP proposal was informed.

<sup>508</sup> [Tribunal's translation] The original Spanish reads: "... [i]ncumplimiento del Cierre Financiero por responsabilidad del CONCESIONARIO, de acuerdo a lo establecido en la cláusula novena."

may terminate the Concession for breach by the CONCESSIONAIRE. In such event, the provisions of Clause 15.3 hereof shall apply.”<sup>509</sup>

370. In such event, Kuntur Wasi was entitled to object to the decision of the MTC asserting that the proposal had been accepted by OSITRAN, that it was in compliance with industry practice and that, therefore, there were no grounds for Peru to terminate the Contract.
371. However, this discussion is purely hypothetical. In fact, the MTC neither used this remedy nor alleged a breach by Kuntur Wasi. Rather, the MTC decided to renegotiate the terms of the financial proposal submitted by the Claimants.
372. The Respondent itself explained the reasons for such decision. In its closing arguments, Peru held that, after the financing proposal made by Kuntur Wasi was rejected, “(...) the MTC would have been well within its rights to terminate the Contract because Kuntur Wasi had failed to achieve financial close pursuant to Clauses 9.2.1 and 15.3.2. [...] The MTC, however, decided in good faith to try to work with Kuntur Wasi to move the Project forward because it was in the public interest to do so. The Parties, thus, negotiated Addendum 1...”<sup>510</sup>
373. In the renegotiation process, the MTC proposed that Addendum No. 1 be executed, which completely disregarded the “i” variable. The new financing model radically amended the original scheme under the Concession Contract with regard to Sub-Stage 2 of works execution, replacing the system of guaranteed indebtedness and its components (PAO and FPAO) with a pay-as-you-work (PPO) mechanism similar to that of Sub-Stage 1 (*supra*, paras. 160-162).

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<sup>509</sup> [Tribunal’s translation] The original Spanish reads: “*En caso que el CONCESIONARIO no haya acreditado el Cierre Financiero, se considerará un incumplimiento del CONCESIONARIO y por lo tanto el CONCEDENTE, previo informe emitido por el OSITRAN, podrá optar por invocar la Caducidad de la Concesión por incumplimiento del CONCESIONARIO, siendo de aplicación lo establecido en el Numeral 15.3 del presente Contrato.*” **Exhibit C-4**, Concession Contract, Cl. 9.2.1. The clause refers to non-compliance with the Financial Closing, not to the non-approval of the EGP. Nonetheless, the Financial Closing (at least in this case) required EGP approval. This is so because under Clause 9.2.1, the Concessionaire had the duty to prove availability of third-party financing (i.e., EGP) or its own financing to perform the works. Kuntur Wasi had no financing of its own. As a result, it required EGP authorization.

<sup>510</sup> Transcript, Day 9 (English) 1943:5-13.

374. Addendum No. 1 proposed by the MTC was accepted by Kuntur Wasi and subscribed by the competent Peruvian authorities (*supra*, paras. 164-171).
375. Thus, the Tribunal agrees with the Claimants in that execution of Addendum No. 1 made irrelevant the discussion over the initial proposal made by Kuntur Wasi with regard to financing.<sup>511</sup> Indeed, even if there were reasons to believe that Kuntur Wasi's original proposal was inconsistent with industry practice, the MTC decided to renegotiate the Contract and execute Addendum No. 1, although it was entitled to terminate the Concession Contract for Kuntur Wasi's failure to obtain the Financial Closing.
376. In view of the findings by the *Contraloría* and the CAF, it is significant that the MTC made such a decision.<sup>512</sup> Having identified the Concession Contract's ambiguity as to the "i" variable, both entities suggested that Peru renegotiate the quarterly PAO to achieve better results. None of said entities interpreted Kuntur Wasi's actions as an abuse of the bidding terms proposed by the State.
377. To conclude, the ambiguity in the Concession Contract resulted in irreconcilable differences to achieve the Financial Closing. Once the problem was identified, the Parties agreed to remedy the situation by amending the financing structure. Thus, the discussion as to the financing mechanism applicable to the Project pursuant to the original contractual framework was terminated upon execution of Addendum No. 1. Therefore, the opinion of the Tribunal is that such a discussion does not have any relevance for the purpose of assessing the causes that led Peru to the unilateral and early termination of the Concession Contract.

#### **(ii) Validity of Addendum No. 1**

378. The Tribunal will analyze next if the alleged unlawfulness of Addendum No. 1 is relevant to assess the merits of the reasons upon which early termination of the Concession Contract was based. As indicated above, Peru submits that the objections made by the *Contraloría*

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<sup>511</sup> Claimants' Reply, Section II.L

<sup>512</sup> See para. 169 *supra*.

to Addendum No. 1 rendered *impossible* the execution of the agreement that had been reached, which made the Parties to attempt a new renegotiation.<sup>513</sup>

379. Above all, the Tribunal considers it implausible that the *Contraloría* would have the authority to order the termination of the Concession Contract.<sup>514</sup> It was possible to terminate the Contract upon the occurrence of any of the causes set forth in Clause 15. However, an order by the *Contraloría* was not one of said causes. In any case, the *Contraloría* did not order or recommend such action to the MTC.
380. The *Contraloría* issued a formal opinion regarding Addendum No. 1 in Audit Report No. 265-2017. There are two conclusions in this report: (1) Addendum No. 1 was subscribed within the first three years of the Concession Contract, without authorization of the Authorized Third-Party Lenders; and (2) Addendum No.1 changed the competitive terms defined in the bidding process, thus distorting the economic-financial balance of the Concession Contract. Both conclusions implied, according to the *Contraloría*, a breach of Law Decree No. 1224, which regulates *Asociaciones Público Privadas (Public and Private Partnerships, “PPP Law”)*.<sup>515</sup> Based on these conclusions, the *Contraloría* recommended to the MTC as follows:

*6. To take actions to re-establish the competitive conditions set forth in the bidding terms followed by all bidders and under which the Concessionaire submitted the successful proposal, as well as the technical, legal and economic conditions considered in the proposal of the successful bidder and the Contract executed, to such end, the Law, the bidding terms and conditions, the contract, the directives, guidelines and guides applicable to the execution of the contract shall be taken into account, in order to safeguard the interests of the State.*

*7. To elaborate a procedure that allows for the registration of the agenda for the joint evaluation required by the provision, as well as the documents analyzed.*

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<sup>513</sup> Respondent's Counter-Memorial, paras. 118, 205. Claimants' Reply, paras. 399 *et seq.*

<sup>514</sup> Claimants make this affirmation in their Reply (Claimants' Reply, para. 403).

<sup>515</sup> **Exhibit C-30**, Audit Report No. 265-2017-CG/IMPROY-AC, 19 May 2017, p. 54.

*8. In order to achieve the financial closing within the shortest term possible, to arrange such actions as are required for the Concessionaire to formally present the Permitted Creditor and submit the financing proposal, arranging at the same that the assessment of the received proposals allows to obtain the best financial terms possible in the interest of the State, maintaining the financial-economic balance.*<sup>516</sup>

381. As shown, none of the recommendations orders or suggests the early termination of the Concession Contract.
382. The merit of the objections raised by the *Contraloría* and the effects that its recommendations had on the validity of Addendum No. 1 is a different issue (*supra*, paras. 311, 312, 342, 343). The Tribunal considers that the allegations of unlawfulness asserted by the *Contraloría* are arguable and, in any case, were not mandatory for the MTC.
383. As indicated above, the Audit Report raised two objections to Addendum No. 1. The first objection referred to the possibility of executing an Addendum within the first three years of the Concession Contract without authorization by an Authorized Third-Party Lender.
384. In this respect, the Tribunal considers that the explanation provided by expert witness María Teresa Quiñones is convincing. The Concession Contract had a vacuum that made it impossible to achieve the Financial Closing to the satisfaction of both Parties. Thus, Kuntur Wasi requested to formalize a new agreement with an Addendum subscribed pursuant to the terms of the Regulatory Provisions of Decree Law 1224, Article 54 (b), which governs Public-Private Partnerships. This provision states that “During the first three

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<sup>516</sup> **Exhibit C-30**, Audit Report No. 265-2017-CG/IMPROY-AC, 19 May 2017, p. 55. [Tribunal’s translation] The original Spanish reads: “6. Disponer las acciones para reestablecer las condiciones de competencia establecidas en las bases con las que participaron todos los postores y resultó ganador la propuesta del Concesionario, así como las condiciones técnicas, legales y económicas consideradas en la propuesta del postor ganador y del Contrato suscrito, para cuyo efecto deben tomarse en cuenta la Ley, las bases del concurso, el contrato, las directivas, lineamientos y guías aplicables para la ejecución contractual, en salvaguarda de los intereses del Estado.

7. Disponer la elaboración de un procedimiento que permita el registro de la agenda correspondiente a la evaluación conjunta dispuesta por la norma, así como de la documentación que ha sido materia de análisis.

8. Disponer, a fin de lograr el cierre financiero en el menor plazo posible, las acciones para que el Concesionario acredite formalmente al Acreedor Permitido y presente su propuesta de financiamiento, disponiendo a su vez que la evaluación de las propuestas recibidas permita obtener las mejores condiciones económicas para los intereses del Estado, manteniendo el equilibrio económico financiero.”

(03) years as from the date of execution of the contract, no Addenda to the Public Private Partnership contracts may be subscribed, except in the case of: b) The substantiated requirements of the authorized third-party lenders, associated with the financial closing stage of the contract.”<sup>517</sup>

385. The *Contraloría* held that an Addendum based on such legal ground was not possible at the time, as there was no Authorized Third-Party Lender to make a valid request for amendment.<sup>518</sup> However, under such interpretation it was not possible to apply the provision.
386. For a lender to be deemed an Authorized Third-Party Lender under the terms of the Concession Contract, a formal undertaking was required by such lender to provide financing to the Concessionaire via the execution of Annex 14. However, no lender would undertake such a commitment if the terms of the EGP were not previously approved by the Grantor. Approval of the EGP, in turn, did not seem feasible unless the Concession Contract was amended, as explained above.<sup>519</sup>
387. The purpose of the provision is precisely to authorize an amendment of the Contract in the event any errors or omissions—such as the uncertainty as to the indebtedness rate—make the financial closing of the Project impossible.<sup>520</sup> In this regard, it is reasonable to apply general interpretation criteria that sustain a practical application of the provision over formal criteria that would render it ineffective.

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<sup>517</sup> [Tribunal’s translation] The original Spanish reads: “*Durante los tres (03) primeros años contados desde la fecha de suscripción del contrato, no pueden suscribirse Adendas a los contratos de Asociación Público Privada, salvo que se trate de: b) Los requerimientos sustentados de los acreedores permitidos, vinculados a la etapa de cierre financiero del contrato.*”

<sup>518</sup> According to the definition set forth by the Concession Contract, the “Authorized Third-Party Lenders require authorization by the GRANTOR to prove such condition, provided they submit Annex 14 to the GRANTOR in advance for approval.” [Tribunal’s translation] The original Spanish reads: “*Acreedores Permitidos deberán contar con la autorización del CONCEDENTE para acreditar tal condición, cumpliendo con presentar previamente el Anexo 14 ante el CONCEDENTE para su aprobación.*” (Clause 1.1 of the Concession Contract).

<sup>519</sup> As Ms. Quiñones stated, the Contraloría’s interpretation led to the chicken or egg dilemma: “the financial closing was a prior requirement to petition a bankability Addendum that would allow for the financial closing.” (**Exhibit CER-6**, Quiñones Alayza Report, para. 152). [Tribunal’s translation] The original Spanish reads: “*se necesitaba alcanzar el cierre financiero como requisito previo para solicitar una Adenda de bancabilidad que permitiese alcanzar el cierre financiero.*”

<sup>520</sup> **Exhibit CER-6**, Quiñones Alayza Report, para. 142.

388. The second objection raised by the *Contraloría* to Addendum No. 1 makes sense from the point of view of the State interest involved in a public tender. Indeed, under a tender process, the winning bidder is selected because of a superior proposal in the context of competitive bidding. If after the tender is awarded, its inherent terms are changed, the non-selected bidders are prejudiced because they were discarded to the benefit of a proposal which, ultimately, was amended.<sup>521</sup> The State, in turn, loses the opportunity to partner with a possibly more appropriate bidder. In this respect, the execution of Addendum No. 1 would affect the very nature of the purpose of the bidding process.
389. However, re-establishing the original bidding conditions would imply reopening the debate on how to determine the “i” component of the formula for the Quarterly PAO. Aware of this, the *Contraloría* suggested restoring the competitive conditions by “arranging at the same time that the assessment of the received proposals allows to obtain the best financial terms possible in the interest of the State, maintaining the financial-economic balance.”<sup>522</sup>
390. In other words, the *Contraloría* recommended returning to the original financing scheme, but this time, negotiating the value of the indebtedness rate that would be returned to the Concessionaire to maintain the Contract’s economic and financial balance. Certainly, Kuntur Wasi’s offer in the bidding process did not include a limit to the “i” component, nor a negotiation process for determining such value. No evidence has been submitted in this case as to whether other bidders included these in their proposals.
391. Thus, even if the *Contraloría*’s recommendation did not imply terminating or amending the awarded Concession Contract, it certainly altered the terms upon which the bidders made their offers, particularly as regards the “i” component. It was then an impracticable recommendation, which failed to adequately solve the ambiguity of the Concession Contract. This ambiguity put the Parties in the position of needing to reach a new agreement not prescribed under the original terms.

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<sup>521</sup> **Exhibit CER-6**, Quiñones Alayza Report, para. 158.

<sup>522</sup> **Exhibit C-30**, Audit Report No. 265-2017-CG/IMPROY-AC, 19 May 2017, p. 56. [Tribunal’s translation] The original Spanish reads: “*disponiendo a su vez que la evaluación de las propuestas recibidas permita obtener las mejores condiciones económicas para los intereses del Estado, manteniendo el equilibrio económico financiero.*”



392. In the same vein, the Tribunal has not found sufficient evidence to find that the recommendations made by the *Contraloría* were binding.
393. Both Parties admitted that the MTC was entitled to some degree of discretion to amend the Concession Contract. According to the Organic Law for the National Control System and the General Comptroller's Office of the Republic, government officials may have *some degree of discretion* provided, when they are expressly authorized by the law in force. In these cases, the *Contraloría* cannot challenge the decisions of the MTC for the mere fact of having a different opinion.<sup>523</sup>
394. However, the Parties disagree on the degree of discretion that such provision grants. The Claimants argue that the MTC acted within the discretionary powers granted by the PPP Law to approve, conduct, execute, supervise and audit the private investment promotion processes.<sup>524</sup> In this regard, the recommendations made in the report merely reflected the *Contraloría*'s a non-binding opinion.<sup>525</sup> Meanwhile, Peru asserts that, notwithstanding the MTC's and MEF's discretionary powers, the *Contraloría* is at all times authorized to supervise the correct use of public funds in Peru.<sup>526</sup> Upon the amendment of the financial-

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<sup>523</sup> **Exhibit CL-262**, Law No. 29622 amending Law No. 27785, Fourth Supplementary Final Provision: "When the law in force expressly gives government officials some degree of discretion to make certain decisions, the agencies of the National Control System cannot challenge the exercise of such discretionary power for the mere fact of having a different opinion. Those decisions may only be challenged if they were taken without adequate consideration of the facts or risks at the appropriate time, or based upon the results obtained in view of the purposes and goals set, or, in such cases where the law allows for several interpretations; the decision deviates from the Interpretation adopted by the guiding agency competent on the matter." [Tribunal's translation] The original Spanish reads: "*En los casos en que la legislación vigente autorice a los funcionarios expresamente algún grado de discrecionalidad para determinada toma de decisión, los órganos del Sistema Nacional de Control no pueden cuestionar su ejercicio por el solo hecho de tener una opinión distinta. Tales decisiones solo pueden observarse si fueron tomadas sin una consideración adecuada de los hechos o riesgos en el momento oportuno. O por los resultados logrados según los objetivos y metas planteados, o cuando, en los casos que la normativa permita varias interpretaciones; la decisión se aparte de la Interpretación adoptada por el órgano rector competente en la materia.*"

<sup>524</sup> Claimants' Reply, para. 405 citing **Exhibit CL-9**, Legislative Decree governing the framework for private investment promotion through Public-Private Partnerships and projects in assets approved by Legislative Decree No. 1224 of 24 September 2015, Sixth Supplementary Final Provision.

<sup>525</sup> Claimants' Reply, paras. 406, 407.

<sup>526</sup> Respondent's Counter-Memorial, paras. 111, 112.

economic structure of the Concession Contract, the decisions of the MTC would be susceptible of review by the *Contraloría*.<sup>527</sup>

395. The Tribunal also notes that Peru raised this interpretation for the first time in this arbitration. At the time the dispute arose, an MTC senior official declared before the Peruvian Congress<sup>528</sup> and on broadcast television that it disagreed with the *Contraloría*'s position.<sup>529</sup> Meanwhile, the MEF issued a public statement affirming the discretionary power of the officials involved in the execution of the Project.<sup>530</sup> Peru even requested an independent study that could corroborate the *Contraloría*'s conclusions. However, this report concluded that, on the contrary, the execution of Addendum No. 1 was beneficial to the Peruvian State.<sup>531</sup>

396. Even during the arbitration, Mr. Bruno Giuffra, the Respondent's witness, argued that the Audit Report was not binding:

*Mr Giuffra: (...) From the outset, I tried to look for a way out, regardless of the Comptroller's proposals. Perhaps, we could find an option D accepted by the Comptroller's Office.*

*Mr Bullard: You didn't consider the Comptroller's Office's Report as binding.*

*Mr Giuffra: It is known that it is not a binding Report.*<sup>532</sup>

397. In view of the considerations above, the Tribunal finds Peru's position unconvincing. While there is a legality argument in favour of the binding nature of the *Contraloría*'s

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<sup>527</sup> This was explained by Peru at the closing arguments: "In other words, while the MTC may decide to amend the contract, it does not have the discretion to change the economic balance of the Concession and its economic equilibrium. Because the Contraloría has the authority to oversee the use of public funds, it did have the power to review the Addendum and to ensure that any changes made to the Contract did not adversely affect the economic equilibrium of the Contract and did not cause harm to the Peruvian Treasury." Transcript, Day 9 (English), 1945:1-10.

<sup>528</sup> **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, Response to Question No. 1, p. 12.

<sup>529</sup> **Exhibit C-120**, News clip from Buenos Días Perú, "Vizcarra sobre Chinchero: Decidimos dejar sin efecto contrato que desde el inicio partió mal," 22 May 2017, minute 1:04-1:16.

<sup>530</sup> **Exhibit C-78**, "Comunicado en relación a observaciones realizadas por la Contraloría," 22 May 2017, MEF.

<sup>531</sup> **Exhibit C-246**, *Análisis del Informe N°265-2017-CG/MPROY — AC, de la Contraloría General De La República*, Jorge Alejandro León Ballén, September 2017, conclusion 5.1.3.

<sup>532</sup> Transcript, Day 5 (English), 1016:19-1017:3.

conclusions, the evidence shows that all Peruvian officials acted—both before and after execution of Addendum No. 1—with the conviction that such conclusions were not binding upon the MTC, but simply a recommended course of action.

398. Accordingly, the Tribunal does not find sufficient grounds to demonstrate the unlawfulness of Addendum No. 1, nor that the recommendations based on the *Contraloría*'s objections were binding. Furthermore, the administrative law experts of both Parties agreed that, at the time of the early termination of the Contract, Addendum No. 1 was valid and in force.
399. María Teresa Quiñones, on behalf of the Claimants, dedicated an entire section of her legal report to justify the validity of Addendum No. 1,<sup>533</sup> and when the Tribunal asked her whether it was in force at the time of the termination of the Concession Contract, she stated: “the text which was in force existed in the Contract which was modified by Addenda 1. That was the text in force.”<sup>534</sup>
400. In turn, the Respondent's expert Enrique Ferrando, when asked the same question, stated that he agreed with Dr. Quiñones and added that “the Contract had been modified by Addenda 1, and that was a contractual relationship without prejudice that it was being questioned for reasons of nullity, but it was in force.”<sup>535</sup>
401. While the Tribunal does not doubt that the *Contraloría* had raised issues about when and how Addendum No. 1 was subscribed, it is clear that the report issued by such authority did not provide for the Addendum's termination or invalidity. Neither did the MTC or the MEF, nor is there any evidence in the file to conclude that the Addendum was no longer effective by operation of the law. In short, Addendum No. 1 was still in force at the time of the termination and provided for a specific mechanism to finance and execute the Project.
402. In conclusion, the Concession Contract as amended by Addendum No. 1 was the contractual framework in force at the time of termination by Peru. The recommendations

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<sup>533</sup> **Exhibit CER-6**, Quiñones Alayza Report, chapter IV, Section A on the “Analysis of the reports issued by *Contraloría*,” paras. 137-165.

<sup>534</sup> Transcript, Day 9 (English), 1793:2-4.

<sup>535</sup> Transcript, Day 9 (English), 1793:5-9.

made by the *Contraloría* did not bind the MTC, nor did they imply the termination of the Contract. While it is reasonable for the MTC to be interested in adapting the Project to the supervising agency's position, Addendum No. 1 could be executed, as it was still in force, without amendments. Indeed, the Roadmap (“*Hoja de Ruta*”) did not alter the force of Addendum No. 1, but simply invited the Parties to negotiate in good faith a new financing scheme. Under such terms, the *Contraloría*’s disagreement with Addendum No. 1 does not amount to an adequate ground to justify the termination of the Concession Contract for reasons of public interest. In the same vein, it cannot be inferred from the objections raised against Addendum No. 1 that Kuntur Wasi had been a deficient concessionaire for the execution of the Project or that the feasibility of the Project had been affected by deficiencies attributable to the Claimants.

### **(iii) Additional term for Project financing**

403. The third circumstance that, in Peru's opinion, motivated the termination of the Concession Contract was Kuntur Wasi's request, made in the final negotiations between the Parties, for six additional months to obtain financing. The analysis of this motive requires a review of the events that preceded Kuntur Wasi’s alleged request.
404. The execution of Addendum No. 1 implied two relevant changes in the financial structure of the Project: (1) the substitution of the PAO system applicable to Sub-Stage 2, with a PPO system; thus, both the execution of works under Sub-Stage 1 and Sub-Stage 2 would be financed by Peru, according to the progress of the work and the approval by OSITRAN; (2) Peru would deliver an advance payment amounting to USD 40 million to finance the execution of the works under Sub-Stage 2, which would be reimbursed by Kuntur Wasi through discounts in the PPOs.
405. On 22 February 2017, the *Contraloría* issued a preliminary report regarding Addendum No.1, warning of risks that Kuntur Wasi might use the Advance Payment for purposes other than those agreed upon by the Parties.<sup>536</sup> On 27 February 2017, the MTC sent a letter to Kuntur Wasi requesting the suspension of the Concession Contract.<sup>537</sup> A few days later,

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<sup>536</sup> **Exhibit C-29**, *Oficio No. 00331-2017-CG/DC*, 22 February 2017, p. 1.

<sup>537</sup> **Exhibit R-75**, *Oficio No. 0813-2017-MTC/25*, 27 February 2017.

the Parties suspended their obligations under the Contract.<sup>538</sup> In May 2017, the *Contraloría* issued Audit Report 265-2017 with a final opinion on Addendum No. 1.<sup>539</sup> As discussed in the preceding section, the *Contraloría* raised certain potential legal issues and risks in relation to Addendum No. 1 and recommended that the original financing structure be re-established, with the adjustments already mentioned.

406. Despite these recommendations, the MTC decided to follow an alternative path. Following Minister Vizcarra’s resignation, the new Minister proposed to Kuntur Wasi that they find a new solution acceptable to the *Contraloría*.<sup>540</sup> In this context, the Parties decided to extend the suspension of their obligations and discussed potential alternatives. The detail of these conversations is unknown to the Tribunal. The only written record is a document signed on 1 June 2017 by Minister Giuffra and Mr. Vargas (the Roadmap) (“*Hoja de Ruta*) (*supra*, paras. 185, 186).
407. The Roadmap outlines two alternatives: “1. Comprehensive renegotiation; or 2. Mutual termination in case the first [alternative] does not work.” Regarding the renegotiation, the document lists the points that would be included in an eventual new addendum. Among the points relevant to the discussion, the Parties agreed that: there would be no Advance Payment or interest payment, the term of the Concession would be reduced to 25 years and PPO would be maintained as the financing mechanism for the execution of the works under Sub-Stage 2.<sup>541</sup>
408. According to Peru, a few days after subscribing to this document, Kuntur Wasi reportedly asked Minister Giuffra for an additional six months to secure financing under the terms of the Roadmap. The Parties have discussed at length the occurrence of this conversation and its relevance to Peru’s subsequent termination of the Concession.

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<sup>538</sup> **Exhibit C-31**, *Acta de acuerdo de Suspensión Temporal de Obligaciones Contractuales*, 2 March 2017.

<sup>539</sup> **Exhibit C-30**, Audit Report No. 265-2017-CG/IMPROY-AC, 19 May 2017.

<sup>540</sup> Transcript Day 5 (Spanish), 1175:4-16. See **Exhibit C-79**, *Oficio No. 2118-2017-MTC/25*, 24 May 2017.

<sup>541</sup> **Exhibit R-16**, Letter from Minister Giuffra to Kuntur Wasi, 1 June 2017.

409. Peru argues that, after three years of trying to achieve Financial Closing, this request evidenced Kuntur Wasi's inability to execute the Project promptly or even at all.<sup>542</sup> Kuntur Wasi contends, instead, that there is no record to prove that this conversation occurred. In any event, if it did occur, it was a reasonable request considering the changes that the Roadmap implied in the financial structure of the Contract.<sup>543</sup>
410. The Tribunal considers it unnecessary to rule on the actuality of this conversation for the purposes of assessing Peru's grounds for terminating the Concession Contract. Assuming that Kuntur Wasi's request did occur, the Tribunal finds that, contrary to Peru's allegation, it was not indicative of the Concessionaire's lack of financial capacity to carry out the Project.
411. In the Tribunal's view, the facts and circumstances seem to indicate that the six-month term proposed by Kuntur Wasi was reasonable, considering the size of the Project and the changes proposed by the Parties in the Roadmap that deviated from Addendum 1.
412. The terms of the Roadmap differed substantially from the terms of Addendum No. 1, which was the agreement in force at that time. In particular, the Roadmap contemplated a financing scheme to be followed by the concessionaire *with no advance payment or interest* payments. This suggests that under the new scheme it would be more difficult to secure financing than under the mechanism contemplated in the previous agreements or at least in Addendum No.1.
413. Indeed, the Concession Contract originally contemplated a PAO payment system that would allow Kuntur Wasi to recover the amounts invested for the execution of the works under Sub-Stage 2, plus interest associated with the financing and an additional profit (spread) of at least 2.5%. Under this structure, Kuntur Wasi conducted a competitive process that lasted approximately seven months to select Goldman Sachs as the potential lender for the Project.<sup>544</sup>

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<sup>542</sup> Respondent's Counter-Memorial, para. 121, 122.

<sup>543</sup> Claimants' Closing Statement, Transcript, Day 9 (Spanish), 2126:4-2128:6.

<sup>544</sup> **Exhibit CWS-1**, First José Balta Statement, paras. 18, 19.

414. Addendum No.1 simplified the financial structure of the Contract, as it made Peru responsible for the payment of the work based on progress and included an Advance Payment of USD 40 million. Thus, Kuntur Wasi would no longer have the duty to obtain financing for the works under Sub-Phase 2 and would be in charge of the operation of the Chinchero Airport for 40 years.
415. The renegotiation proposal provided for new changes in the financing method applicable to the Concession Contract. Although the Sub-Phase 2 works would still be financed by Peru through a PPO system, under this agreement there would be no Advance Payment, and the term of the Concession would be reduced from 40 to 25 years. Undoubtedly, these were significant changes that would affect the preliminary commitment made by any lender. In this regard, expert Finnerty stated that a material change in the financing structure would require obtaining the lenders' commitment again:

*PRESIDENT LOW: So, all you're really saying is that if there's a material change you may have to go back to the drawing board with the lenders; is that correct?*

*[Mr FINNERTY]: That's correct. If there's a material change and, as a result, one of lenders now refuses to sign the commitment letter, then you've got to make some changes to the Project or find a substitute, and then go back to the MTC...*<sup>545</sup>

416. Given that (i) the lender selection process under the original scheme took approximately seven months, (ii) the Parties were considering substantial amendments to the Concession Contract, reducing the term of the Concession to almost half of the original period, and (iii) Peru's financial expert confirmed that a substantial change in the Project would require renewing the loan commitments, the Tribunal finds that Kuntur Wasi's request for a six-month period to obtain financing under the new scheme being negotiated was reasonable.
417. The Tribunal also dismisses the allegation that such request evidenced that Kuntur Wasi was unable or unfit to carry out the Project.

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<sup>545</sup> Transcript, Day 4 (English), 837:1-9.

418. Mr. Giuffra stated that the excessive request for time to raise funds “was a clear sign that it was not prepared to proceed with the Project and did not have the necessary financing to do so. Mr. Vargas’ statement led me to deeply doubt about Kuntur Wasi’s ability to commit to carrying out and actually completing the Project.”<sup>546</sup>
419. Aside from Mr. Giuffra’s statements, there is no record evidencing an objective inability of Kuntur Wasi to honour its commitments. Professor Finnerty argued, in the third question of his legal report, that Kuntur Wasi relied on a third party for financing, and that in any event third party financing would require prior agreement between the Parties on the terms of the Concession Contract.<sup>547</sup>
420. None of the above considerations is indicative of an inability to carry out the Project. While Kuntur Wasi did not have the resources to finance the Project on its own, expert Finnerty stated in these proceedings that Corporación América’s and Andino’s financial support made it feasible for it to do so.<sup>548</sup> On the other hand, the need for a prior agreement between the Parties shows that Kuntur Wasi was not required to have immediate financing, as the terms of the Project were under a renegotiation process.
421. Moreover, if Peru considered the six-month term to be excessive, it would have been reasonable for it to seek to negotiate a shorter term with Kuntur Wasi. It is worth noting that the Parties had agreed to attempt a *comprehensive renegotiation* of the Concession Contract, which would certainly involve resolving issues such as the matter supposedly raised by Kuntur Wasi. In view of these considerations, it does not seem justified for Peru to immediately adopt the decision not to continue with the Concession Contract solely based upon a request by Kuntur Wasi for an additional period of time to secure financing based on revised terms of the Concession.

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<sup>546</sup> **Exhibit RWS-1**, First Giuffra Statement, para. 11. [Tribunal’s translation] The original Spanish reads: “*era una clara señal de que no estaba preparado para seguir Adelante con el Proyecto y no disponía del financiamiento necesario para hacerlo. La afirmación del Sr. Vargas me hizo dudar seriamente de la habilidad de Kuntur Wasi para comprometerse a llevar a cabo el Proyecto y culminarlo.*”

<sup>547</sup> **Exhibit RER-3**, First Finnerty Report, para. 56-59.

<sup>548</sup> Transcript, Day 4 (English), 838:21-839:3.



422. In conclusion, Kuntur Wasi's alleged request for a six-month period to secure financing under the Roadmap structure was reasonable and appropriate to the Project's status. Also, it is not evidence of Kuntur Wasi's alleged financial inability to carry out the Project. Consequently, the reason invoked by Peru cannot justify the early termination of the Concession Contract.

**(iv) Inexistence of a public interest justifying the termination of the Concession Contract**

423. The analysis of the case records shows that there were no objective reasons to conclude that Kuntur Wasi was a deficient contractor for the execution of the Project. Indeed, the submission of a financing proposal that in Peru's opinion was unacceptable is explained by the ambiguity in the Concession Contract. The decision to subscribe to Addendum No. 1 was joint and informed. The subsequent objections raised by the *Contraloría* did not make it impossible to execute such Addendum and, in any case, were not attributable to Kuntur Wasi. There are no reasons either to disapprove Kuntur Wasi's behavior in the negotiations following the objections raised by the *Contraloría*. The alleged request for a six-month period to obtain financing under the new contractual framework provided for in the Roadmap was reasonable and does not evidence a technical inability to carry out the Project.
424. As explained above, for the Concession Contract to be terminated for *well-founded reasons of public interest*, required, at least, the existence of one reason to justify the termination. Dr Ferrando elaborated on this point as follows:

*In fact, the expression "well-founded" refers to the existence of a causal link between the termination and the public interest intended to be protected via the termination. That is to say, that the reason for the unilateral termination must actually be the reason alleged; there must be coherence so that the ground supporting the "public interest" shall not be arbitrary or alien to the reason for termination. Well-founded is not grounded, explained, motivated*

*or developed.*<sup>549</sup>

425. The Tribunal considers that the reason of public interest invoked by Peru to terminate the Concession Contract does not meet this standard. There is not sufficient evidence to prove that Kuntur Wasi was a deficient partner for the execution of the Project; so, such circumstance was not a legitimate cause for the MTC's decision.
426. In view of this conclusion, it is unnecessary to rule on the discussion between the Parties' legal experts as to whether it was necessary to provide the reasons for such decision and the moment when such reasons should be given. The question is not whether Peru sufficiently justified its decision, but whether its decision was based on any reason to justify the early termination of the Concession Contract. The Tribunal considers it was not.
427. Based on the analysis above, the Arbitral Tribunal finds that Peru breached the Concession Contract by terminating it without a well-founded reason of public interest.

**(2) Peru acted in bad faith and its conduct was inconsistent with the promises and commitments made to the Claimants**

***a. The Parties' Positions***

**(i) The Claimants' Position**

428. The Claimants' second claim is that Peru acted in bad faith and in a manner inconsistent with the promises and commitments it made to the Claimants when it terminated the Concession Contract.
429. To support their claim, the Claimants rely on Article 1362 of the Peruvian Civil Code, which establishes that contracts must be negotiated, entered into and performed in good faith. Under Peruvian law, the principle of good faith encompasses several standards that a diligent businessperson is required to observe in his or her dealings, including: the duty

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<sup>549</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, para. 136. [Tribunal's translation] The original Spanish reads: "*En realidad, la expresión "debidamente fundado" está referido a la existencia de un nexo de causalidad entre la resolución y el interés público que se busca proteger con la resolución. Es decir que sea cierto, que sea verdad que la razón de la resolución unilateral fue la que se argumenta, que exista una congruencia, de modo tal que el sustento del "interés público" no sea arbitrario o ajeno a la razón de la resolución. Debidamente fundado no es fundamentado, explicado, motivado o desarrollado.*"

to act in a coherent manner, the duty to act with transparency, and the prohibition on acting in a manner that is contradictory with previous actions (*doctrina de actos propios*).<sup>550</sup>

430. According to the Claimants, it is well settled under Peruvian law that public entities are also bound to act in good faith and hence, are bound by the doctrine of *actos propios*, which prevents them from acting in a manner inconsistent with their previous actions.<sup>551</sup> In particular, the Claimants rely on Article 1.8 of the *Ley de Procedimiento Administrativo General*, which establishes that public authorities must act in good faith and cannot go against their own actions, and Article 1.15 of the same law, which requires that public entities act in a manner consistent with individuals' legitimate expectations. According to the Claimants, to prove that there has been a breach of the *actos propios* doctrine, three conditions must be met: (i) there must be a binding conduct that creates a legitimate expectation; (ii) there must be a contradictory conduct; and (iii) there must be identity of the parties in elements (i) and (ii).<sup>552</sup>
431. In this case – the Claimants argue – their legitimate expectations arose not only from the Concession Contract and the Guarantee Agreement themselves, but also from the statements made by all relevant authorities and high-ranking officials in Peru to the effect that Addendum No. 1 was valid, that there was no impediment to the execution of the Concession Contract and that there was absolutely no public interest reason that would support the termination of the Contract.<sup>553</sup> In particular, the Claimants argue that the following conduct indicated that Peru supported and approved Addendum No. 1 up until 13 July 2017:

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<sup>550</sup> Claimants' Memorial, paras. 304-306, citing, among others: **Exhibit CL-17**, *Sala Civil Permanente de la Corte Suprema de la República*, Cassation No. 88-2014, Lima Sur, 2 March 2015, p. 1; **Exhibit CL-18**, *Sala Civil Transitoria de la Corte Suprema*, Cassation No. 1322-2006, Puno, 6 November 2006, pp. 12, 13.

<sup>551</sup> Claimants' Memorial, paras. 308, 309; **Exhibit CL-21**, Morón Urbina, Juan Carlos, *COMENTARIOS A LA LEY DEL PROCEDIMIENTO ADMINISTRATIVO GENERAL, TEXTO ÚNICO ORDENADO DE LA LEY NO. 27444*, 12<sup>a</sup> edición. Lima: Gaceta Jurídica, 2017, p. 103.

<sup>552</sup> Claimants' Memorial, paras. 312, 314, 315. See also Claimants' Reply, paras. 272 *et seq* in relation to the application of the *actos propios* doctrine to Minister Vizcarra's statements.

<sup>553</sup> Claimants' Memorial, paras. 315, 318 ; Claimants' Reply, para. 96 *et seq*.

- Report of 20 January 2017, issued by OSITRAN’s Governing Board in favor of Addendum No. 1, which indicated that:

*[A]s under the proposed payment mechanism the Grantor shall not pay interest but the amount of the Pay-As-You-Work Fund proposed, the economic-financial balance is not affected, and the value of money is maintained in time, since the Grantor will pay the exact amount of the Pay-As-You-Work Fund proposed by the Concessionaire and which is a part of it’s financial proposal.*<sup>554</sup>

- Report of 27 January 2017 issued by the MEF, also in favour of Addendum No. 1.<sup>555</sup>
- Television statement by President Kuczynski on 30 January 2017, in which he indicated that Addendum No. 1 would save approximately US\$590 million.<sup>556</sup>
- Statement by Minister Vizcarra, on 1 February 2017, indicating that, having analyzed the terms of Addendum No. 1, the Council of Ministers had decided to approve it because it significantly reduced the costs.<sup>557</sup>
- MTC’s video, of 1 February 2017, reiterating that, with Addendum No. 1, the Government “has managed to avoid litigation that would have lasted years, and will save the State USD 590 million at face value.”<sup>558</sup>

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<sup>554</sup> Claimants’ Memorial, para. 319, citing **Exhibit C-72**, *Oficio Circular No. 006-17-SCD-OSITRAN*, attaching the *Acuerdo No. 2009-607-17-CD-OSITRAN*, 20 January 2017, p. 5. [Tribunal’s translation] The original Spanish reads : “... con el esquema de pago propuesto, el Concedente no pagará intereses, sino el monto del Fondo de Pago por Obras propuesto no se modifica el equilibrio económico financiero, manteniendo el valor del dinero en el tiempo, toda vez que el Concedente pagará exactamente el monto del Fondo de Pagos por Obras que fue propuesto por el Concesionario y que forma parte de su propuesta económica.”

<sup>555</sup> Claimants’ Memorial, para. 320.

<sup>556</sup> Claimants’ Memorial, para. 322 ; **Exhibit C-136**, News article published by RPP NOTICIAS, “Kuczynski : ‘Vamos a ir adelante con el aeropuerto de Chinchero’,” 30 January 2017.

<sup>557</sup> Claimants’ Memorial, para. 323; **Exhibit C-75**, News article published by RPP NOTICIAS, *Vizcarra: “PPK viajará este viernes al Cusco para iniciar obras en Chinchero,”* 1 February 2017.

<sup>558</sup> Claimants’ Memorial, para. 324, citing **Exhibit C-137**, Video published on the *Portal Oficial del Ministerio de Transportes y Comunicaciones of Peru*, 1 February 2017. [Tribunal’s translation] The original Spanish says: “ha conseguido evitar un litigio que hubiese durado años y permitirá ahorrar 590 millones de dólares al Estado a valor nominal.”

- Memorandum of 2 February 2017 issued by the MTC, which indicated that Addendum No. 1 was motivated by the public interest need to provide the city of Cuzco-Chinchero with a new airport; that Addendum No. 1 did not alter the conditions of competition of the tender process; and that it would result in savings for the State of between US\$235 million and US\$370 million in interest.<sup>559</sup>
- Statement by Minister Vizcarra before the Peruvian Congress on 9 February 2017, in which he once again publicly spoke of the benefits of Addendum No.1, stating that “this Addendum favors the State.”<sup>560</sup>
- Statement by Minister Vizcarra before the Peruvian Congress, on 18 May 2017 (after the *Contraloría* had issued its report criticizing Addendum No. 1), in which he stated that Addendum No. 1 had been validly and legally negotiated, and that there was no public interest reason that would support the termination of the Concession Contract.<sup>561</sup>
- Report issued by the MEF on 22 May 2017, in response to the *Contraloría*’s observations on Addendum No. 1, in which the MEF concluded that Addendum No. 1 was beneficial to the State and resulted in estimated savings for the State of between US\$245 million and US\$340 million.<sup>562</sup>
- Statement by Ms. Fiorella Molinelli (then Vice-Minister of Transport and Communications) on 22 May 2017, in which she indicated that the *Contraloría*’s report

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<sup>559</sup> Claimants’ Memorial, para. 321; **Exhibit C-116**, Memorandum No. 528-2017-MTC/25, 2 February 2017, paras. 5.17; 8.16; 10.9.

<sup>560</sup> Claimants’ Memorial, para. 325, citing **Exhibit C-117**, Video of Minister Martín Vizcarra before the *Comisión Permanente del Congreso, Congreso de la Republica del Perú*, 9 February 2017, minute 29.30 onwards. [Tribunal’s translation] The original Spanish reads: “*esta Adenda favorece al Estado.*”

<sup>561</sup> Claimants’ Memorial, para. 325; **Exhibit C-33**, Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco, 18 May 2017, pp. 15, 23, 24.

<sup>562</sup> Claimants’ Memorial, para. 329; **Exhibit C-78**, “*Comunicado en relación a observaciones realizadas por la Contraloría,*” MEF, 22 May 2017, para. 1.5.

was “not serious, contrary to the Comptroller’s allegations, political lacking technical and legal basis.”<sup>563</sup>

432. All these actions of the State, together with its having signed the Concession Contract and the Guarantee Agreement, gave rise to the legitimate expectation that, if Peru were to terminate the Contract, it would do so in accordance with the requirements set out in the Contract and under Peruvian law.<sup>564</sup>
433. Yet on the Claimants’ view, this is precisely what Peru failed to do. Only three days after asserting before the Congress that there was no public interest reason to terminate the Concession Contract, on 21 May 2017 Minister Vizcarra announced that the State would terminate the Concession Contract and Addendum No. 1.<sup>565</sup> Furthermore, on 4 June 2017, just three days after the Renegotiation Proposal, the new Minister of Transport, Minister Giuffra, announced that “Kuntur Wasi [would] not be involved in the construction and operation of the Chinchero International Airport.”<sup>566</sup> This was followed by an official announcement, on that same day, by the MTC indicating that the Contract would be terminated by mutual agreement.<sup>567</sup>
434. According to the Claimants, through the MTC, OSITRAN and the MEF, Peru created legitimate expectations on the Claimants only to breach those expectations a few days later, through the MTC’s termination of the Concession Contract.<sup>568</sup> Thus, Peru breached its obligations under the *actos propios* doctrine.

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<sup>563</sup> Claimants’ Memorial, para. 330, citing **Exhibit C-121**, News clip from CANAL N “*Viceministra Molinelli: Informe de Contraloría no tiene sustento técnico*,” 22 May 2017. [Tribunal’s translation] The original Spanish says: “*poco serio, es un informe, contrario a lo que dijo el Contralor, político, carece de sustento técnico, carece de sustento legal.*”

<sup>564</sup> Claimants’ Memorial, para. 332.

<sup>565</sup> Claimants’ Memorial, para. 335, citing **Exhibit C-35**, News article published by Semana Económica, “*Aeropuerto de Chinchero: Ejecutivo dejará sin efecto contrato de concesión*,” 22 May 2017; **Exhibit C-34**, News clip from Cuarto Poder, “*Martín Vizcarra: ‘Chinchero va, pero el Contrato no’*,” 21 May 2017.

<sup>566</sup> Claimants’ Memorial, para. 337, citing **Exhibit C-40**, News article published by El Comercio, “*Gobierno y Kuntur Wasi acordaron resolver contrato por Chinchero, anuncia Giuffra*,” 4 June 2017. [Tribunal’s translation] [Tribunal’s translation] The original Spanish reads: “*Kuntur Wasi no participará en la construcción y operación del aeropuerto internacional de Chinchero.*”

<sup>567</sup> Claimants’ Memorial, para. 337.

<sup>568</sup> Claimants’ Memorial, para. 340-342.

435. Finally, the Claimants argue that a contracting party's failure to act in good faith gives the non-breaching party the right to be compensated for any damages, pursuant to Article 1321 of the Peruvian Civil Code.<sup>569</sup>

### **(ii) The Respondent's Position**

436. The Respondent does not deny that Peruvian law sets out a general obligation to act in good faith, or that the doctrine of *actos propios* applies to public entities. It also agrees with the Claimants that, to establish a breach of the doctrine of *actos propios*, the three elements set out above in paragraph 430 must be considered.<sup>570</sup> Where the Respondent disagrees with the Claimants is on whether elements (i) and (ii) were actually met in the present case.<sup>571</sup>

437. First, the Respondent argues that the alleged acts of the State in support of Addendum No. 1 do not constitute "binding conduct" for purposes of an *actos propios* analysis. According to the Respondent, the fact that some public officials publicly supported the Addendum does not bind the State. Furthermore, the Claimants knew (or should have known) that the Addendum could be subject to the *Contraloría*'s review and that if the *Contraloría* had negative findings, the State was obligated to act in accordance with those findings.<sup>572</sup>

438. Secondly, the Respondent alleges that it always acted in a consistent manner, driven to achieve the public interest of building the Chinchero Airport. In the Respondent's view, it was precisely to achieve the public interest that Peru decided to open the tender process in 2010; to award the Concession to Kuntur Wasi with the expectation of having a new airport built by 2021; to reject Kuntur Wasi's unreasonable financial package; to try to renegotiate the Contract through Addendum No. 1 in the face of Kuntur Wasi's inability to achieve financial closure; to engage in negotiations with Kuntur Wasi again, when the *Contraloría* – acting within its legal capacities and exercising its powers – provided observations with respect to Addendum No. 1; and to terminate the Concession Contract when it became

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<sup>569</sup> Claimants' Memorial, para. 304.

<sup>570</sup> Respondent's Counter-Memorial, paras. 215, 216.

<sup>571</sup> Respondent does not deny that there is an identity of the parties, but argues that there is no violation of the *actos propios* doctrine because elements one and two fail. See Respondent's Counter-Memorial, para. 220.

<sup>572</sup> Respondent's Counter-Memorial, para. 217, citing **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 166-171.

clear that the Parties would not be able to agree on how to amend the Contract and move forward with the Project.<sup>573</sup>

***b. The Tribunal's Analysis***

439. The Claimants assert that the Peruvian Government's actions are contrary to its prior own acts and is therefore in breach of its good faith duty. In essence, the doctrine of *actos propios* requires that the contracting party "observe in the future such conduct as may have been inferred from such party's prior actions."<sup>574</sup>
440. The Parties agree that for the doctrine of *actos propios* to apply three elements are required: (i) a relevant or binding conduct, *i.e.*, a source of legitimate expectation in the other party, (ii) a subsequent incoherent conduct, and (iii) identity of the parties in the first and second elements.<sup>575</sup>
441. To assess the first requirement, not only does the prior conduct actually displayed by the Peruvian Government have to be determined, but also the expectations derived from such conduct. The Claimants' claim is confusing in this regard. Based upon the filings made by the Parties, the Tribunal identifies two expectations that, in Kuntur Wasi's view, would have been affected: (i) compliance with the contractual requirements in the event that Peru decided to terminate the Contract<sup>576</sup> and (ii) Peru's endorsement of Addendum No. 1 and, therefore, the continuation of the Project.<sup>577</sup>
442. In this Tribunal's view, the first expectation that the Claimants allege was violated cannot amount to a breach of the good faith duties distinct from the duties agreed under the Contract. Indeed, Kuntur Wasi alleges that the Peruvian Government's actions led to "Kuntur Wasi's certainty, expectation and right such that, if Peru were to terminate the

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<sup>573</sup> Respondent's Counter-Memorial, paras. 218, 219.

<sup>574</sup> **Exhibit MTQ-39**, Díez Picazo, Luis (1963), "*La doctrina de los actos propios*", Barcelona, España: Bosch. P.245., cited in **Exhibit CER-6**, Quiñones Alayza Report, para. 172. [Tribunal's translation] The original Spanish reads: "*observar en el futuro la conducta que los actos anteriores hacían prever.*"

<sup>575</sup> Claimant's Memorial, para. 312; Respondent's Counter-Memorial, para. 216.

<sup>576</sup> Claimants' Memorial, para. 332.

<sup>577</sup> Claimants' Memorial, para. 315.



Contract, it would proceed in compliance with the stipulated requirements.”<sup>578</sup> However, Kuntur Wasi had not only the *expectation* that a unilateral termination would be exercised in accordance with the Contract, but also a *right* enforceable under the Contract.

443. As reviewed above, Addendum No. 1 was validly entered into and did not result in grounds for Contract termination. This circumstance was acknowledged by the Peruvian Government's representatives, who confirmed that Addendum No. 1 was legal and rejected the *Contraloría*'s objections.<sup>579</sup> In this sense, even if it might be considered that Peru acted in a contradictory manner by terminating the Contract, such contradiction is no different from the breach of the Contract.
444. The doctrine of *actos propios* identifies a duty related to the contractual obligation to conduct business in a consistent manner.<sup>580</sup> However, when the expectation that is claimed to have been violated was agreed upon under a contract, the question of a breach of the good faith duty becomes a question of breach of contract, as alleged by Kuntur Wasi and as discussed in the previous section (*supra*, paras. 288 *et seq.*). The analysis of the claim for breach of the doctrine of *actos propios* implies a determination as to whether Peru's actions gave rise to expectations *other than* those expressly agreed upon in the Contract. As a result, the first expectation alleged by the Claimants as having been violated cannot be assessed as matter of *actos propios*, but of contractual breach.

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<sup>578</sup> Claimants' Memorial, para. 332. [Tribunal's translation] The original Spanish reads: “[G]eneró la seguridad, la expectativa y el derecho de Kuntur Wasi de que, si Perú iba a decidir resolver el Contrato de Concesión, lo haría cumpliendo los requisitos estipulados expresamente...” Law expert Eduardo Benavides also confirmed that this would be at least one of the expectations that the Claimants allege as defrauded. With regard to Kuntur Wasi's claim in this respect, the expert stated that “If the State, through administrative acts, official admissions by its representatives, formal communications and contractual representations, generates in the concessionaire the confidence that the Project will be executed, that the State will honour its commitments and that the concession will be respected, a legitimate expectation is generated in the concessionaire that the State will respect the concessionaire's rights and will comply with its obligations in defence of the concession.” (Exhibit CER-7, Benavides Torres Report, para. 147) [Tribunal's translation] The original Spanish reads: “Si el Estado, a través de actos administrativos, reconocimientos oficiales de sus representantes, reconocimientos formales y declaraciones contractuales, genera en el concesionario, la confianza de que el Proyecto será ejecutado, que el Estado cumplirá sus compromisos y que se respetará la concesión, se genera una confianza legítima en el concesionario de que el Estado respetará los derechos del concesionario y cumplirá con sus obligaciones, defendiendo la concesión.”

<sup>579</sup> Exhibit C-33, Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco, 18 May 2017, p.15; Exhibit C-78, “Comunicado en relación a observaciones realizadas por la Contraloría,” MEF, 22 May 2017; Exhibit C-121, News clip from CANAL N “Viceministra Molinelli: Informe de Contraloría no tiene sustento técnico,” 22 May 2017.

<sup>580</sup> Exhibit RER-2, First Ferrando Gamarra Report, para. 162.

445. By contrast, the Tribunal considers that in the second expectation alleged by the Claimants as having been violated, the requirement is, at least in the abstract, met. Here, Kuntur Wasi argues that the Respondent generated “legitimate expectations in the investor that Peru supported Addendum No. 1, that the Project would continue, and that there was no public interest reasons to justify the termination of the Concession Contract.”<sup>581</sup> In this regard, the Tribunal considers that although the Peruvian Government had the power to unilaterally terminate the Contract on the ground set forth in Clause 15.5, a relevant and consistent conduct associated with the inappropriateness of such ground might, eventually, prevent exercise of that power upon the basis of good faith. This is the scope of the doctrine of *actos propios*.
446. However, under a specific analysis of the record and arguments of the Parties concerning the actual verification of the requirements of the doctrine of *actos propios*, the Tribunal finds that there was no relevant inconsistent or incoherent conduct by the Peruvian Government with regard to the inappropriateness of Contract termination for reasons of public interest, within the context in which the termination notice occurred.
447. It is true that the MTC affirmed there was no reason of public interest to terminate the Contract.<sup>582</sup> However, these statements were made in the context of challenges against Minister Vizcarra for the defects in the contractual design and the objections raised by the *Contraloría* to Addendum No. 1.<sup>583</sup>
448. Based on these statements, the Tribunal agrees with Kuntur Wasi that the Peruvian Government may have generated certain expectations that the Contract would not be

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<sup>581</sup> Claimant’s Memorial, para. 331. [Tribunal’s translation] The original Spanish reads: “*las expectativas legítimas en el inversionista de que Perú apoyaba la Adenda No. 1, de que el Proyecto continuaría, y de que no existía causal de interés público que justifique la terminación del Contrato de Concesión.*”

<sup>582</sup> **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, pp. 23 and 47. Responses to the questionnaire submitted by Congress where Minister Vizcarra stated that “To declare reasons of public interest requires sound grounds and the signature of several Ministers. Undoubtedly, if such grounds existed, public clause could be invoked; in the case of the “Chinchero” Airport there was no way to configure such legal issue.” [Tribunal’s translation] The original Spanish reads: “*Declarar una razón de interés público requiere un sustento firme y la firma de varios Ministros. Sin duda si existieran esas razones se podría invocar esa cláusula, en el caso del Aeropuerto “Chinchero” no había forma de configurar una situación legal de ese tipo.*”

<sup>583</sup> **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 14, 23, 24, 29 and 47.

terminated due to the objections raised against Addendum No. 1. But this does not prevent the Peruvian Government from legitimately considering a unilateral termination under Clause 15.5 in the face of new circumstances.

449. Indeed, after the objections raised by the *Contraloría* to Addendum No. 1 became known and the MTC, the MEF and other public agencies supported execution of such Addendum, the Parties signed the Roadmap, in which they expressed their intention to (i) renegotiate the Contract or (ii) terminate the Contract by mutual agreement.<sup>584</sup>
450. The Tribunal believes that the Roadmap is particularly relevant to the analysis of a legitimate expectation that the Contract would not be terminated and that it would be executed pursuant to Addendum No.1. Although Addendum No.1 was the contractual framework in force, the subsequent subscription of the Roadmap concerning its modification or, failing that, the termination of the Contract, undercuts the conclusion that Kuntur Wasi had a legitimate expectation that the Contract would remain in force under the terms of Addendum No.1.
451. In this regard, the Tribunal considers that the MTC's execution and subsequent defence of Addendum No. 1 are expressions of Peru's good faith negotiation to ensure the continuity of the Project. However, these actions lose force as the basis for a legitimate expectation that the Contract would be executed in accordance with the terms agreed under Addendum No. 1, as the Claimants themselves by signing the Roadmap were willing to renegotiate those terms.
452. Based on the above considerations, this claim must be rejected by the Tribunal. First, because terminating the Contract in accordance with the requirements set forth therein was not an expectation of Kuntur Wasi created by Peru's conduct, but a contractual right whose violation was analyzed in the previous section; and second, because Kuntur Wasi, by signing the Roadmap, agreed to renegotiate or at least revise the terms of Addendum No.1, thus losing the expectation that the Contract would necessarily be performed pursuant to the terms previously agreed.

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<sup>584</sup> Claimants' Reply, para. 28.

**(3) Kuntur Wasi's termination of the Concession Contract was valid and has consequences under Peruvian law**

***a. The Parties' Positions***

**(i) The Claimants' Position**

453. As explained above, the Claimants' position is that Peru's unilateral termination of the Concession Contract was contrary to the express terms of the Concession Contract and as such, invalid. This, on the Claimants' case, itself constituted a breach of the Concession Contract. On the basis of this understanding, and despite renegotiation efforts, the Claimants claim that they were forced to terminate the Contract pursuant to Article 1429 of the Peruvian Civil Code.<sup>585</sup>
454. The Claimants explain that, under Peruvian law, the termination of the Contract for breach requires proof that: (i) there was a breach; (ii) the non-breaching party requested the other party to amend its breach and comply with the Contract; and (iii) at least 15 days must have elapsed after the request.<sup>586</sup>
455. According to the Claimants, there can be no doubt that the Respondent breached the Concession Contract (as explained in the previous sections). Secondly, the Claimants requested Peru to comply with the Contract and to remedy its breaches, by letter of 22 January 2018.<sup>587</sup> Despite this request, Peru failed to remedy its breach. For this reason, Kuntur Wasi sent a letter to the MTC on 7 February 2018, informing the MTC of the termination of the Concession Contract.<sup>588</sup>
456. Finally, the Claimants allege that the consequence of a termination for breach is that the breaching party must pay compensation for any damages caused to the non-breaching party, pursuant to Article 1429 of the Peruvian Civil Code.<sup>589</sup>

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<sup>585</sup> Claimants' Memorial, para. 456.

<sup>586</sup> Claimants' Memorial, para. 457.

<sup>587</sup> **Exhibit C-88**, Letter No. 014-2018-KW, 22 January 2018.

<sup>588</sup> Claimants' Memorial, para. 460; **Exhibit C-89**, Letter No. 018-2018-KW, 7 February 2018.

<sup>589</sup> Claimants' Memorial, para. 462.

## (ii) The Respondent's Position

457. According to the Respondent, it validly and legitimately terminated the Concession Contract for public interest reasons in July 2017, as explained above at paras. 335 *et seq.* However, the Respondent argues that, even if it had breached the Contract, the Contract expressly limits the amount of compensation that can be awarded to the Concessionaire under such circumstances to sunk costs duly recognized by OSITRAN.<sup>590</sup>
458. In particular, the Respondent relies on Clause 15.4 of the Concession Contract, which establishes that in case the Contract is terminated because of the MTC's breach, the MTC only has to pay the Concessionaire "the general expenses incurred [by the concessionaire] until the date on which the Contract is terminated, duly verified and approved by OSITRAN."<sup>591</sup>
459. Notably, however, the Claimants have refused to provide OSITRAN any information about the expenses to be paid, and, therefore, at the moment, there were no expenses to be paid to Kuntur Wasi.<sup>592</sup>

### *b. The Tribunal's Analysis*

460. Kuntur Wasi's allegations under this claim imply declaring that (i) Peru's termination was "invalid and ineffective,"<sup>593</sup> (ii) consequently, the contractual obligations remained enforceable subsequent to the communication of termination by the MTC, and (iii) that Kuntur Wasi's subsequent termination was valid and had the effects prescribed by the Peruvian Civil Code.<sup>594</sup>

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<sup>590</sup> Respondent's Counter-Memorial, para. 235.

<sup>591</sup> Respondent's Counter-Memorial, para. 235, citing **Exhibit C-4**, Concession Contract, Cl. 15.4.3(a). The original Spanish reads: "*los gastos generales en que haya incurrido hasta la fecha en que surta efecto la resolución del Contrato, debidamente acreditados y reconocidos por el OSITRAN.*"

<sup>592</sup> Respondent's Counter-Memorial, paras. 127, 235.

<sup>593</sup> Claimants' Memorial, para. 455. [Tribunal's translation] The original Spanish reads: "*inválida e ineficaz.*"

<sup>594</sup> Claimants' Memorial, para. 461.

461. The Tribunal has already held that Peru's termination of the Concession Contract, without a well-founded reason of public interest, amounts to a breach of contract (*supra*, para. 427). Therefore, the Tribunal must now analyze the legal effects of such improper termination.
462. In response to Kuntur Was's request that Peru's unilateral termination be declared ineffective, the Respondent merely affirmed that said termination was legitimate.<sup>595</sup> On the other hand, if this Tribunal were to find that the termination violated the terms of the Concession Contract (as has ultimately been held), Peru merely stated its position with respect to the applicable statute governing damages, but failed to qualify the legal consequences of the improper termination.
463. The Tribunal finds that the unilateral termination communicated by the MTC was ineffective, since it did not comply with one of the requirements established in the Concession Contract, *i.e.*, to be supported by a well-founded reason of public interest. As a logical consequence, the termination communicated by the MTC on 13 July 2017 by means of Official Letter No. 142-2017-MTC/01 did not terminate the contractual relationship.
464. Although this finding implies holding that the contractual relationship remained in force during the subsequent months, the conclusion would be the same if the Tribunal were to declare that termination was effective. Indeed, according to Clause 15.5.1 of the Concession Contract, the unilateral termination exercised by Peru would only be effective upon the lapse of six months after its communication, that is, in January 2018. As soon as this term had expired, Kuntur Wasi informed its intention to terminate the Concession Contract.
465. Indeed, by letter dated 22 January 2018, Kuntur Wasi set out the breaches which -in its view- Peru incurred and which entitled Kuntur Wasi to request the termination of the Concession Contract. In this regard, Kuntur Wasi informed as follows "[u]nder these circumstances, Kuntur Wasi gives the Grantor one last chance and, in accordance with Article 1429 of the Civil Code, which is a supplementary provision applicable to all

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<sup>595</sup> Respondent's Counter-Memorial, p. 235; Respondent's Rejoinder, para. 315.

contracts, (...) requires that the Grantor pay the Advance Payment [...] [and] comply with all its obligations; within fifteen (15) days from the receipt of this communication. This requirement is made under penalty that upon expiration of said time limit, the Concession Contract shall be deemed terminated by operation of law and compensation shall be sought for damages, loss of profit and moral damages caused by the Grantor .”<sup>596</sup>

466. On 7 February 2018, by means of Letter No. 018-2018-KW, Kuntur Wasi informed the MTC that “[d]ue to the failure to comply with the requirements made within the time limit set out in the warning letter, Kuntur Wasi hereby informs the Peruvian Government that, as of this date, the Concession Contract is terminated by operation of law.”<sup>597</sup> Kuntur Wasi then lists the steps to be followed to prepare the inventory and return of the Concession assets, and adds that “as the concession has terminated, in accordance with Clause 15.4.5, the Grantor shall return the Performance Bond immediately.”<sup>598</sup> Moreover, Kuntur Wasi underlines that “as the Grantor’s breaches were wilful or, at best, due to gross negligence, the limited liability established in the Concession Contract does not apply [...] The amount of compensation shall be determined by the Arbitral Tribunal in accordance with Clause Sixteen of the Concession Contract.”<sup>599</sup>

467. Pursuant to the relief sought by Kuntur Wasi, the Tribunal has to analyze whether the above-mentioned termination, within the framework of Article 1429 of the Peruvian Civil

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<sup>596</sup> **Exhibit C-88**, Letter No. 014-2018-KW, 22 January 2018, p. 8. [Tribunal’s translation]. The original Spanish reads: “*Frente a esta situación, Kuntur Wasi otorga una última oportunidad al Concedente y, conforme al artículo 1429 del Código Civil, norma supletoria aplicable a todo contrato, lo requiere a pagar el Valor de Adelanto [...], lo requiere a cumplir con todas sus obligaciones; ello dentro del plazo de quince (15) días de recibida esta comunicación. Este requerimiento se realiza bajo apercibimiento de, una vez cumplido dicho plazo, tener por resuelto de pleno derecho el Contrato de Concesión y requerir la indemnización por el daño emergente, lucro cesante y daño moral causados por el Concedente.*”

<sup>597</sup> **Exhibit C-89**, Letter No. 018-2018-KW, 7 February 2018, p. 1. [Tribunal’s translation]. The original Spanish reads: “*No habiéndose cumplido el requerimiento en el plazo señalado en la carta de intimación, Kuntur Wasi cumple con comunicar al Estado peruano que, a partir de la fecha, el Contrato de Concesión ha quedado resuelto de pleno derecho.*”

<sup>598</sup> **Exhibit C-89**, Letter No. 018-2018-KW, 7 February 2018, p. 3. [Tribunal’s translation]. The original Spanish reads: “[...] *habiendo caducado la concesión, conforme a la cláusula 15.4.5, corresponde que el Concedente devuelva la Garantía de Fiel Cumplimiento del Contrato de Concesión inmediatamente.*”

<sup>599</sup> **Exhibit C-89**, Letter No. 018-2018-KW, 7 February 2018, p. 3-5. [Tribunal’s translation]. The original Spanish reads: “[...] *en tanto los incumplimientos del Concedente se han producido voluntariamente o, en el mejor de los casos, con culpa inexcusable, no son de aplicación los límites de responsabilidad establecidos en el Contrato de Concesión [...] El monto de la indemnización deberá ser determinado por el Tribunal Arbitral conforme a la Cláusula Décimo Sexta del Contrato de Concesión.*”

Code, “is valid and, therefore, has legal effects on the Concession Contract.”<sup>600</sup> The Tribunal will sustain this request, subject to the following qualifiers.

468. First, Kuntur Wasi was authorized to request the termination of the Concession Contract. As stated in this decision (*supra*, para. 427), improper termination by Peru also amounted to a breach of the Concession Contract. It is a breach by the Grantor (*Concedente*), here, Peru, that enables the Concessionaire to terminate the contractual relationship on an early basis, both pursuant to the terms of the Concession Contract (Clause 15.4) and pursuant to the general rules prescribed by the Peruvian Civil Code (Article 1428). In this respect, both regulations are consistent, as they offer the creditor a termination remedy upon the debtor’s breach.
469. The Tribunal sees no obstacle in declaring that the termination of the Concession Contract was, in this case, consistent with the Civil Code’s prerogative. As a result, the Concession Contract was terminated *ipso iure*, i.e., by operation of law, when the 15-day time limit from the date when Kuntur Wasi’s request for compliance of 22 January 2018 expired. In other words, the fact that the terms of the Concession Contract enable the Concessionaire to exercise a termination remedy for the Grantor’s breach, does not prevent the fact that such very remedy, provided in the interest of the damaged party, may be exercised pursuant to the supplementary rules of civil law prescribed in the Civil Code.
470. Nonetheless, the finding above is independent from the damages rules applicable to the case, a matter over which the Parties entered into a special agreement to limit the Civil Code’s common or supplementary regime.
471. Even if damages are discussed in a different section herein-below (*infra*, paras. 801 *et seq.*), the Tribunal deems it relevant to advance certain considerations in view of the discussion between the Parties in this respect.
472. The Parties agreed upon a special damages regime to be applied to the different events of termination (Clause 15). Particularly, Clause 15.4 of the Concession Contract governs

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<sup>600</sup> Claimants’ Memorial, para. 674, (e). [Tribunal’s translation] The original Spanish reads: “*es válida y, por lo tanto, produce efectos jurídicos en el Contrato de Concesión.*”



damages due in the event of termination for breach by the Grantor. Clause 15.4.4 expressly provides that “[t]he items listed in this Clause shall be the only payments admitted in favour of CONCESSIONAIRE, and include admission of various expenses arising under the Concession.”<sup>601</sup> [Tribunal’s translation]

473. Kuntur Wasi admitted the existence of this agreement to limit liability by indicating in its letter of termination that such limits would not be applicable, on the grounds that Peru’s breaches had been *committed wilfully or upon gross negligence* (*supra*, para. 466). In other words, according to Kuntur Wasi, the application of the damages provisions of the Civil Code (not limited to the damages specified in the Concession Contract) is subject to a finding of wilful misconduct or gross negligence on the part of the MTC (Article 1321 of the Peruvian Civil Code). As noted in this Decision (*infra*, para. 577), the Tribunal has concluded that the MTC did not engage in wilful misconduct or gross negligence in breaching the Concession Contract.
474. Kuntur Wasi’s letter of termination also acknowledges other applicable contractual clauses, in order to prepare the inventory, the return of the assets and the reimbursement of the bond. It is worth noting that reimbursement of the bond is precisely regulated in Clause 15.4.5 of the Concession Contract, under the section that governs termination for breach by the Grantor (*Concedente*). In other words, the termination of the Concession Contract in accordance with the general rules of the Civil Code does not imply waiving the Concession Contract in other matters especially agreed upon by the Parties. Such was the understanding of the Claimants when they terminated the Contract for breach.
475. Thus, the Tribunal concludes that (i) the termination communicated by Peru on 13 July 2017 did not have the effect of terminating the contractual relationship; and (ii) this contractual relationship remained in force until the termination communicated by Kuntur Wasi became effective, on 7 February 2018. The effects derived from both conclusions, particularly in terms of damages, are addressed in the relevant sections of this decision.

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<sup>601</sup> The original Spanish reads: “[l]os conceptos señalados en la presente Cláusula son los únicos pagos a ser reconocidos a favor del CONCESIONARIO, que incluye el reconocimiento de los gastos diversos con motivo de la Concesión.”

**(4) Peru’s failure to make the Advance Payment constituted a breach of its obligations under the Concession Contract, as amended**

***a. The Parties Positions***

**(i) The Claimants’ Position**

476. As explained above at para. 159, according to Addendum No. 1, the MTC would pay Kuntur Wasi an Advance Payment of US\$ 40 million, within 30 days of signing the Addendum, provided that Kuntur Wasi delivered an Advance Payment Guarantee (“*Garantía de Adelanto*”) to the State (*i.e.*, a letter of guarantee for the amount of the Advance Payment, which would secure the appropriate use of the amount received in the Advance Payment).<sup>602</sup>
477. However, on the Claimants’ case, before the Claimants could issue the *Garantía de Adelanto* (within the deadline provided in the Contract), Peru had already declared that it would not comply with its obligation to pay de Advance Payment on 4 June 2017, and ultimately terminated the Contract on 13 July 2017. In these circumstances, there was – on the Claimants’ case – a risk that even if Kuntur Wasi delivered the *Garantía de Adelanto*, Peru would simply not make the Advance Payment.<sup>603</sup>
478. According to the Claimants, Article 1427 of the Peruvian Civil Code establishes that, when there is a risk that the party to the contract that was supposed to carry out a subsequent obligation (*i.e.*, Peru by making the Advance Payment) will not be able to perform under the contract, the party who was supposed to perform in the first place (here, Kuntur Wasi by delivering the *Garantía de Adelanto*) may suspend its obligations until the second party performs its obligations or offers guarantees that it will perform.<sup>604</sup> On the basis of this provision, on 14 August 2017, Kuntur Wasi sent a letter to the MTC, requesting payment of the Advance Payment despite not having issued the *Garantía de Adelanto*.<sup>605</sup>

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<sup>602</sup> Claimants’ Memorial, para. 349, citing **Exhibit C-24**, Addendum No. 1, Cl. 3.12.

<sup>603</sup> Claimants’ Memorial, para. 351; Claimants’ Reply, paras. 151 *et seq.*

<sup>604</sup> Claimants’ Memorial, para. 352.

<sup>605</sup> Claimants’ Memorial, para. 353; **Exhibit C-147**, Letter No. 098-2017-KW, 18 August 2017.

479. The MTC replied to the Claimants' letter on 31 August 2017, indicating that the Concession Contract had been unilaterally terminated on 13 July 2017 and, therefore, that Peru would not make the Advance Payment.<sup>606</sup> According to the Claimants, even if the MTC's termination was considered valid, pursuant to Clause 15.8.7 of the Concession Contract, in case the termination was subject to arbitration proceedings, the termination itself would only take effect after the issuance of the corresponding arbitral award.<sup>607</sup> Therefore, at the moment Kuntur Wasi requested payment of the Advance Payment, the Concession Contract was still in force and Peru was therefore in default pursuant to Article 1333.3 of the Peruvian Civil Code.<sup>608</sup>

### **(ii) The Respondent's Position**

480. The Respondent, on the other hand, argues that before 30 days had passed after signing Addendum No. 1, the *Contraloría* issued its Preliminary Report, alerting about the potential problems with the Addendum. In light of the *Contraloría*'s report, in February 2017, the Parties agreed to suspend their obligations under the Contract, including those related to the Advance Payment and in May 2017, the Parties decided to extend this suspension until the end of August 2017. Thus, the Respondent argues that during that time it did not have an obligation to make the Advance Payment.<sup>609</sup>

481. On 13 July 2017, the State unilaterally terminated the Contract and, therefore, the obligation to pay the Advance Payment (or any other obligation under the Contract) no longer existed.<sup>610</sup>

482. Finally, the Respondent argues that even if the Tribunal were to consider that the State had an obligation to make the Advance Payment, such obligation was conditional on Kuntur Wasi delivering an Advance Payment Guarantee, which it never did.<sup>611</sup>

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<sup>606</sup> Claimants' Memorial, para. 354, citing **Exhibit C-148**, *Oficio No. 3562-2017-MTC*, 31 August 2017.

<sup>607</sup> Claimants' Memorial, para. 355; Claimants' Reply, paras. 570 *et seq.*

<sup>608</sup> Claimants' Memorial, para. 356.

<sup>609</sup> Respondent's Counter-Memorial, paras. 110, 118, 226.

<sup>610</sup> Respondent's Counter-Memorial, para. 226.

<sup>611</sup> Respondent's Counter-Memorial, para. 226.

***b. The Tribunal's Analysis***

483. Through Addendum No. 1, the Parties designed a new financial scheme whereby they replaced the PAO system for Sub-Stage 2 with a PPO system (*supra*, para. 404). The new design also provided for the delivery of an advance payment by Peru for the commencement of the works under this stage.
484. Addendum No. 1 stipulates that the “Amount of the Advance Payment” would be US\$ 40,262,870, which would be paid by Peru to Kuntur Wasi “within thirty calendar days following the date of execution of Addendum No. 1 to the Concession Contract” (Clause 3.12 of the Addendum).<sup>612</sup> The same Clause provides that for delivery of the Amount of the Advance Payment “the CONCESSIONAIRE shall previously deliver to the GRANTOR a letter of guarantee for the Advance Payment Guarantee for the Works under the PPO 2 and give instructions on the account to which the transfer or deposit of the aforementioned amount is to be made.”<sup>613</sup> Clause 10.2.4 of the Concession Contract (incorporated under Clause 3.21 of Addendum No.1) details the obligations of Peru and Kuntur Wasi in relation to the delivery of the Amount of the Advance Payment and the Advance Payment Guarantee, respectively.
485. The Parties do not dispute the existence or the terms of these obligations. Both Parties agree that Peru was required to deliver the Amount of the Advance Payment within 30 days from the execution of Addendum No. 1, upon delivery of the Advance Payment Guarantee by Kuntur Wasi.<sup>614</sup> The discussion focuses, instead, on the enforceability of the obligations in view of the events that took place after Addendum No. 1 was entered into.
486. On 22 February 2017, the *Contraloría* issued a preliminary opinion on Addendum No.1 warning that the delivery of the Amount of the Advance Payment, under the terms provided

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<sup>612</sup> [Tribunal's translation] The original Spanish reads: “*dentro de los treinta días calendario siguientes a la fecha de la firma de la Adenda N°1 al Contrato de Concesión.*”

<sup>613</sup> [Tribunal's translation] The original Spanish reads: “*el CONCESIONARIO deberá entregar previamente al CONCEDENTE la carta fianza por la Garantía de Adelanto para las Obras retribuidas por el PPO 2 e instruir respect de la cuenta a la se realice la transferencia o depósito del monto antes referido.*”

<sup>614</sup> Claimants' Memorial, para. 351; Respondent's Counter-Memorial, para. 226.

for in Addendum No.1, posed a risk that the Concessionaire might use the amount for a purpose other than that it was intended (*supra*, para. 173).

487. In response to said warnings, the MTC requested that Kuntur Wasi suspend the obligations until the final opinion by the *Contraloría* was available.<sup>615</sup> On 2 March 2017, the Parties agreed to temporarily suspend the obligation to deliver the Advance Payment Guarantee, the Amount of the Advance Payment and, consequently, to suspend the commencement of the Works Execution Stage. According to the suspension resolution, the Parties reached that agreement “to safeguard the interests of the Peruvian Government and in response to the Concessionaire's intention to assure that the funds of the Amount of the Advance Payment [would] be undoubtedly channelled through transparent vehicles and with the necessary traceability.”<sup>616</sup>
488. On 22 May 2017, the *Contraloría* issued its final opinion through Audit Report No. 265-2017. On 31 May 2017, the Parties agreed to extend the suspension period for 90 days as from June 1. Thus, the obligations would be suspended until 30 August 2017.<sup>617</sup> However, on 13 July 2017, while the suspension was still in effect, Peru notified Kuntur Wasi of the unilateral termination of the Concession Contract pursuant to Clause 15.5.1.
489. On 18 August 2017, Kuntur Wasi sent a letter to the MTC expressing the view that the unilateral termination informed by Peru did not comply with the requirements set forth in the Contract. According to Kuntur Wasi, this event posed a *clear and imminent risk* that Peru might not comply with its obligations upon termination of the suspension. In this context, Kuntur Wasi advised that, upon application of Article 1427 of the Civil Code, Kuntur Wasi would suspend the delivery of the Advance Payment Guarantee until the MTC first complied with the payment of the Amount of the Advance Payment or granted a guarantee to secure such Advance Payment. It also added that “as long as the Grantor does not comply with the payment of the indicated amount or does not grant a guarantee to

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<sup>615</sup> **Exhibit R-75**, *Oficio No. 0813-2017-MTC/25*, 27 February 2017.

<sup>616</sup> **Exhibit C-31**, *Acta de acuerdo de Suspensión Temporal de Obligaciones Contractuales*, 2 March 2017, Section V. [Tribunal's translation] The original Spanish reads: “... *en cautela de los intereses del Estado Peruano y de la preocupación del Concesionario que no exista duda alguna que los fondos del Valor del Adelanto se van a canalizar mediante vehículos transparentes y con la trazabilidad necesaria.*”

<sup>617</sup> **Exhibit C-32**, *Adenda al Acta de Suspensión Temporal de Obligaciones Contractuales*, 31 May 2017.

secure such amount, the Grantor will be in voluntary breach of its contractual obligations.”<sup>618</sup>

490. On 31 August 2017, Peru rejected this requirement, asserting that the unilateral termination was *valid, legitimate and effective*. In Peru’s opinion, requesting the payment of the Amount of the Advance Payment upon termination of the suspension made no sense “since the MTC has unilaterally terminated the Contract by letter dated 13 July 2017, which termination shall be effective on 13 January 2018.”<sup>619</sup>
491. The Claimants contend that Peru breached the Concession Contract by failing to deliver the Amount of the Advance Payment, pursuant to Article 1427 of the Peruvian Civil Code. The Claimants assert that the termination of the Contract was ineffective and that, according to Clause 15.5.1, even if the termination had been validly exercised, it would only take effect as of January 2018, so that Peru was required to deliver the Amount of the Advance Payment (*supra*, paras. 478, 479). Meanwhile, the Respondent contends that the Contract was validly terminated and that, therefore, the obligation to deliver the Amount of the Advance Payment ceased to exist as of that time. The Respondent also asserts that, in any event, this obligation was contingent upon the delivery of the Advance Payment Guarantee, which Kuntur Wasi never provided (*supra*, paras. 480-482).
492. The Tribunal agrees with Kuntur Wasi in that, once the suspension was terminated, the Parties had to resume performance of their obligations. Indeed, Clause 15.5.1 establishes that the termination must be notified “not less than six (6) months prior to the date set for termination.”<sup>620</sup> Thus, regardless of the alleged validity of the unilateral termination exercised by Peru (which this Tribunal has rejected), it was appropriate to seek performance of the enforceable obligations.

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<sup>618</sup> **Exhibit C-147**, Letter No. 098-2017-KW, 18 August 2017, p. 2. [Tribunal’s translation] The original Spanish reads: “...*en tanto el Concedente no cumpla con el pago del monto indicado o no otorgue garantía que lo respalde, incurrirá en incumplimiento voluntario de sus obligaciones contractuales.*”

<sup>619</sup> **Exhibit C-148**, Oficio N° 3562-2017-MTC, 31 August 2017, p. 2. [Tribunal’s translation] The original Spanish reads: “... *por cuanto el MTC ha declarado la caducidad unilateral del Contrato mediante carta del 13 de julio de 2017, caducidad que se producirá el 13 de enero de 2018.*”

<sup>620</sup> [Tribunal’s translation] The original Spanish reads: “...*con una antelación no inferior a seis (6) meses del plazo previsto para la terminación.*”

493. Notwithstanding the foregoing, this Tribunal finds that the Claimants' claim is not admissible for the reasons explained below.

494. Kuntur Wasi's claim is based upon Article 1427 of the Peruvian Civil Code, which provides as follows:

*If subsequent to termination of a contract for mutual consideration there is a risk that the party who must perform in the second place will not be able to comply with its duties, the party who must perform in the first place may suspend performance until the other party duly performs or secures such performance.*<sup>621</sup>

495. First, the rule requires that consideration be *mutual*. According to Dr. Ferrando, the obligations in this claim did not meet this requirement, since the Amount of the Advance Payment had to be delivered only once Kuntur Wasi had delivered the Advance Payment Guarantee. In other words, they were successive, not simultaneous, obligations.<sup>622</sup>

496. The Tribunal disagrees with this argument. Mutual consideration does not mean that obligations must be performed simultaneously, but rather that an obligation is due in exchange for another; they are designed to facilitate or accept the performance of another obligation; or they are obligations whose performance can only be reasonably understood as contingent upon the performance of the other. Kuntur Wasi's obligation to deliver the Advance Payment Guarantee, even though it was due prior to receiving the Amount of the Advance Payment, was clearly linked to the Peruvian Government's obligation. Therefore, the first requirement of the rule analyzed is met.

497. Thus, Kuntur Wasi was legally excused from delivering the Advance Payment Guarantee once Peru notified it of the improper termination and throughout the effective period of the Contract. As the rule provides, *the party who must perform in the first place may suspend*

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<sup>621</sup> [Tribunal's translation. The original Spanish reads: "*Si después de concluido un contrato con prestaciones recíprocas sobreviniese el riesgo de que la parte que debe cumplir en segundo lugar no pueda hacerlo, la que debe efectuar la prestación en primer lugar puede suspender su ejecución, hasta que aquella satisfaga la que le concierne o garantice su cumplimiento.*"

<sup>622</sup> **Exhibit RER-6**, Second Ferrando Gamarra Report, paras. 141-144.

*performance*. The rule operates as an incentive for the counter-party to continue performance under the Contract.

498. Nonetheless, Kuntur Wasi's claim in this case does not conform to the remedy available under the article invoked. Indeed, Kuntur Wasi does not seek an excuse for its breach in order to maintain the Contract, but requests that this Tribunal determine that Peru breached the obligation to deliver the amount of the Advance Payment in order to justify Kuntur Wasi's termination. On the other hand, the obligation to deliver this amount was never enforceable, because the Claimant breached its own duty. In fact, both the obligation to deliver the amount of the Advance Payment and the obligation to deliver the Guarantee were discharged once Kuntur Wasi terminated the Concession Contract. As concluded above, Kuntur Wasi's termination was valid and effective as of 7 February 2018 (*supra*, para. 475). However, this termination was not founded on Article 1427 of the Peruvian Civil Code.

499. Furthermore, the Tribunal notes that this claim has no practical effects in terms of compensation. If the Peruvian Government had delivered the Amount of the Advance Payment, it could have executed the Advance Payment Guarantee or, failing that, Kuntur Wasi would now have a duty to reimburse such amount.

500. For the reasons above, the Tribunal rejects the Claimants' claim discussed in this section.

**(5) Peru's requests that Kuntur Wasi return the Concession area were wrongful**

***a. The Parties' Positions***

**(i) The Claimants' Position**

501. The Claimants further claim that, pursuant to Clause 5.2 of the Concession Contract, Kuntur Wasi should be in possession of the Concession area through the duration of the Contract.<sup>623</sup> Furthermore, in the Claimants' view, in case there was a dispute in relation to the termination of the Contract, Clause 15.8.7 established that the Concession Contract would remain in effect until there was a final award on the matter.<sup>624</sup> Therefore, it was

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<sup>623</sup> Claimants' Memorial, para. 358.

<sup>624</sup> Claimants' Memorial, para. 359; Claimants' Reply, paras. 153, 574-577.



legitimate for Kuntur Wasi to retain the Concession area until a final award was issued, and the MTC breached the Concession Contract by repeatedly demanding that Kuntur Wasi return the Concession area.<sup>625</sup>

## **(ii) The Respondent's Position**

502. Pursuant to Clause 15.5.1 of the Contract, unilateral termination would enter into effect six months after the MTC notified Kuntur Wasi that it was terminating the Contract (*i.e.*, on 13 January 2018). Clause 15.8.1 provides that once a termination takes effect, the Concessionaire must return the airport land to the MTC. Thus, the Respondent asserts that rather than a breach of the Contract, demanding the return of the airport land was the MTC's obligation.<sup>626</sup>
503. The Respondent also rejects the Claimants' argument that Clause 15.8.7 meant that it was not required to return the airport land until after the arbitration award was issued. According to the Respondent's expert, Dr. Ferrando, Clause 15.8.7 is not applicable because the Contract expressly states that, in case of unilateral termination, the termination will be effective within six months after notice of termination. Furthermore, in January 2018 (*i.e.*, when the unilateral termination took effect), Kuntur Wasi had not yet submitted its request for arbitration and, therefore, the termination was not subject to an arbitral proceeding.<sup>627</sup>

### ***b. The Tribunal's Analysis***

504. The Tribunal has already established that the unilateral termination by Peru was improper and, therefore, ineffective. Consequently, the Contract remained in force until termination by operation of law on 7 February 2018, upon Kuntur Wasi's request (*supra*, para. 475).
505. This means that Kuntur Wasi was validly entitled to hold the Concession assets until the date mentioned in the preceding paragraph. Clause 5.2 of the Concession Contract embraces this right as follows: "The CONCESIONNAIRE shall hold possession, use and

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<sup>625</sup> Claimants' Memorial, paras. 360-369; Claimants' Reply, para. 153.

<sup>626</sup> Respondent's Counter-Memorial, para. 227.

<sup>627</sup> Respondent's Counter-Memorial, paras. 227, 228, citing **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 181-189.

benefit of all the Concession Assets, the right to provide Airport and Non-Airport Services, as well as the exercise of such rights as may be necessary to comply with the obligations under this Contract and Applicable Law.”<sup>628</sup>

506. However, Kuntur Wasi’s claim requires not only declaring Kuntur Wasi’s legitimate possession of the Concession assets until the date of their restitution. The claim also requires a declaration that Peru breached the Contract *by repeatedly demanding the return of the Concession Area despite clear contractual provisions to the contrary*.<sup>629</sup> Thus, the Tribunal must determine whether a demand, contrary to the terms of the Contract, amounts to a breach by the demanding party.
507. As a defence, the Peruvian Government refers to the Contract terms to justify said demand. In particular, the Respondent asserts the following as grounds for the Respondent’s legitimate right to the return of the Concession area: (i) the termination was effective as of 13 January 2018, and therefore Kuntur Wasi had the duty to return the Concession area as of such date pursuant to Clause 15.8.1; (ii) Clause 15.8.7, which provides for the suspension of the effects of termination until an arbitral award is issued, would not apply (1) because Clause 15.5.1 provides for the suspension of the effects of termination for six months as from the date of notice of termination, a provision that should prevail for reasons of its specificity, and (2) because by the time when the termination of the Contract became effective, Kuntur Wasi had not initiated yet the arbitration proceeding objecting to such termination.
508. The Tribunal considers that, regardless of the merits of the above-mentioned defences, Kuntur Wasi’s claim is not admissible because Peru did not breach any obligation by demanding that the Concession area be returned.

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<sup>628</sup> [Tribunal’s translation] The original Spanish reads: “*El CONCESIONARIO tendrá la posesión, el uso y disfrute de los Bienes de la Concesión, el derecho a la prestación de los Servicios Aeroportuarios y Servicios No Aeroportuarios, así como el ejercicio de los derechos que sean necesarios para que cumpla con las obligaciones a su cargo establecidas en el presente Contrato y las Leyes Aplicables.*”

<sup>629</sup> Claimants’ Memorial, para. 371. [Tribunal’s translation] The original Spanish reads: “*exigir reiteradamente la devolución del Área de la Concesión pese a las claras disposiciones contractuales en sentido contrario.*”

509. It was Peru's duty to provide the land for the execution of the Project, while Kuntur Wasi was entitled, in turn, to retain possession of the Concession area until Contract termination. This is precisely what happened in the case. In fact, Kuntur Wasi only returned the land on 8 February 2018, the date on which the Record of Return of the Concession assets was entered into and the day after the Concession Contract was terminated by operation of law (*supra*, para. 206).
510. The demands for the early return of the Concession area might, at most, be qualified as conduct contrary to the principle of good faith, as it disregards the agreed-upon contractual framework. Nonetheless, this consideration does not suffice to determine that there was a breach by Peru; rather, it may only be relevant for the purposes of assessing whether the Concession Contract was repudiated. This matter will be discussed in a different section below (*infra*, paras. 521 *et seq.*).
511. Lastly, as established regarding the claim on the delivery of the Amount of the Advance Payment, the Tribunal does not find that this claim has practical consequences in terms of compensation. No damage has been sustained as a result of the demand for early return of the Concession area, which, in any case, had to be returned by the end of the Concession.

**(6) Peru breached the Concession Contract by benefitting from the EDI without paying for it**

***a. The Parties' Positions***

**(i) The Claimants' Position**

512. As explained above, under the Concession Contract, Kuntur Wasi had the obligation to prepare and deliver the EDI. This was a detailed set of executive or shop drawings of the Project, with a sufficient level of detail to allow the commencement of the construction works.<sup>630</sup> On 27 May 2015, Kuntur Wasi submitted its EDI to OSITRAN. OSITRAN then provided comments, which were addressed by Kuntur Wasi in a resubmitted EDI. The final EDI was approved by OSITRAN on 7 December 2015.<sup>631</sup>

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<sup>630</sup> Claimants' Memorial, para. 372.

<sup>631</sup> Claimants' Memorial, para. 373; **Exhibit C-5**, *Oficio No. 1553-2015-MTC/12.08*, 7 December 2015.

513. Kuntur Wasi's claim in relation to the EDI is that the Respondent is currently using and benefitting from Kuntur Wasi's EDI in order to carry out the Project with other contractors, but has not paid for it. In particular, the Claimants point out that the new tender process for the Chinchero Airport expressly stated that the new concessionaire would have to use Kuntur Wasi's EDI as a point of departure in relation to the first phase of the works (*i.e.*, earthworks), modifying it from there.<sup>632</sup>
514. Finally, the Claimants argue that Peru must pay for all the costs incurred by Kuntur Wasi in preparing the EDI, and that the State's offer must not be "generic or conditional."<sup>633</sup>

### **(ii) The Respondent's Position**

515. The Respondent does not deny having used Kuntur Wasi's EDI. Rather, the Respondent's argument is that it has made several attempts to pay Kuntur Wasi for the EDI, but the Claimants have refused to receive payment. According to the Respondent, when a creditor refuses payment of the obligation, the debtor is not in default.<sup>634</sup>

#### ***b. The Tribunal's Analysis***

516. Kuntur Wasi seeks a determination of breach of the Concession Contract because the EDI was not paid for. The Parties do not dispute that Kuntur Wasi prepared and delivered the EDI in accordance with the requirements of the Contract.<sup>635</sup> Nor do they dispute that payment was due. The Parties differ, however, as to whether a breach of the Contract may be declared upon said ground, taking into account that the MTC offered payment which was rejected by Kuntur Wasi because the latter considered that the amount offered covered the costs of the EDI only partially and was conditioned on the Claimants' agreement to withdraw their claims in this arbitration proceeding.<sup>636</sup>

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<sup>632</sup> Claimants' Memorial, para. 375.

<sup>633</sup> Claimants' Memorial, para. 376.

<sup>634</sup> Respondent's Counter-Memorial, para. 229; **Exhibit R-108**, *Oficio No. 583-2019-MTC/02*, 6 November 2019.

<sup>635</sup> Claimants' Memorial, para. 373; Respondent's Counter-Memorial, para. 229.

<sup>636</sup> Claimants' Memorial, para. 376; Claimants' Reply, paras. 805.

517. The Tribunal notes that the Claimants only raised this claim as a breach of contract in their Memorial.<sup>637</sup> In contrast, in their Reply, the Claimants raised this claim exclusively as a violation of the BIT for expropriation of intellectual property.<sup>638</sup> The arguments raised in connection with the contractual claim and under international law are, in any event, the same, *i.e.*, that rejection of the payment offer is not a waiver of the right to monies owed and that Peru's offer did not fully cover the EDI's costs. Therefore, the Tribunal deems it relevant to refer to the discussion in the section on expropriation under the BIT, where the merits of this claim are discussed in detail (*infra*, paras. 758 *et seq.*).
518. In any event, the Tribunal considers that the non-payment for the EDI does not amount to a breach of contract. According to the Concession Contract, the delivery of the EDI was among the obligations that the Concessionaire had to perform in order to receive remuneration for its work.
519. Compensation sought for this item only arises in connection with the early termination of the Contract, so that it is appropriate for the EDI to be compensated as part of the “*general expenses*” incurred by Kuntur Wasi, in accordance with Clause 15.4.3 of the Concession Contract.
520. Accordingly, the Tribunal rejects this claim on the grounds that Peru did not breach the Concession Contract by failing to pay for the EDI. This decision is without prejudice to Kuntur Wasi's right to full compensation for the EDI, which is appropriate as an *expense* incurred by the investor in the performance of the Contract improperly terminated by Peru (*infra*, para. 985 (v)b.), and as consequential damage for the violation of the fair and equitable treatment clause under the BIT (*infra*, para. 985 (iv)).

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<sup>637</sup> Claimants' Memorial, paras. 372-377, 562-565.

<sup>638</sup> Claimants' Reply, paras. 802-826.

## **(7) Peru repudiated the Concession Contract**

### ***a. The Parties' Positions***

#### **(i) The Claimants' Position**

521. The Claimants' sixth claim is that Peru repudiated the Contract by announcing – on various occasions – that it would not comply with the Contract.<sup>639</sup> In particular, the Claimants refer to the following statements made by Peruvian high-ranking officials and public entities, indicating that Peru would not comply with the Concession Contract:<sup>640</sup>

- 21 May 2017: statement by Minister Vizcarra to the effect that, having considered the Contraloría's report, the Government would terminate the Concession Contract;<sup>641</sup>
- 4 June 2017: statement by Minister Giuffra announcing that Kuntur Wasi would not participate in the construction and operation of the Concession;<sup>642</sup>
- 13 July 2017: Peru's notification to Kuntur Wasi of the unilateral termination of the Concession Contract;<sup>643</sup>
- 11 September 2017: Peru's repeated refusal to comply with the Concession Contract;<sup>644</sup>
- 21 December 2017: Peru's request that Kuntur Wasi return the Concession area;<sup>645</sup>

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<sup>639</sup> Claimants' Memorial, para. 378.

<sup>640</sup> Claimants' Memorial, para. 379.

<sup>641</sup> **Exhibit C-35**, News article published by *Semana Económica*, "*Aeropuerto de Chinchero: Ejecutivo dejará sin efecto contrato de concesión*," 22 May 2017; **Exhibit C-34**, News clip from *Cuarto Poder*, "*Martín Vizcarra: 'Chinchero va, pero el Contrato no'*," 21 May 2017.

<sup>642</sup> **Exhibit C-40**, News article published by *El Comercio*, "*Gobierno y Kuntur Wasi acordaron resolver contrato por Chinchero, anuncia Giuffra*," 4 June 2017.

<sup>643</sup> **Exhibit C-44**, *Oficio No. 142-2017-MTC/01*, 13 July 2017.

<sup>644</sup> **Exhibit C-149**, *Oficio No. 3703-2017-MTC/25*, 11 September 2017.

<sup>645</sup> **Exhibit C-82**, *Oficio No. 5379-2017-MTC/25*, 21 December 2017.

- 12 January 2018: Peru’s reiterated request that Kuntur Wasi return the Concession area;<sup>646</sup>
- 18 January 2018: Peru’s reiterated request that Kuntur Wasi return the Concession area;<sup>647</sup> and
- 19 January 2018: Peru’s reiterated request that Kuntur Wasi return the Concession area.<sup>648</sup>

522. These statements also meant that Peru put itself in a position of default in relation to all of its obligations under the Concession Contract, which in turn allowed Kuntur Wasi to terminate the Concession Contract for breach.<sup>649</sup>

### **(ii) The Respondent’s Position**

523. The Respondent asserts that it did not repudiate the Contract by announcing that it would not comply with its terms (*i.e.*, in relation to termination of the Contract or the non-payment of the US\$40 million Advance Payment); rather, Peru unilaterally terminated the Concession Contract in a legitimate exercise of its contractual rights.<sup>650</sup>

524. Secondly, the Respondent further argues that some of the acts of repudiation alleged by the Claimants are post-termination. In the Respondent’s view, it would be illogical and unreasonable for the Claimants to expect that the MTC would make the US\$ 40 million Advance Payment provided in Addendum No. 1 after the *Contraloría* had determined the terms of Addendum No. 1 were not consistent with Peruvian law, and the MTC had terminated the Contract.<sup>651</sup>

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<sup>646</sup> **Exhibit C-86**, *Oficio No. 200-2018-MTC 25*, 12 January 2018.

<sup>647</sup> **Exhibit C-48**, *Oficio No. 010-2018-EF/CE-36*, 18 January 2018.

<sup>648</sup> **Exhibit C-125**, *Oficio No. 020-2018-MTC/12*, 19 January 2018.

<sup>649</sup> Claimants’ Memorial, para. 380.

<sup>650</sup> Respondent’s Counter-Memorial, para. 222.

<sup>651</sup> Respondent’s Counter-Memorial, para. 223.

***b. The Tribunal's Analysis***

525. The Claimants allege that Peru repudiated the Contract by announcing it would not honour the agreement. Further, the Claimants assert that pursuant to Article 1333.3 of the Peruvian Civil Code, whenever a debtor states that it will not perform its duties, such debtor becomes *ipso facto* in default.
526. The Respondent contends that the MTC never stated that it would not comply with its contractual obligations, but rather terminated the Contract in accordance with the requirements established in the Concession Contract and Peruvian law. The Respondent also asserts that the other examples used by the Claimants to assert an alleged repudiation of the Contract occurred after the termination. In this regard, the Respondent explains that Peru could not have repudiated a Contract that was already terminated.
527. Repudiation occurs when a debtor clearly and expressly states that it will not honour its obligation. Even if it is an Anglo-Saxon instrument (*repudiatory breach*), the hypothesis of repudiation has progressively been incorporated to traditional civil law systems and instruments of comparative law. Nonetheless, application of repudiation under Peruvian law has been subject to controversy in this proceeding. According to Dr. Ferrando, repudiation “is not a term of legal nature embraced by the relevant Peruvian laws.”<sup>652</sup> Thus Dr. Ferrando states that the Claimants use this term colloquially simply to say that the MTC refused to comply with the Contract.
528. Kuntur Wasi did not comment on this point in its Reply Memorial, nor through the Peruvian law experts who issued reports on its behalf. The only legal support for the claim would be Article 1333.3 of the Peruvian Civil Code, which provides as follows:

*A debtor shall be in default as from the date on which creditor requests, in court or otherwise, fulfilment of the former's obligation. A demand is not required for debtor to be in default: (...) 3. Whenever debtor informs in*

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<sup>652</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, para. 195. [Tribunal's translation] The original Spanish reads: “...no es un término de naturaleza jurídica que se encuentre en las normas peruanas relevantes.”



*writing it is unwilling to perform an obligation.*<sup>653</sup>

529. According to the Claimants, under this provision “Peru is in default, giving rise to Kuntur Wasi’s right to validly terminate the Concession Contract.”<sup>654</sup>
530. The Tribunal interprets the transcribed rule as offering a default mechanism for cases that are usually considered in comparative law as a repudiation of the contract (“unwillingness”). However, this rule does not permit an *inference* of future non-performance from the debtor’s actions or circumstances. Indeed, this is a restricted hypothesis: “whenever the debtor informs in writing it is unwilling to perform”.
531. Upon an analysis of the events in which the Peruvian Government would have allegedly announced that it was unwilling to honour the Concession Contract, the Tribunal concludes that the requirements for application of said rule are not met.
532. The first event alleged by Kuntur Wasi is the notice and exercise of the termination clause. The Tribunal considers that Contract termination does not mean *informing an unwillingness to perform*. On the contrary, Peru stated repeatedly that it was terminating the Concession Contract based on a contractual prerogative.<sup>655</sup> The fact that this Tribunal has concluded that exercise of such prerogative was improper does not prove *repudiation* of the Concession Contract, but rather a *breach* thereof. In other words, the assumption contravenes the purpose of the instrument under analysis, which implies projecting in advance the future breach of the debtor. Where the debtor has already breached, termination is an effective mechanism to protect the creditor's interests. This is the mechanism that was exercised by Kuntur Wasi.
533. Another basis to assert an alleged refusal by the Peruvian Government to comply with the Concession Contract would be its reluctance to deliver the Amount of the Advance

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<sup>653</sup> [Tribunal’s translation] The original Spanish reads: “*Incurre en mora el obligado desde que el acreedor le exija, judicial o extrajudicialmente, el cumplimiento de su obligación. No es necesaria la intimación para que la mora exista: (...) 3.- Cuando el deudor manifieste por escrito su negativa a cumplir la obligación.*”

<sup>654</sup> Claimants’ Memorial, para. 380. [Tribunal’s translation] The original Spanish reads: “... *tiene por efecto constituir a Perú en incumplimiento, generando el derecho en Kuntur Wasi de resolver válidamente el Contrato de Concesión.*”

<sup>655</sup> **Exhibit C-148**, *Oficio N° 3562-2017-MTC*, 31 August 2017, **Exhibit C-149**, *Oficio No. 3703-201-MTC/25*, 11 September 2017.

Payment. In this regard, the Claimants refer to Official Notices Nos. 3562-2017-MTC/25 and 3703-2017-MTC/25 dated 31 August 2017 and 11 September 2017, respectively. In the first of these official letters, the MTC stated that “the reiterated demand for the delivery of the Amount of the Advance Payment upon termination of the suspension makes no sense, since the MTC has unilaterally terminated the Contract by letter dated 13 July 2017, which termination shall be effective on 13 January 2018.”<sup>656</sup> In the second official letter, the MTC merely reiterated that it disagreed with Kuntur Wasi’s position.<sup>657</sup>

534. In the Tribunal’s opinion, Official Letter No. 3562-2017-MTC/25 is the most relevant evidence to assert a potential repudiation of the Concession Contract by Peru. Indeed, even if the termination had been validly exercised, it would only be effective as of January 2018, as stated in the Concession Contract. However, such evidence is not enough to assert that Peru repudiated the Contract. As concluded above, the obligation to deliver the amount of the Advance Payment was not enforceable, because Kuntur Wasi never provided the applicable Guarantee. In addition, the Official Letter No. 3562-2017-MTC/25 does not express an intention to disregard the Contract, but a confirmation that it would be in force until a certain date according to its own provisions. Therefore, such document does not meet the requirements set forth in article 1333.3.
535. Finally, the request for the return of the Concession area does not amount to a repudiation of the Concession Contract, either. Indeed, in the first request, dated 21 December 2017, the MTC urged Kuntur Wasi to kindly return possession of the area to the Peruvian Government as soon as possible, and in any event, no later than on the expiration date.<sup>658</sup> In the following communications Peru merely reiterated the request for the return of the Concession area as of 13 January 2018, the date on which, in its opinion, the Concession Contract would terminate.<sup>659</sup> Everything indicates that the return request prior to

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<sup>656</sup> **Exhibit C-148**, Oficio N° 3562-2017-MTC, 31 August 2017, p. 2. [Tribunal’s translation] The original Spanish reads: “...la insistencia en el pago del Valor de Adelanto al momento en que se levante la suspensión carece de lógica, por cuanto el MTC ha declarado la caducidad unilateral del Contrato mediante carta del 13 de julio del 2017, caducidad que se producirá el 13 de enero de 2018.”

<sup>657</sup> **Exhibit C-149**, Oficio No. 3703-2017-MTC/25, 11 September 2017.

<sup>658</sup> **Exhibit C-82**, Oficio No. 5379-2017-MTC/25, 21 December 2017.

<sup>659</sup> **Exhibit C-86**, Oficio No. 200-2018-MTC 25, 12 January 2018; **Exhibit C-48**, Oficio No. 010-2018-EF/CE-36, 18 January 2018; **Exhibit C-125**, Oficio No. 020-2018-MTC/12, 19 January 2018.

termination was made by calling upon a voluntary act of the Concessionaire. The remaining requests, although erroneous, were made on the basis of the contractual provisions and not in denial of the agreement.

536. Accordingly, the Tribunal rejects the allegation of repudiation of the Concession Contract. As explained, Article 1333 of the Peruvian Civil Code contemplates a restricted hypothesis of repudiation, under which a debtor may be held in default provided there is an express intention not to perform. In this case, the statements by the Peruvian Government referred to by the Claimants do not meet the requirement set forth in said article.

**(8) Peru breached the Concession Contract by failing to observe the Guarantee Agreement**

***a. The Parties' Positions***

**(i) The Claimants' Position**

537. As explained above, at the time the Concession Contract was signed, Kuntur Wasi and the MTC also signed a Guarantee Agreement.<sup>660</sup> The Claimants argue that the fact that performance of the Concession Contract was guaranteed through the Guarantee Agreement meant that the State extended sovereign protections (“*protecciones soberanas*”) in favor of the investor.<sup>661</sup>
538. According to the Claimants, “the Concession Contract, through the Guarantee Agreement, is protected and shielded, to the maximum extent possible, against any action of public entities contrary to the provisions agreed upon, even against an act of the Congress of the Republic, *i.e.*, the ultimate expression of the sovereign power of the State.”<sup>662</sup> In this respect, the Claimants appear to rely on the nature of the Guarantee Agreement as a

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<sup>660</sup> Claimants’ Memorial, paras. 399, 400; Respondent’s Counter-Memorial, para. 230.

<sup>661</sup> Claimants’ Memorial, para. 400.

<sup>662</sup> Claimants’ Memorial, para. 402. [Tribunal’s translation] The original Spanish reads: “*el Contrato de Concesión goza, mediante el Contrato de Garantía, de la máxima protección y blindaje frente a cualquier actuación de cualquier entidad pública que pretenda ir en contra de lo pactado, incluso frente a una ley del Congreso de la República, que es la máxima expresión del poder soberano estatal.*” In this respect, the Claimants appear to rely on the nature of the Guarantee Contract as a “*Contrato Ley*.”

“*Contrato Ley*,” which according to the Claimants, is meant to protect investors against political risks in order to attract investment.<sup>663</sup>

539. The concept of “Contratos Ley” is set out in Article 62 of the Peruvian Constitution, according to which: “[b]y means of contract-law agreements (contratos-ley), the State may issue guarantees and grant assurances. These agreements may not be amended by legislative act...”<sup>664</sup> The Claimants argue that the Contratos Ley are a domestic system for the protection of investments because they allow freezing the fiscal, exchange rate, labor and non-discrimination legislation, among others, and guarantee all of the terms of a contract against any contrary action by the State.<sup>665</sup> According to the Claimants, given the nature of the Guarantee Agreement as a *Contrato Ley*, the Guarantee Agreement has at least three effects in this case:

- it reinforces the State’s compromise that it will comply with the obligations under the Concession Contract. Notably, this commitment is undertaken by the Peruvian State itself and not merely through some public entities;<sup>666</sup>
- it implies that the State is responsible not only for any breaches of the Concession Contract, but also for any acts in the exercise of its sovereign capacity that are contrary to the terms of the Concession Contract. In other words, the State cannot “hide” behind its “sovereign capacity” to justify a failure to comply with the Contract.<sup>667</sup>
- it means that State can be brought to arbitration for any breach of the Guarantee Agreement resulting from any acts of the State. This is, in the Claimants’ view, precisely the reason

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<sup>663</sup> Claimants’ Memorial, paras. 402-404.

<sup>664</sup> Claimants’ Memorial, para. 404; **Exhibit CL-23**, Constitución Política del Perú, 1993, art. 62. [Tribunal’s translation] The original Spanish reads: “[m]ediante contratos-ley, el Estado puede establecer garantías y otorgar seguridades. No pueden ser modificados legislativamente...”

<sup>665</sup> Claimants’ Memorial, para. 406.

<sup>666</sup> Claimants’ Memorial, para. 414.

<sup>667</sup> Claimants’ Memorial, para. 415, citing **Exhibit CL-39**, *Tribunal Constitucional del Perú*, File No. 005-2003-AI/TC, 3 October 2003, para. 33.

why Clause 3 of the Guarantee Agreement establishes that disputes in relation thereto are subject to arbitration pursuant to Clause 16 of the Concession Contract.<sup>668</sup>

540. On the Claimants' case, all of Peru's breaches of the Concession Contract also constitute breaches of the Guarantee Agreement, because under the Guarantee Agreement, Peru guaranteed the obligations of the MTC.<sup>669</sup>

## **(ii) The Respondent's Position**

541. In the Respondent's view, the Claimants' position is that the Guarantee Agreement extended sovereign protections in favour of the Claimants and guaranteed that the MTC would not terminate the Concession Contract.<sup>670</sup> The Respondent argues that this interpretation is wrong, as this type of contract is only intended to guarantee that the MTC will comply with its obligations and representations under the Concession Contract.<sup>671</sup>
542. Furthermore, the Respondent argues that the guarantees provided in the Guarantee Agreement are expressly limited to certain aspects of the Concession Contract, related to the stages of design, financing, construction, operation, and maintenance, but do not extend to termination of the Contract. The Guarantee Agreement also does not and cannot prevent other Peruvian entities such as the *Contraloría* or the *Fiscalía* from exercising their legal powers and acting within their competence.<sup>672</sup>
543. In any event, on the Respondent's case, since the MTC did not breach the Concession Contract (either by terminating the Concession Contract, by refusing to pay the advance payment, by using the EDI or by demanding the return of the Airport Land), it has likewise not breached the Guarantee Agreement.<sup>673</sup>

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<sup>668</sup> Claimants' Memorial, para. 417.

<sup>669</sup> Claimants' Memorial, para. 417.

<sup>670</sup> Respondent's Counter-Memorial, para. 231.

<sup>671</sup> Respondent's Counter-Memorial, para. 232; **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 199-211.

<sup>672</sup> Respondent's Counter-Memorial, para. 232; **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 205-207.

<sup>673</sup> Respondent's Counter-Memorial, para. 233.

*b. The Tribunal's Analysis*

544. The Parties disagree as to the nature of the Guarantee Agreement and the effects that the qualification of the Guarantee Agreement has on the case. The Claimants argue that this document is a Contract-Law (“*Contrato-Ley*”), which would have the effect of shielding or reinforcing the Peruvian State’s commitment to comply with the obligations secured therein. In particular, this would imply that (i) all public entities, in addition to the Grantor, would be bound by the Concession Contract; (ii) public entities should refrain from exercising state powers that would result in the breach of the obligations under the Concession Contract; and (iii) the arbitration prescribed in the Concession Contract would be applicable to the Peruvian State. Meanwhile, in the Respondent’s view, the document would simply guarantee the MTC’s compliance with the representations and obligations of the Concession Contract.<sup>674</sup>
545. The Tribunal finds the Respondent’s position on this issue not convincing. The Guarantee Agreement is a contract entered into pursuant to Article 1357 of the Peruvian Civil Code, which provides that “by law, supported by reasons of social, national or public interest, guarantees and assurances may be granted by the State by means of contract.” In this case, execution of the Guarantee Agreement was authorized by Supreme Decree 185-2014-EF.<sup>675</sup> The obligations under the Guarantee Agreement must be different from the obligations under the contract secured. Otherwise, it would make no sense to assume an obligation already undertaken. Precisely, the purpose of a guarantee is to create an additional obligation that secures performance of a duty.
546. The purpose of the Guarantee Agreement is stipulated in Clause 2.1:

*Under this Guarantee Agreement, the STATE secures in favour of THE CONCESSION COMPANY, the representations, warranties and obligations of the Grantor established in the CONCESSION CONTRACT. This*

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<sup>674</sup> Claimants’ Memorial, paras. 404 *et seq.*; Respondent’s Counter-Memorial, paras. 230, 232.

<sup>675</sup> **Exhibit C-49**, Guarantee Agreement, Whereas, Cl. 1.13.

*guarantee is not a financial guarantee.*<sup>676</sup> [Tribunal's translation]

547. The scope of this guarantee was studied by both Parties' experts on Peruvian law. Eduardo Benavides, for the Claimants, argued that the Guarantee Agreement is a Contract-Law ("*Contrato-Ley*"), by which Peru waived "the right to exercise acts under the legal power of the State (*Ius Imperium*), throughout the execution of the contract, that might be contrary to the obligations and guarantees contained in such contract."<sup>677</sup> In practice, by virtue of the Guarantee Agreement, the Concession Contract "is mandatory and binding upon all the entities of the Peruvian State" and prevents amendment of its provisions by an act of the Government.<sup>678</sup>
548. Enrique Ferrando, on behalf of the Respondent, argued that the Guarantee Agreement ensures appropriate performance of the Concession Contract, and awards reinforced protection to the investments in the design, financing, construction, operation and maintenance of the airport.<sup>679</sup> In particular, Dr. Ferrando stated that the guarantee provided to the Concession Contract ensures that "its provisions will not be affected by direct actions that amend or alter the originally agreed contractual terms."<sup>680</sup>
549. The experts agree that the Guarantee Agreement conveys immutability to the terms of the Concession Contract. The Tribunal agrees with the Claimants that this translates into the following consequences: (i) the Peruvian State—not just the MTC—undertook to observe the provisions of the Contract; and (ii) State entities committed to limit the exercise of their public powers, in consideration of the rights and obligations contained in the Concession Contract. Therefore, the exercise of a public power by any entity of the Peruvian

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<sup>676</sup> The original Spanish reads: "*En virtud del presente CONTRATO DE GARANTÍA, EL ESTADO garantiza A LA SOCIEDAD CONCESIONARIA, las declaraciones, seguridades y obligaciones del Concedente establecidas en el CONTRATO DE CONCESIÓN. Esta garantía no constituye una garantía financiera.*"

<sup>677</sup> **Exhibit CER-7**, Benavides Torres Report, Conclusion 1, p. 4. [Tribunal's translation] The original Spanish reads: "...a ejercer actos de *Ius Imperium* durante la ejecución de un contrato que pudieran contradecir las obligaciones y garantías contenidas en dicho contrato."

<sup>678</sup> **Exhibit CER-7**, Benavides Torres Report, Conclusion 2, p. 5. [Tribunal's translation] The original Spanish reads: "...obliga y vincula a todas las entidades del Estado Peruano."

<sup>679</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, para. 211.

<sup>680</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, para. 208. [Tribunal's translation] The original Spanish reads: "...sus disposiciones no se verán afectadas por intervenciones directas que modifiquen o alteren las condiciones contractuales originalmente pactadas."

Government contrary to the Concession Contract, would imply in turn a breach of the Guarantee Agreement.

550. In this case, the Tribunal has held that the MTC breached the Concession Contract by terminating such Contract without a reason of public interest that justified the decision (*supra*, para. 427). To the extent that the MTC is a State agency, this breach also involves a violation of the Guarantee Agreement, because the latter was binding on the Peruvian State as a whole.
551. With regard to other breaches attributed by the Claimants to entities other than the MTC, the Tribunal confirms its previous findings. The Tribunal determined that it was the MTC and not any other state agency that breached the Concession Contract. The reasons to determine the Respondent's compliance in these other claims are outlined in the respective sections. In each case, the Tribunal has considered the Guarantee Agreement executed and has determined whether the Peruvian State acted in accordance with its contractual obligations.
552. Accordingly, the Tribunal concludes that the MTC's violation of the Concession Contract was at the same time a violation by the Peruvian Government of the Guarantee Agreement. As both violations were attributable to the same State agency, the breach of the Guarantee Agreement has no additional consequences in practice for the purposes of assigning liability under Peruvian law. This finding does not change the effects derived from the violation of the Guarantee Agreement for the purposes of assigning liability to the Peruvian Government under international law (*infra*, para. 733).

**(9) Peru acted with *dolo* and *culpa inexcusable***

***a. The Parties' Positions***

**(i) The Claimants' Position**

553. The Claimants further claim that Peru breached the Concession Contract wilfully – because it knew that it was breaching its commitments and nevertheless, pursued conduct that was



inconsistent with the Contract – and with gross negligence, because Peru did not use the minimum level of diligence required by Peruvian law.<sup>681</sup>

554. Article 1138 of the Peruvian Civil Code establishes that “a person who deliberately fails to perform an obligation is guilty of wilful misconduct (*“dolo”*),” without any need to show the intention to harm.<sup>682</sup> Article 1319 of the Peruvian Civil Code establishes that somebody acts with inexcusable negligence (*“culpa inexcusable”*) if it “negligently fails to perform an obligation.” *Culpa inexcusable* or gross negligence is the highest degree of negligence and implies a disregard for the most basic duties and obligations.<sup>683</sup>
555. In this case, the Claimants argue that the Respondent wilfully breached the Concession Contract by unilaterally terminating it despite knowing that the termination was not valid. In particular, the Claimants fault the Respondent for terminating the Contract despite knowing that: (i) Kuntur Wasi had not breached the Contract; (ii) Addendum No. 1 had been validly signed; and (iii) there was no public interest that could justify the termination of the Contract.<sup>684</sup> According to the Claimants, the reports of 13 July 2017 on which the Respondent relies for its position that there was a public interest justifying the termination of the Concession Contract, prove the Claimant’s case. In the Claimant’s view, none of these reports conclude that it was in the public interest to terminate the Concession Contract, let alone did they recommend that the MTC terminate it.<sup>685</sup>
556. The Claimants also argue that Peru knew that – through its actions – it had created in Kuntur Wasi the legitimate expectation that the Project would be executed under the terms of Addendum No. 1; and that, by unilaterally terminating the Concession Contract, Peru wilfully breached those legitimate expectations.<sup>686</sup>

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<sup>681</sup> Claimants’ Memorial, para. 422.

<sup>682</sup> Claimants’ Memorial, para. 423, citing **Exhibit CL-34**, Osterling, Felipe, *Las Obligaciones*, Lima: Editora Jurídica Grijley, Octava Edición, 2007, pp. 239, 240.

<sup>683</sup> Claimants’ Memorial, para. 438.

<sup>684</sup> Claimants’ Memorial, para. 426, 427.

<sup>685</sup> Claimants’ Reply, paras. 547 *et seq.*

<sup>686</sup> Claimants’ Memorial, paras. 431, 432.

557. Likewise, the Claimants argue that Peru knew that it had to make the Advance Payment and that, even if the Contract had been validly terminated, the obligations under the Contract would remain in force until the issuance of a final award, and despite that knowledge, Peru wilfully refused to make the Advance Payment.<sup>687</sup>
558. Not only did Peru know that its actions were contrary to the Concession Contract, but it also knew that those actions would cause harm to Kuntur Wasi. This is, in the Claimants' view, evidenced by Minister Vizcarra's statement to the effect that, in case of termination, the State would have to pay compensation to Kuntur Wasi.<sup>688</sup>
559. According to the Claimants, the Respondent also acted with gross negligence when it terminated the Concession Contract without any supporting public interest reasons; without providing any reasoning whatsoever; without indicating which "problem" the termination was intended to solve; and despite the Guarantee Agreement.<sup>689</sup> Through these actions, Peru also failed to act with the slightest diligence required by the law governing public-private partnerships, according to which, when confronted with two alternatives, the State must always choose the one that would allow the project to be executed and which promotes the investment.<sup>690</sup>
560. Finally, the Claimants allege that, under Peruvian law, the characterization of a breach as wilful or as resulting from gross negligence has two consequences: (i) contractually agreed limitations on the amount of compensation are automatically void and therefore, inapplicable; (ii) the non-breaching party has a right to be compensated for unforeseeable damages caused by the breach.<sup>691</sup>

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<sup>687</sup> Claimants' Memorial, para. 433-435.

<sup>688</sup> Claimants' Memorial, para. 436; **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 24.

<sup>689</sup> Claimants' Memorial, paras. 441, 444, 446; Claimants' Reply, paras. 554 *et seq.*

<sup>690</sup> Claimants' Memorial, para. 442.

<sup>691</sup> Claimants' Memorial, paras. 448-454, citing, among others, art. 1328 and art. 1321 of the Peruvian Civil Code.

## (ii) The Respondent's Position

561. The Respondent denies acting with *dolo* or *culpa inexcusable*. The Respondent's case is that it did not breach the Contract by unilaterally terminating it, and therefore, there is no *dolo*. However, in the Respondent's view, even if the Tribunal were to find that the termination was inconsistent with the Contract, the MTC's actions were not wilful.<sup>692</sup>
562. According to Dr. Ferrando, under Peruvian law, for there to be *dolo*, there has to be a breach and an intention to breach.<sup>693</sup> The Respondent asserts that the Claimants have failed to show that the MTC acted with deliberate intention to breach the Contract. In particular, the Respondent takes issue with all three facts that – on the Claimants' case – indicate the MTC's deliberate action: that the MTC knew that Kuntur Wasi had not breached the Contract; that Peru knew that Addendum No. 1 had been validly executed; and that there was no public interest justification to unilaterally terminate the Contract).<sup>694</sup>
563. First, the Respondent argues that the reason for the termination of the Contract was Kuntur Wasi's failure to submit a reasonable financial package that would not cause an economic prejudice to the State. Secondly, the fact that Addendum No. 1 was signed in accordance with Peruvian law does not indicate that it would not be subject to the *Contraloría*'s review and that, following the *Contraloría*'s unfavorable views, it would not be terminated by the MTC. Third, according to the Respondent, the only way to fulfil the State's public interest in building the Chinchero Airport was to terminate the Contract because Kuntur Wasi had proven to be an unreliable partner.<sup>695</sup>
564. The Respondent also denies that the MTC acted with gross negligence by failing to identify a public interest reason for terminating the Concession Contract, for the same reasons.<sup>696</sup>

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<sup>692</sup> Respondent's Counter-Memorial, para. 210; **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 218-220.

<sup>693</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 218-20.

<sup>694</sup> Respondent's Counter-Memorial, paras. 211, 212.

<sup>695</sup> Respondent's Counter-Memorial, para. 212.

<sup>696</sup> Respondent's Counter-Memorial, para. 214.

***b. The Tribunal's Analysis***

565. The Claimants argue that the Peruvian Government allegedly engaged in wilful misconduct or gross negligence based upon three grounds: (i) by unilaterally terminating the Concession Contract in the knowledge that there was no valid reason for such termination; (ii) by frustrating Kuntur Wasi's legitimate expectations that the Project would be executed in accordance with Addendum No.1; and (iii) by failing to deliver the Advance Payment. In Claimants' opinion, the Peruvian Government was aware that these actions were contrary to the Concession Contract and would damage Kuntur Wasi.
566. The Tribunal has found that Peru breached the Concession Contract by failing to comply with the requirements set forth in Clause 15.5.1 for termination thereof. With respect to the other claims mentioned in the preceding paragraph, the Tribunal has found that Peru acted in accordance with its duties under the Concession Contract. Accordingly, the analysis of the allegations of wilful misconduct or gross negligence will be limited to the only event that amounts to a breach of contract as stated in the Decision.
567. Articles 1318 and 1319 of the Peruvian Civil Code define wilful misconduct ("*dolo*") and gross negligence ("*culpa grave*"), respectively. With respect to the former, the law provides that "a person who deliberately fails to perform an obligation is guilty of wilful misconduct." As for the latter, the law provides that "inexcusable negligence is incurred by those who, due to gross negligence, do not execute an obligation."
568. In the civil law tradition, also in force in Peru, both wilful misconduct and gross negligence require a high standard of proof.<sup>697</sup> Wilful misconduct requires proof that the subject acted *deliberately*, which requires producing evidence showing the subjectivity of the contracting party at the time of the breach. Although wilful misconduct does not always entail an intention to harm the counterparty, it carries the heavy burden of proving that the breach was committed consciously.
569. Meanwhile, proof of gross negligence essentially operates objectively, contrasting a standard of care with the debtor's actions. The party alleging gross negligence must go

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<sup>697</sup> **Exhibit RER-2**, First Ferrando Report, para. 220.

beyond the mere presumption of negligence associated with the breach of contract, and must show what the applicable minimum standard of care was and how the debtor deviated from it.

570. The Claimants base their allegation of wilful misconduct or gross negligence on the termination of the contractual relationship, contending that the Peruvian State was aware that (i) Kuntur Wasi had not breached the Contract, (ii) Addendum No.1 had been validly executed and (iii) there was no reason of public interest justifying the termination of the Contract.
571. In the Tribunal's opinion, none of these arguments suffice to prove that the Respondent engaged in wilful misconduct or gross negligence. With respect to the former, it is undisputed that at the time of termination Peru did not consider that Kuntur Wasi had breached the Concession Contract. If that had been the case, Peru would have given notice of termination in accordance with Clause 15.3, which governs the events for termination attributable to the Concessionaire's fault. The Peruvian State opted, instead, to terminate the Concession Contract in accordance with Clause 15.5, which does not govern termination upon the Concessionaire's breach but upon a well-founded reason of public interest. Thus, according to the provisions of the Contract, the State was authorized to terminate the contractual relationship, even if there was no breach by the Concessionaire. In other words, the fact that Kuntur Wasi had not defaulted does not mean, *per se*, that the Concession Contract was terminated through wilful misconduct or gross negligence.
572. Terminating the Concession Contract even if Addendum No. 1 was valid does not amount to wilful misconduct or gross negligence by Peru, either. Although the Respondent contested the validity of Addendum No. 1, the evidence produced in this arbitration has demonstrated that during the effective term of the contractual relationship, the MTC and the MEF acted on the understanding that Addendum No. 1 was valid and that the *Contraloría's* recommendations were not binding (*supra*, paras. 378 *et seq.*). The efforts made by the MTC to amend Addendum No. 1 responded to a legitimate interest to find a

solution that would be satisfactory to the supervising authority.<sup>698</sup> Kuntur Wasi agreed with this (*supra*, paras. 487, 488). Thus, the Tribunal does not find a thoughtless or reckless disregard of Addendum No. 1 by the MTC, but rather an attempt to adapt the terms of the agreement to the recommendations issued by the *Contraloría*.

573. Lastly, Kuntur Wasi asserts that there was wilful misconduct or gross negligence because there was no valid reason justifying the termination pursuant to Clause 15.5 of the Concession Contract. According to Kuntur Wasi, none of the 13 July 2017 reports, on which the Respondent based its decision to terminate the Concession Contract, state that such termination was a matter of public interest. And Kuntur Wasi further alleges that the Peruvian State did not provide any reasons at all for the termination and failed to indicate the problem intended to be solved with termination. Nor did the Peruvian Government display the minimum duty of diligence required by the PPP Law, which provides to always opt for the alternative that allows for the execution of the Project and promotes private investment.
574. The Tribunal agrees with the Claimants in that the Peruvian Government did not provide a well-founded reason of public interest to lawfully terminate the Contract pursuant to the terms of Clause 15.5. Hence, the Tribunal held that Peru breached the Concession Contract. However, this circumstance does not prove that Peru engaged in wilful misconduct or gross negligence.
575. Gross negligence requires proof that the behaviour displayed by the debtor reveals an unusual lack of care, that demonstrates factual and reckless disregard for the interest of the other party.
576. Peru's actions were clumsy or negligent with regard to Kuntur Wasi. This is evidenced by the MTC's actions: announcing the termination shortly after subscribing the Renegotiation Proposal; failing to carefully consider Kuntur Wasi's request for six months to secure financing; or deciding to terminate the Contract in spite of the fact that other entities

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<sup>698</sup> Minister Giuffra Statement: "From the outset, I tried to look for a way out, regardless of the Controller's proposals. Perhaps, we could find an option D accepted by the Comptroller's Office." (Transcript, Day 5 (English), 1016:19-22).

recommended that the terms of the Project be adapted. However, these circumstances do not represent an extreme hypothesis of wilful misconduct or gross negligence.

577. Although Peru has been unable to prove that Kuntur Wasi was a deficient contracting party to carry out the Project and that, therefore, early termination was a matter of public interest, the State did indeed establish that it engaged in an active search for a solution allowing for the execution of the Project under terms conforming to both the framework in force and the interests of the investor. When the Parties were unable to achieve the Financial Closing, Peru proposed the execution of Addendum No. 1. When the *Contraloría* warned that Addendum No. 1 was potentially unlawful, Peru encouraged the renegotiation of the financial terms one more time. These circumstances show there was no such intention of Peru to harm Kuntur Wasi or gain personal benefits at the expense of the latter, but rather find a solution that would be mutually acceptable to the Parties. To conclude, even if Peru breached the Concession Contract (as it did), the Tribunal dismisses the allegation that in so doing, Peru has engaged in wilful misconduct or gross negligence.

**(10) Peru’s actions caused damage to the image, honour and good reputation of Kuntur Wasi and its shareholders**

***a. The Parties’ Positions***

**(i) The Claimants’ Position**

578. The Claimants’ last claim under Peruvian law is that the Respondent has damaged Kuntur Wasi’s constitutionally protected rights to “image, reputation and honour.”<sup>699</sup> According to the Claimants, this constitutional right is linked to the concept of dignity and protects the social reputation in society of natural or legal entities against false accusations.<sup>700</sup> Therefore, any act that causes humiliation, that is disrespectful or that otherwise implies the dissemination of lies, or that negatively affects a person’s reputation in society, is a violation of the right to “image, reputation and honor,” and as such, gives rise to moral damages.<sup>701</sup>

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<sup>699</sup> Claimants’ Memorial, para. 381.

<sup>700</sup> Claimants’ Memorial, paras. 382-386.

<sup>701</sup> Claimants’ Memorial, para. 387.

579. The Claimants argue that Kuntur Wasi's shareholders are companies with high standing in the region and in the world. In this sense, the Claimants point out that Corporación América is the greatest private airport operator in the world, with 52 airports in Latin America, Europa and Eurasia, and with more than 20 years' experience in the field; and Andino is a Peruvian entity with a long-standing record, which trades on the Stock Exchange of Lima.<sup>702</sup> The Claimants further argue that, when the Concession was awarded, Peru itself spoke to Kuntur Wasi's experience.<sup>703</sup> And when Addendum No. 1 was signed, President Kuczinski emphasized Corporación América's experience and good reputation.<sup>704</sup>
580. Yet the good reputation of Kuntur Wasi, its officials and its shareholders has been severely affected since 2017 because of Peru's actions.<sup>705</sup> In particular, the Claimants take issue with two actions taken by Peru, which, on the Claimants' case, have damaged their reputation:
- Peru's decision to open criminal investigations against Kuntur Wasi's and Andino's officials for having signed the Concession Contract and Addendum No. 1. According to the Claimants, the *Fiscalía* has initiated investigations on the basis of abstract allegations and without clear indication of the facts that support opening an investigation for collusion.<sup>706</sup> In the Claimants' view, the decision to open criminal investigations was "arbitrary" and "contrary to the norms of civilized nations."<sup>707</sup> The Claimants further argue that, even if some of the criminal investigations against Kuntur Wasi and its employees have been dismissed, one continues and, in any event, the Peruvian State must pay for the damage caused by opening unfounded investigations that had significant media attention and were arbitrary.<sup>708</sup>
  - The termination of the Concession Contract itself will have a negative effect on Corporación América's prospects for securing another airport concession in the future.

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<sup>702</sup> Claimants' Memorial, paras. 388, 389.

<sup>703</sup> Claimants' Memorial, para. 390.

<sup>704</sup> Claimants' Memorial, para. 392.

<sup>705</sup> Claimants' Memorial, para. 393.

<sup>706</sup> Claimants' Memorial, paras. 394, 656-661.

<sup>707</sup> Claimants' Memorial, para. 655.

<sup>708</sup> Claimants' Reply, paras. 165 *et seq.*



That is because most tender procedures require bidders to confirm whether a government has ever cancelled one of their concession contracts in the past. Peru's unjustified and arbitrary decision therefore poses a risk to Corporación América.<sup>709</sup> The termination has also had a negative impact on Mr. Balta – Kuntur Wasi's former General Manager – who explains that he lost his job as a result of the termination and will find it hard to find another job in Peru.<sup>710</sup>

581. These actions justify, on the Claimants' case, the award of moral damages.<sup>711</sup>

### **(ii) The Respondent's Position**

582. The Respondent does not deny that the *Fiscalía* opened preliminary investigations against the Claimants' representatives as a result of the *Contraloría*'s findings about Addendum No. 1. However, the Respondent's case is that the preliminary investigation was not baseless or designed to harass the Claimants.<sup>712</sup>

583. According to the Respondent, because the *Fiscalía* is the general prosecutor in Peru, if it receives a complaint that a possible crime has been committed and believes it to be at least plausibly substantiated, it has a duty to initiate preliminary investigations.<sup>713</sup> In this case, the *Fiscalía* received a request from the MTC to investigate whether any possible criminal activities had been associated with Addendum No. 1 and, given the seriousness of the issue and the significance of the Project for Peru, the *Fiscalía* prudently opened a preliminary investigation. This was not, as the Claimants suggest, a targeted discriminatory action against Kuntur Wasi or Corporación América. Rather, the preliminary investigations extended to everyone involved with the Addendum.<sup>714</sup>

584. The Respondent further argues that Kuntur Wasi and its shareholders have been afforded due process and have availed themselves of their due process rights through local court

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<sup>709</sup> Claimants' Memorial, para. 397, 662.

<sup>710</sup> Claimants' Memorial, para. 398; citing **Exhibit CWS-1**, First José Balta Statement, para. 74.

<sup>711</sup> Claimants' Memorial, para. 665.

<sup>712</sup> Respondent's Counter-Memorial, para. 148.

<sup>713</sup> Respondent's Counter-Memorial, para. 148.

<sup>714</sup> Respondent's Counter-Memorial, para. 149.

proceedings to narrow the investigation. And, in any event, the investigation by the *Fiscalía* never moved beyond preliminary status (neither Kuntur Wasi's nor Corporación América's representatives were ever indicted) and in the end, it was closed in January 2020.<sup>715</sup>

585. Therefore, according the Respondent, even if the Claimants' allegations were true (*i.e.*, that the criminal investigations were not justified), the Claimants have failed to explain how a preliminary investigation that: (i) did not involve the arrest or detention of anyone; (ii) was conducted in accordance with due process of law; and (iii) has ultimately been dropped, is comparable to an abusive physical or emotional harm that would be needed to be proved to claim moral damages.<sup>716</sup>
586. With respect to the Claimants' allegation that the termination of the Contract has resulted in reputational loss, the Respondent contends that the Claimants' claim is highly speculative, as the Claimants did not present any evidence of bids where this issue has been raised. Furthermore, according to the Respondent, the alleged reputational loss would in no event support a finding of moral damages because, if the Tribunal finds in favor of the Respondent, then the Respondent acted consistently with its obligations under the Contract and international law, and the Claimants have no cause for complaint. If, on the other hand, the Tribunal finds in favor of the Claimants, then the Tribunal will have recognized their complaints either with respect to the termination of the Contract or the State's treatment of the Claimants or their investments.<sup>717</sup>
587. Finally, the Respondent contends that an award of moral damages requires far more than merely showing that an investor's "reputation" was harmed by the State, both under international law and Peruvian law. As a matter of international law, the Respondent emphasizes that in the rare instances where moral damages have been awarded, there has been egregious conduct and severe physical harm, and not a mere showing of impact on reputation.<sup>718</sup> As a matter of Peruvian law, the Respondent argues that moral damages are

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<sup>715</sup> Respondent's Counter-Memorial, para. 149, 400.

<sup>716</sup> Respondent's Counter-Memorial, para. 400.

<sup>717</sup> Respondent's Counter-Memorial, para. 401.

<sup>718</sup> Respondent's Counter-Memorial, paras. 400-404.

only available to companies to the extent that they prove that their commercial reputation – not that of their employees – was impaired by illegal conduct against the company itself, and that the Claimants have not proven such an allegation in this case. In any event, Peruvian law is only relevant for the Claimants’ contract law claims, not for its treaty-based claims.<sup>719</sup>

***b. The Tribunal’s Analysis***

588. The Claimants contend that Peru breached the Concession Contract, the Guarantee Agreement and Peruvian law as it damaged “the image, honour and good reputation of Kuntur Wasi and the latter’s shareholders and officers.” To support this claim, the Claimants explain in three different sections that (1) Peruvian law embraces the right of legal entities to good reputation, (2) Kuntur Wasi had built good reputation, and (3) Peru damaged such good reputation.
589. The Tribunal understands that Kuntur Wasi has, as any legal person, fundamental rights such as the right to one’s honour and good name. Indeed, as the Claimants allege, these are rights established for all persons in general by the Constitution of Peru, as has been expressly recognized by the Constitutional Court.<sup>720</sup>
590. The Respondent does not object this conclusion but adds certain considerations that it submits should be taken into account to determine whether a claim for damage to a legal person’s reputation is admissible. Among these considerations, the Respondent affirms that (i) the harmful behaviour must be particularly serious,<sup>721</sup> (ii) damage has to be claimed exclusively by the party harmed,<sup>722</sup> and (iii) moral damages claimed by a legal person require a financial prejudice.<sup>723</sup>

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<sup>719</sup> Respondent’s Counter-Memorial, para. 406, citing **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 250-258, 261.

<sup>720</sup> **Authority CL-26**, *Expediente N° 0905-2001-AA/TC*, legal ground 7, 14 August 2002; Claimants’ Memorial, para. 384, footnote 469.

<sup>721</sup> Respondent’s Counter-Memorial, para. 395.

<sup>722</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, paras. 250, 251.

<sup>723</sup> Respondent’s Counter-Memorial, para. 406.

591. With regard to the first consideration, the Tribunal rejects the assertion that an action that causes moral damage for which compensation may be sought shall necessarily imply physical harm or illegal detention.<sup>724</sup> To arrive at this conclusion, the Respondent thoroughly examines prior decisions issued by tribunals ruling in cases of disputes between States and investors, but this claim was filed under contract-law provisions. Therefore, the merits of the claim shall be determined in light of the provisions stipulated in the Concession Contract and, failing that, Peruvian law. Pursuant to Peruvian law, the requirements applicable to compensation of moral damages are the same as those applicable to property losses, thus a negligent action, even if not gross, suffices to amount to an unlawful act.<sup>725</sup>
592. The second consideration is that moral damages may only be claimed by the harmed party. In this respect, the Tribunal agrees. Indeed, moral damage, such as any compensable damage, is personal. This means that, save for a few exceptional cases such as succession by inheritance or the transfer of a business, the action for damages shall be brought exclusively by the harmed party. Legal standing to sue lies solely in the victim to seek redress.
593. Therefore, the Tribunal finds that the claims for damage to the honour and reputation of Kuntur Wasi based on the criminal investigations against the company's officers are not admissible. In fact, any criminal investigation initiated against an individual and the ultimate communication ("*formalización*") thereof, would only provide legal standing to such individual to sue for any possible harm (monetary or otherwise) derived from an unfounded or abusive proceeding. On the contrary, such an investigation does not provide standing to sue for damage to the person's own attributes to a business represented by those officers because as a matter of fact, the business has not sustained any harm.<sup>726</sup>
594. Finally, the Respondent asserts that a claim for moral damages by a legal person requires a financial prejudice. In this regard, Dr. Ferrando explains that: "the reputation of legal

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<sup>724</sup> Respondent's Counter-Memorial, para. 395.

<sup>725</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, para. 252.

<sup>726</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, para. 250, 251.

persons is not an inherent quality. [...] Therefore, damage to reputation translates into lost revenue resulting from damage to the firm's name. If this loss does not exist, there is no moral damage.”<sup>727</sup>

595. Even if the Tribunal disagrees with this allegation, it cannot ignore that the Claimants did not dispute that this was a requirement of any action for moral damages. On the contrary, the Claimants argued that the harm to their reputation did in fact have financial consequences. In this regard, the Claimants affirmed that this damage would have negative consequences for Corporación América in future bids for other airports.<sup>728</sup> Furthermore, Mr. Vargas stated that the politicization of the conflict and the criminal investigations would have allegedly damaged Andino's financial system and would have allegedly even resulted in the suspension of several other projects until this case is resolved.<sup>729</sup>
596. The Tribunal notes that the possible monetary damages alleged under these statements cannot be sustained with respect to Kuntur Wasi. As noted earlier in relation to jurisdiction, this company was incorporated for the exclusive purpose of carrying out the construction and operation of the Chinchero Airport.<sup>730</sup> Therefore, its bidding in other tenders could not be affected as there would be none. Likewise, the alleged monetary damages of Andino are irrelevant, since Kuntur Wasi does not have legal standing to sue for damages sustained by its shareholders, *i.e.*, different legal entities.
597. Lastly, it is noted that this claim, which has been submitted as a contractual claim in the proceeding,<sup>731</sup> was filed by Kuntur Wasi and not by Corporación América. Even assuming

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<sup>727</sup> **Exhibit RER-2**, First Ferrando Gamarra Report, para. 253. [Tribunal's translation] The original Spanish reads: “...la reputación de las personas jurídicas no es una cualidad inherente a estas. [...] Por consiguiente, el daño a la reputación se manifiesta a través de una merma de los ingresos de la persona jurídica derivados del daño reputacional. Si esa merma no existe, no hay daño moral.”

<sup>728</sup> **Exhibit CWS-2**, First Barrenechea Statement, para. 60.

<sup>729</sup> **Exhibit CWS-6**, Second Vargas Loret de Mola Statement, para. 10.

<sup>730</sup> **Exhibit C-17**, Constitutive Documents of Kuntur Wasi, 11 June 2014, Chapter I “Corporate name, purpose, registered office and duration”, Article 2: “The purpose of the company shall be solely and exclusively the exercise of the rights and the performance of the obligations under the concession contract for the design, financing, [...] operation and maintenance of the new Chinchero-Cuzco International Airport (AICC).” [Tribunal's translation] The original Spanish reads: “La sociedad tiene por objeto dedicarse única y exclusivamente al ejercicio de los derechos y obligaciones relativos al contrato de concesión para el diseño, financiamiento, [...] operación y mantención del nuevo aeropuerto de internacional de Chinchero-Cusco (AICC).”

<sup>731</sup> Claimants' Memorial, p. 113.

that this is a general claim of both Claimants, no evidence has been presented to prove the possible negative consequences for Corporación América in future bids. The fact that this damage was actually sustained was merely asserted in the memorials by reference to the statement of the Chief Executive Officer of Corporación América.<sup>732</sup> This contention does not suffice to establish a financial loss that is certain and resulting from the harm to Corporación América's reputation.

598. In conclusion, the Tribunal rejects the claim for damage to Kuntur Wasi's honour and reputation. First, because the criminal investigations against the company's officers do not provide legal standing to sue to Kuntur Wasi as if it were the company's own damage. Second, there is no evidence of financial loss sustained by Kuntur Wasi resulting from the alleged damage to the firm's honour or reputation.

#### **B. ALLEGED BREACHES UNDER THE BIT AND INTERNATIONAL LAW**

599. The Claimants assert that the BIT has been breached in five respects by the conduct of the Respondent: first, by the Respondent's failure to provide fair and equitable treatment to their investment, as required by Article 2(3) of the BIT, first sentence (Section B.(1)); second, by the Respondent's unjustified conduct in violation of the second sentence of Article 2(3) of the BIT (same); third, by the Respondent's expropriation of the Concession Contract and the EDI, in violation of Article 4(2) of the BIT (Section B.(2)); fourth, by the Respondent's failure to provide legal security for their investment, as required by Article 4(1) of the BIT (Section B.(3)); and finally, by the Respondent's contractual breaches, actionable under the BIT by virtue of its MFN clause, Article 3(1), through which an umbrella clause from another treaty can be imported (Section B.(4)). The first two claims will be considered together since they involve the different and overlapping aspects of the same BIT provision.

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<sup>732</sup> Claimants' Memorial, para. 397; Claimants' Reply, para. 956. Both paragraphs refer to **Exhibit CWS-2**, First Barrenechea Statement, para. 60.

(1) Article 2(3) of the BIT

a. *The Parties' Positions*

(i) **The Claimants' Position**

600. The Claimants' first claim under the BIT is that the Respondent acted in an inconsistent, contradictory and arbitrary manner towards the Claimants, in breach of Article 2(3) of the BIT.<sup>733</sup> This Article reads as follows:

*Each Contracting Party shall ensure at all times a fair and equitable treatment of the investments of investors of the other Contracting Party, and shall not prejudice their management, maintenance, use, enjoyment, or disposition through unjustified or discriminatory measures.*<sup>734</sup>

601. According to the Claimants, Article 2(3) of the BIT sets out two independent obligations which required the Respondents to: (i) provide the Claimants' investment with fair and equitable treatment at all times (the “**positive obligation to provide FET**”); and (ii) abstain from adopting “unjustified and discriminatory” measures affecting the management, maintenance, use, enjoyment or disposition (“*gestión, mantenimiento, uso, goce o disposición*”) of the Claimants' investments (the “**negative obligation of Article 2(3)**”).<sup>735</sup>

602. In the Claimants' view, albeit independent, these two obligations are closely related: by definition, unjustified treatment would lead to a breach of the fair and equitable treatment standard (whereas a breach of fair and equitable treatment does not require showing that the State's conduct was unjustified or discriminatory).<sup>736</sup> In this case, however, the Claimants argue that Peru's conduct is both unjustified and arbitrary, and thus contrary to both aspects of this Article.

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<sup>733</sup> Claimants' Memorial, para. 468.

<sup>734</sup> **Exhibit C-50**, Perú-Argentina BIT, art. 2(3). This is an English translation provided at para. 239 of Respondent's Counter-Memorial. The Spanish original of art. 2(3) of the BIT reads: “*Cada Parte Contratante asegurará en todo momento un tratamiento justo y equitativo a las inversiones de inversores de la otra Parte Contratante, y no perjudicará su gestión, mantenimiento, uso, goce o disposición a través de medidas injustificadas o discriminatorias.*”

<sup>735</sup> Claimants' Memorial, para. 470.

<sup>736</sup> Claimants' Memorial, para. 471. The Claimants rely on caselaw supporting that unjustified and discriminatory conduct by the State inform the analysis of breach of FET (*see*, Claimants' Memorial, footnote 537).

***(a) The standard of Article 2(3) of the BIT***

603. The Claimants, while acknowledging that the BIT does not define the content of its FET standard, rely on prior caselaw indicating that FET protects investors' legitimate expectations against conduct that is arbitrary, discriminatory, lacking transparency, consistency or coherence.<sup>737</sup> According to the Claimants, the BIT's FET standard offers investors an "ample and flexible" protection, which seeks to assure investors that, among other things, they will be treated "fairly" considering all circumstances and will not be "harmed" by the State.<sup>738</sup>
604. The Claimants emphasize that – contrary to the Respondent's suggestion – the BIT's FET standard is autonomous from the customary international law minimum standard of treatment.<sup>739</sup> In the Claimants' view, the BIT's FET obligation sets out an objective standard, which does not require showing that the State acted with bad faith or that the State deliberately breached the BIT.<sup>740</sup>
605. Finally, the Claimants assert that the Tribunal must look at the cumulative effect of a State's measures in order to determine whether there has been a breach of fair and equitable treatment, rather than analyze each measure individually and in isolation.<sup>741</sup>
606. On the basis of the above standard, the Claimants argue that Peru's conduct fell short of FET for the following reasons: Peru's actions were inconsistent or contradictory (subsection (b)); Peru acted arbitrarily and without justification (subsection (c)); and Peru contravened the Claimants' legitimate expectations (subsection (d)).

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<sup>737</sup> Claimants' Memorial, paras. 472-474, relying in particular on the decision in **Exhibit CL-77**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, para. 543.

<sup>738</sup> Claimants' Memorial, paras. 472, 473.

<sup>739</sup> Claimants' Reply, paras. 588-599.

<sup>740</sup> Claimants' Memorial, paras. 473, 603 *et seq.*

<sup>741</sup> Claimants' Memorial, para. 475.



***(b) Inconsistency or contradictory conduct***

607. Relying on *Saluka v. Czech Republic*,<sup>742</sup> *MTD v. Chile*,<sup>743</sup> *Abengoa v. Mexico*,<sup>744</sup> *Lemire v. Ukraine II*,<sup>745</sup> *PSEG Global v. [Türkiye]*,<sup>746</sup> *Lauder v. Czech Republic*,<sup>747</sup> *EnCana v. Ecuador*,<sup>748</sup> and *Glencore v. Colombia*<sup>749</sup> (among others) the Claimants argue that contradictory conduct by State organs and entities that, arbitrarily and without reasoning, reverses previous decisions on which the investor relied, leads to a breach of the BIT's fair and equitable treatment requirement.<sup>750</sup>

**i. Contradictions over Kuntur Wasi's EGP**

608. According to the Claimants, Peru acted in a contradictory manner when it first issued favorable opinions in relation to Kuntur Wasi's financial proposal, only to later reject the EGP without any justification.<sup>751</sup> In particular, Kuntur Wasi refers to:

- OSITRAN's report of 20 July 2016, in which OSITRAN concluded that the documents submitted by Kuntur Wasi for the EGP approval "comply with the provisions of the Concession Contract" [Tribunal's translation] ("*se ajustan a las*

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<sup>742</sup> **Exhibit CL-80**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNICTRAL, Partial Award, 17 March 2006 (hereinafter *Saluka v. Czech Republic*).

<sup>743</sup> **Exhibit CL-69**, *MTD Equity Sdn. Bhd. y MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (hereinafter *MTD v. Chile*).

<sup>744</sup> **Exhibit CL-81**, *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 (hereinafter *Abengoa v. Mexico*).

<sup>745</sup> **Exhibit CL-64**, *Joseph C. Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2018 (hereinafter *Lemire v. Ukraine II*).

<sup>746</sup> **Exhibit CL- 79**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of [Türkiye]*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (hereinafter *PSEG Global v. [Türkiye]*).

<sup>747</sup> **Exhibit CL-209**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001 (hereinafter *Lauder v. Czech Republic*).

<sup>748</sup> **Exhibit CL-211**, *EnCana Corporation v. Republic of Ecuador*, LCIA No. UN3481, Award, 3 February 2006 (hereinafter *Encana v. Ecuador*).

<sup>749</sup> **Exhibit RL-26**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 (hereinafter *Glencore v. Colombia*).

<sup>750</sup> Claimants' Memorial, paras. 477 *et seq*; Claimants' Reply, paras. 616 *et seq*.

<sup>751</sup> Claimants' Memorial, para. 482.

*disposiciones del Contrato de Concesión*”);<sup>752</sup> and OSITRAN’s subsequent opinion, of 22 July 2016, approving Kuntur Wasi’s EGP;<sup>753</sup>

- The *Contraloría* report of 27 October 2016 and the CAF report, of 7 November 2016, both of which recommended only that the MTC should renegotiate the amount of the quarterly PAO, but did not recommend terminating the Concession Contract;<sup>754</sup> and
- Peru’s notification to Kuntur Wasi of 25 November 2016, in which the MTC rejected Kuntur Wasi’s 4 May 2016 EGP without any reasoning other than to say that the EGP “would cause an economic prejudice to the Grantor” [Tribunal’s translation] (“*generaría un perjuicio económico al Concedente*”).<sup>755</sup>

609. According to the Claimants, the Respondent admits that any contradictions between OSITRAN and the MTC in relation to the EGP became moot because Addendum No. 1, which replaced the previous financing structure, was approved. On the Claimants’ case, this is precisely the reason why any justification for termination of the Concession Contract because Kuntur Wasi “gamed the system” is moot. However, it does not eliminate the inconsistency.<sup>756</sup>

## **ii. Contradictions in relation to the negotiations leading to Addendum No. 1**

610. On the Claimants’ case, Peru also acted in a contradictory manner during the negotiation of Addendum No. 1. In particular, the Claimants argue that the MTC sent Kuntur Wasi two proposals to amend the Concession Contract, and once Kuntur Wasi had accepted one of them and sent a draft on the basis of such proposal (which also incorporated the MTC’s, the CAF’s and the *Contraloría*’s recommendations), the MTC rejected it. The MTC then

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<sup>752</sup> Claimants’ Memorial, para. 484, citing **Exhibit C-114**, *Informe No. 014-16-GRE-GAJ-OSITRAN*, 20 July 2016, paras. 228, 231.

<sup>753</sup> Claimants’ Memorial, para. 484; **Exhibit C-21**, *Oficio Circular No. 039-16-SCD-OSITRAN*, 22 July 2016.

<sup>754</sup> Claimants’ Memorial, para. 485; **Exhibit C-22**, *Oficio No. 4268-2016 MTC/25*, 27 de octubre de 2016, (the MTC sent the report of the *Contraloría* to Kuntur Wasi on 27 October 2016); **Exhibit C-23**, *Reporte de Conclusiones y Recomendaciones*, CAF, 7 November 2016, p. 23.

<sup>755</sup> Claimants’ Memorial, para. 486; **Exhibit C-67**, *Oficio No. 4601-2016-MTC*, 25 November 2016.

<sup>756</sup> Claimants’ Reply, para. 690; citing the Respondent’s Counter-Memorial, para. 258.

sent a third proposal which completely changed the financing mechanism of the Project, which ultimately became Addendum No. 1.<sup>757</sup>

### iii. Contradictions in relation to Addendum No. 1

611. The Claimants argue that Peru contradicted itself when it first promoted, supported, and finally signed Addendum No. 1 to bring the Project forward, and then later unilaterally and without reasoning, terminated the Concession Contract.<sup>758</sup> According to the Claimants, after Peru changed the economic structure of the Concession Contract, all the competent Peruvian entities, including OSITRAN, MEF, and the MTC, and high-ranking Government officials (including President Kuczynski) approved Addendum No. 1.<sup>759</sup> These public manifestations of support continued even after Addendum No. 1 was signed, as evidenced by Minister Vizcarra's appearance before the Congress as late as in May 2016 to defend its benefits, among other actions.<sup>760</sup>
612. According to the Claimants, despite the "repeated, continued and consistent" support shown by Peru in relation to the benefits of Addendum No. 1, by the end of February 2017, Peru started to change its position. The change began on 22 February 2017, when the *Contraloría* issued a report finding that there was a potential risk that Kuntur Wasi could use the Advance Payment for a different purpose than to commence the construction works, and was followed by the *Contraloría's* report of 19 May 2017, which concluded that Addendum No. 1 breached certain regulations.<sup>761</sup> On 21 May 2017, three days after supporting Addendum No. 1 in Congress and the day before renouncing his post, Minister Vizcarra appeared on television to communicate that the Government would terminate

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<sup>757</sup> Claimants' Memorial, paras. 488, 489, relying on: **Exhibit C-61**, Email from Yaco Rosas (MTC) to José Carlos Balta del Río (Kuntur Wasi), 22 October 2016; **Exhibit C-62**, Letter No. 183-2016-KW, 28 October 2016; **Exhibit C-63**, *Oficio No. 4362-2016-MTC/25*, 7 November 2016; **Exhibit CWS-1**, First José Balta Statement, para. 30; **Exhibit C-64**, Email from Yaco Rosas (MTC) to José Carlos Balta del Río (Kuntur Wasi), 9 November 2016. Claimants' Reply, paras. 633 *et seq.*

<sup>758</sup> Claimants' Memorial, para. 490; Claimants' Reply, paras. 639 *et seq.*

<sup>759</sup> Claimants' Memorial, paras. 491-493.

<sup>760</sup> Claimants' Memorial, para. 494; **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, pp. 15, 16.

<sup>761</sup> Claimants' Memorial, para. 495, 496.

(“*dejar sin efecto*”) the Concession Contract as modified by Addendum No. 1.<sup>762</sup> According to the Claimants, Minister Vizcarra’s announcement was telling, in that it spoke in terms of the termination of the Concession Contract and not just the Addendum No. 1, despite the fact that the *Contraloría*’s reports only referred to Addendum No.1.<sup>763</sup>

613. According to the Claimants, the Respondent’s only argument in relation to these contradictions is that the public statements in support of Addendum No. 1 came from individuals who do not bind the Peruvian State. On the Claimants’ case, however, those statements are binding on Peru pursuant to Article 4 of the ILC Articles on State Responsibility, as they were issued by organs of the State, and in particular, by the President, the Council of Ministers or the Ministers themselves.<sup>764</sup>

#### **iv. Contradictions in relation to the termination of the Concession Contract**

614. In the Claimants’ view, Peru also acted in a contradictory manner when it terminated the Concession Contract: first, Minister Vizcarra appeared before Congress on 18 May 2017 to support Addendum No. 1 and said that there was no public interest reason that would justify terminating the Contract; secondly, only three days later, Minister Vizcarra appeared before television to announce that the Government would terminate the Concession Contract; thirdly: on 23 May 2017, President Kuczynski announced that Peru would not terminate the Concession Contract, but would seek to agree on amendments; fourthly, despite the President’s announcement and the fact that the Parties were in the middle of negotiations, on 4 June 2017, Minister Giuffra publicly announced that the Government and Kuntur Wasi had reached a mutual agreement to terminate the Concession Contract and the MTC published an official statement to that effect; and finally, on 13 July 2017, Minister Giuffra declared the unilateral termination of the Concession Contract.<sup>765</sup>

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<sup>762</sup> **Exhibit C-120**, News clip from Buenos Días Perú, “*Vizcarra sobre Chinchero: Decidimos dejar sin efecto contrato que desde el inicio partió mal*,” 22 May 2017.

<sup>763</sup> Claimants’ Memorial, para. 497.

<sup>764</sup> Claimants’ Reply, paras. 645, 646.

<sup>765</sup> Claimants’ Memorial, paras. 501-504; Claimants’ Reply paras. 661 *et seq.*

**v. Contradictions in relation to the existence of public interest reasons for the termination**

615. The Claimants further argue that Peru's conduct was contradictory as to the reasons for the termination of the Concession Contract. While Peru first represented that Addendum No. 1 was adopted precisely to guarantee that the public interest would be upheld, because it would allow to provide the city of Cuzco with adequate airport infrastructure in the near term, a few months later, it said the exact opposite.<sup>766</sup>

**vi. Contradictions in relation to the *Trato Directo***

616. Finally, the Claimants assert that Peru's conduct was also contradictory in relation to the negotiations that took place after the termination of the Concession Contract. In particular, the Claimants allege that while Peru showed interest in engaging in negotiations with Kuntur Wasi (and even asked for an extension of the deadline for the negotiations), at the same time, it repeatedly requested Kuntur Wasi to return the Concession area.<sup>767</sup> The Claimants also take issue with the fact that once Kuntur Wasi returned the Concession area, Peru terminated the *Trato Directo* almost two months before the expiration of the deadline for the negotiations.<sup>768</sup>

617. According to the Claimants, the Respondent did not have a contractual right to seek the return of the Concession area because at the time of the negotiations, the Concession Contract was still in force (pursuant to Article 15.8.7 of the Concession Contract, the effects of the termination would be suspended until an award was issued) and required that the Parties engage in the *Trato Directo* as a prerequisite to the institution of arbitration proceedings (as set out in Clause 16 of the Concession Contract).<sup>769</sup>

***(c) Arbitrary and unjustified conduct***

618. According to the Claimants, a State also breaches its fair and equitable treatment obligations if it acts in an arbitrary and unjustified manner. In their view, "arbitrary" –

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<sup>766</sup> Claimants' Memorial, paras. 507, 508; Claimants' Reply, paras. 668 *et seq.*

<sup>767</sup> Claimants' Memorial, paras. 510- 513; Claimants' Reply, paras. 677 *et seq.*

<sup>768</sup> Claimants' Reply, para. 677.

<sup>769</sup> Claimants' Reply, para. 681.

adopting Prof. Schreuer’s words – means a situation where the measure in question “*inflicts damage on the investor without serving any apparent legitimate purpose*,”<sup>770</sup> or a situation which implies an excess of discretion, prejudice or personal preference which causes harm to the investor without any apparent legitimate objective.”<sup>771</sup>

619. The Claimants argue that, in this case, the termination of the Concession Contract should have been sufficiently reasoned, at least for three reasons. First, because the obligation to provide the reasoning supporting public decisions affecting an investment is set out in international law as developed by case law (relying on the case law cited above). Secondly, because Clause 15.5.1 of the Concession Contract requires that unilateral termination be based on “well-founded reasons of public interest” (“*razones de interés público debidamente fundadas*”); and thirdly, because Peruvian administrative law requires that every public decision must be “well-founded” (“*debidamente motivad[a]*”) and “suit the public interest objective” (“*adecuarse a las finalidades de interés público*”).<sup>772</sup> [Tribunal’s translation]

620. According to the Claimants, the MTC’s communication of 13 July 2017, notifying Kuntur Wasi of the termination of the Concession Contract, is neither grounded on public interest reasons, nor does it contain any reasoning:<sup>773</sup>

- (i) Contrary to what the MTC says in the communication, Peru itself had recognized previously that there was in fact no public interest reason supporting the termination of the Concession Contract. In support of this allegation, the Claimants point to Minister Vizcarra’s appearances before the Congress, in which he affirmed that “[a]s a State we did not have tools to terminate this

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<sup>770</sup> Claimants’ Memorial, para. 514, citing **Exhibit CL-83**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (hereinafter *EDF v. Romania*), para. 303.

<sup>771</sup> Claimants’ Memorial, para. 516 and Reply, para. 694, citing, e.g., **Exhibit CL-83**, *EDF v. Romania*, para. 303; **CL-84**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 192.

<sup>772</sup> Claimants’ Memorial, paras. 518-520, citing **Exhibit CL-4**, *Decreto Supremo 004-2019-JUS, Texto Único Ordenado de la Ley del Procedimiento Administrativo General*.

<sup>773</sup> Claimants’ Memorial, paras. 523, 524; Claimants’ Reply, paras. 711 *et seq.*

Contract”<sup>774</sup> and that “to declare reasons of public interest requires sound grounds and the signature of several Ministers. Undoubtedly, if such reasons existed, such clause could be invoked; in the case of the “Chinchero” Airport there was no way to configure such legal issue” [Tribunal’s translation];<sup>775</sup>

(ii) There is in fact no public interest reason that would support the termination of the Concession Contract. To the contrary, building the Chinchero Airport is in the public interest. Terminating the Concession Contract would only delay the construction of the Project (in fact, the works would have begun almost three years after the moment when Kuntur Wasi would have started the works, had the Contract not been terminated) and to increased costs;<sup>776</sup>

(iii) The MTC’s communication of 13 July 2017 does not contain any reasoning: it did not explain why continuing with the Project with Kuntur Wasi would pose a problem in relation to the public interest, nor why terminating the Concession Contract would in fact solve that problem. The communication only contains vague statements that are not related to the specific circumstances (*i.e.*, stating that the termination is “more in line” (“*más acorde*”) with the public interest) and false statements. In particular, the Claimants take issue with the MTC’s statement that it would no longer be possible to carry out the Project, arguing that Kuntur Wasi was both able and willing to carry out the Project.<sup>777</sup>

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<sup>774</sup> **Exhibit C-117**, Video of Minister Martín Vizcarra before the *Comisión Permanente del Congreso*, *Congreso de la República del Perú*, 9 February 2017, minute 30.27 onwards. The Spanish original says: “Como Estado no teníamos herramientas para caducar este Contrato.”

<sup>775</sup> **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 23. The Spanish original reads: “[d]eclarar una razón de interés público requiere un sustento firme y la firma de varios Ministros. Sin duda si existieran esas razones se podría invocar esa cláusula, en el caso del Aeropuerto “Chinchero” no había forma de configurar una situación legal de ese tipo.”

<sup>776</sup> Claimants’ Memorial, paras. 524-526; **Exhibit C-24**, Addendum No. 1, Cl. 3, numerals 12, 13; **Exhibit C-145**, *Mensaje a la Nación*, Martín Vizcarra Cornejo, 28 July 2019, p. 6; **Exhibit C-146**, “Informe de Acción Simultánea No. 1345-2018-CG/MPROY-AS, ‘Procedimiento de selección para la contratación de la ejecución de la obra: Movimiento de tierras en sectores Resa Sur y luces de aproximación a la pista 34 del Aeropuerto Internacional de Chinchero-Cusco (AICC)’”, Contraloría General de la República, Subgerencia de Control de Megaproyectos, 20 December 2018, p. 13.

<sup>777</sup> Claimants’ Memorial, paras. 527, 529.

(iv) Peru's decision to terminate the Concession Contract is not based on any technical opinion. According to the Claimants, while it is true that Addendum No. 1 was subject to a process in which OSITRAN, the MEF and the MTC issued opinions; none of these entities recommended the termination of the Concession Contract.<sup>778</sup> The Claimants also point out that the Respondent expressly admitted that the MTC's decision to terminate was based on Minister Giuffra's own personal "discretion" and "belief" that Kuntur Wasi would not be able to complete the Project;<sup>779</sup> and that the 13 July 2017 reports issued by the MINCETUR and the MTC which allegedly informed the MTC's decision, do not state that it was in the public interest to terminate the Concession Contract, let alone do they recommend such action.<sup>780</sup>

621. Based on the above facts, the Claimants conclude that the unilateral termination decision was based on Minister Giuffra's unsupported belief at the time that Kuntur Wasi would not be able to carry out the Project (and this in turn was purportedly caused by Kuntur Wasi's having informed Minister Giuffra that it would need an additional six months to obtain financing). In the Claimants' view, it was irrational for Peru to conclude that the State's best interest lay in terminating the Concession Contract even if it were correct that Kuntur Wasi had said it needed six additional months as the Respondent alleges, especially considering the costs associated with the termination.<sup>781</sup>

622. According to the Claimants, Peru's arbitrary conduct constitutes a breach of the fair and equitable obligation as well as a breach of Peru's separate obligation to abstain from adopting unjustified measures that negatively affect investments (as set out in Article 2(3) of the BIT). In the Claimants' view, this obligation requires that Peru abstain from any conduct that causes a "negative economic impact" on the investments.<sup>782</sup>

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<sup>778</sup> Claimants' Memorial, para. 528; Claimants' Reply, para. 712.

<sup>779</sup> Claimants' Reply, paras. 714-716, citing the Respondent's Counter-Memorial, para. 279.

<sup>780</sup> Claimants' Reply, para. 717.

<sup>781</sup> Claimants' Reply, paras. 721-728.

<sup>782</sup> Claimants' Memorial, paras. 532-534.



***(d) Legitimate expectations***

623. Finally, the Claimants also argue that the protection of an investor's legitimate expectations is a key component of the fair and equitable treatment obligation.<sup>783</sup> Relying on previous case law, the Claimants suggest that the BIT protects against State conduct that "affect the basic expectations that were taken into account by the foreign investor to make the investment."<sup>784</sup> As to the source of legitimate expectations, the Claimants argue that they can arise from the State's representations or undertakings, whether explicit or implicit.<sup>785</sup>
624. To determine whether there is a breach of legitimate expectations, the Claimants suggest that the Tribunal carries out an analysis similar to the one applied by the *Olin Holdings v. Libya* tribunal, which asked the following three questions: (1) Did the host State's conduct create reasonable and justifiable expectations on the part of the investor?; (2) Did the investor act in reliance on said conduct?; and (3) Did the host State fail to honor those expectations?<sup>786</sup>

**i. Peru's conduct created legitimate expectations**

625. According to the Claimants, Peru created, through the following conduct, the legitimate expectation of the Claimants that they would be able to carry out and operate the Project for a certain period of time and that Peru would only unilaterally terminate the Concession Contract for well-founded public interest reasons:<sup>787</sup>

1. Law No. 27528,<sup>788</sup> which declared that the Chinchero Airport was a public interest project;

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<sup>783</sup> Claimants' Memorial, paras. 538, citing *inter alia*: **Exhibit CL-87**, Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara J. INT'L L. 7, 17 (2014); **Exhibit CL-88**, UNCTAD, *Series on International Investment Agreements II, Fair and Equitable Treatment: A sequel* (UNCTAD/DIAE/IA/2011/5), 2012, p. 63.

<sup>784</sup> **Exhibit CL-91**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (hereinafter *Tecmed v. Mexico*), para. 154.

<sup>785</sup> Claimants' Memorial, para. 540, citing **Exhibit CL-71**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (hereinafter *Gold Reserve v. Venezuela*), para. 571.

<sup>786</sup> Claimants' Memorial, para. 541, citing **Exhibit CL-92**, *Olin Holdings Ltd. v. Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018 (hereinafter *Olin Holdings v. Libya*), para. 307.

<sup>787</sup> Claimants' Memorial, para. 543, 548; Claimants' Reply, para. 734.

<sup>788</sup> **Exhibit CL-93**, Law No. 27,528.

2. Emergency Decree No. 039-2010 that declared that the Chinchero Airport was of “national necessity and its execution was a priority in the year;”<sup>789</sup> [Tribunal’s translation]
3. Supreme Decree No. 059-96-PCM,<sup>790</sup> which stated that it was in the national interest to promote private investment in the infrastructure sector; and the Law on Public-Private Partnerships, which declared it to be of “national interest the promotion of private investment through Public-Private Partnerships;”<sup>791</sup> [Tribunal’s translation]
4. PROINVERSIÓN’s Agreement No. 357-01-2010,<sup>792</sup> which approved the *Plan de Promoción de la Inversión* for the Chinchero Airport, and the subsequent *Bases*;
5. The Concession Contract, which established that the only reason Peru could unilaterally terminate the Contract was for “well-founded reasons of public interest” (“razones de interés público debidamente fundadas”), and the Guarantee Agreement, through which Peru guaranteed all of the MTC’s representations and obligations under the Concession Contract;<sup>793</sup>
6. Addendum No. 1, which reinforced the State’s commitments, and which was approved by several public entities, including OSITRAN; President Kuczynski; the Council of Ministers; the MTC itself; Minister Vizcarra, Minister Molinelli; and the MEF.<sup>794</sup>

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<sup>789</sup> The Spanish original reads: “necesidad nacional y de ejecución prioritaria en el año.” **Exhibit CL-6**, Decreto de Urgencia No. 039-2010, 9 June 2010.

<sup>790</sup> **Exhibit CL-7**, *Texto Único Ordenado de las normas con rango de Ley que regulan la entrega en concesión al sector privado de las obras públicas de infraestructura y de servicios públicos*, 27 December 1996

<sup>791</sup> The Spanish original reads: “interés nacional la promoción de la inversión privada mediante las Asociaciones Público Privadas.” **Exhibit CL-9**, Decreto Legislativo No. 1224, “Decreto Legislativo del marco de promoción de la inversión privada mediante asociaciones público privada y proyectos en activos” 24 September 2015, art. 3.

<sup>792</sup> **Exhibit C-164**, *Acuerdo PROINVERSIÓN* No. 357-01-2010, 7 July 2010.

<sup>793</sup> Claimants’ Memorial, paras. 544, 545.

<sup>794</sup> Claimants’ Memorial, paras. 546.

626. The Claimants reject the Respondent's characterization of the Claimants' legitimate expectations as constituting expectations that they would be able to complete the Project and successfully operate the Concession for 40 years. According to the Claimants, their expectation was that they would be able to continue with the Project under the terms and conditions set out in Addendum No. 1.<sup>795</sup> The Claimants also argue that investment treaty tribunals have consistently held that legitimate expectations can arise from contracts with the State,<sup>796</sup> and that in this case, their legitimate expectations were created through the Concession Contract itself; the factual circumstances surrounding the Concession Contract; as well as the Guarantee Agreement, which reinforced the obligations contained in the Concession Contract.<sup>797</sup>
627. The Claimants also take issue with the Respondent's argument that legitimate expectations could not be derived from the Concession Contract because the construction of the Project was subject to further approvals and actions (such as obtaining the financial closure and approval by the MTC). According to the Claimants, their expectations were precisely that *if* the conditions and requirements set out in the Contract were fulfilled, they would be able to build and operate the Chinchero Airport. In other words, the Claimants argue that the Contract was the framework that governed the relationship between the Parties and that it expected that Peru would comply with it.<sup>798</sup>
628. Finally, in response to the Respondent's argument that the Claimants could not derive any legitimate expectations from Addendum No. 1 because it was approved *after* the Claimants had already invested in Peru, the Claimants argue that Addendum No. 1 effectively modified the Concession Contract, that it was proposed by the State itself and that Kuntur Wasi could have rejected it. Furthermore, the Claimants also assert that after Addendum No. 1 was adopted, they continued to make investments in Peru through the resources spent to be able to perform the Concession Contract.<sup>799</sup>

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<sup>795</sup> Claimants' Reply, paras. 739, 740.

<sup>796</sup> Claimants' Reply, paras. 743-746.

<sup>797</sup> Claimants' Reply, paras. 748, 755.

<sup>798</sup> Claimants' Reply, paras. 750 *et seq.*

<sup>799</sup> Claimants' Reply, paras. 757, 758.

**ii. The Claimants' relied on those legitimate expectations**

629. Secondly, the Claimants argue that they relied on the legitimate expectations generated by Peru's conduct. In particular, the Claimants explain that, in reliance on the above mentioned legislative and administrative acts, the following actions were taken:<sup>800</sup>

- (i) Corporación América and Andino created the Kuntur Wasi consortium with the specific purpose of participating in the tender process;
- (ii) Kuntur Wasi participated in the tender process and drafted the required technical and economic proposals;
- (iii) Once the Concession Contract was signed, Kuntur Wasi invested millions of dollars to comply with all its obligations under the Concession Contract (including obtaining permits, licenses, the preparation of the EDI and the Financial Closing); and
- (iv) Kuntur Wasi also engaged in the renegotiation of Addendum No. 1 and participated, in good faith, in the renegotiation to amend the entire Concession Contract.

**iii. Peru breached the Claimants' legitimate expectations**

630. Finally, the Claimants assert that all their legitimate expectations were destroyed when Peru unilaterally terminated the Concession Contract on 13 July 2017. From that moment, the Claimants lost all their rights to the Project without receiving any compensation from the State.<sup>801</sup>

631. According to the Claimants, the Respondent's argument that the Claimants are trying to assert legitimate expectations that the *Contraloría* would not exercise its legitimate competence to review Addendum No. 1 is a misrepresentation. The Claimants argue that their case is not whether the *Contraloría* could review the Addendum, but rather whether

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<sup>800</sup> Claimants' Memorial, paras. 549, 550.

<sup>801</sup> Claimants' Memorial, para. 551.

the State had sufficient public interest reasons to deprive the Claimants of their legitimate expectations.<sup>802</sup>

## **(ii) Respondent's Position**

### ***(a) The standard of Article 2(3) of the BIT***

632. The Respondent appears to agree with the Claimants that Article 2(3) establishes two independent obligations, but submits that there is substantial overlap between them, such that the negative obligation related to unjustified measures is subsumed within the FET obligation.<sup>803</sup>
633. The Respondent alleges that – contrary to the Claimants' suggestion – the FET standard under international law does not require the State to provide an investor with perfect fairness or equity, and thus, not every act that could possibly be labelled somewhat “unfair” constitutes a breach of the Treaty.<sup>804</sup> Relying on the decisions in *Waste Management v. Mexico* and *Genin v. Estonia*, the Respondent argues that for a finding of breach of FET, the Claimants would have to establish that the acts of the State show “wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith”;<sup>805</sup> or that the State's actions that are “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory [...] involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”<sup>806</sup>
634. In the Respondent's view, although some of these quotes referred to the “minimum standard of treatment” under public international law, the BIT's FET standard is largely

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<sup>802</sup> Claimants' Reply, para. 772.

<sup>803</sup> Respondent's Counter-Memorial, para. 240.

<sup>804</sup> Respondent's Counter-Memorial, para. 240, 241.

<sup>805</sup> Respondent's Counter-Memorial, para. 241, citing, *inter alia*, **Exhibit RL-23**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (hereinafter, *Genin v. Estonia*), para. 367.

<sup>806</sup> Respondent's Counter-Memorial, para. 242, citing **Exhibit RL-25**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (hereinafter, *Waste Management II v. Mexico*), para. 98. (Emphasis omitted).

the same as the minimum standard under CIL.<sup>807</sup> In any event, the Respondent argues that the debate as to whether these two standards are the same is futile because it does not dispute that the BIT's FET standard contains protection against State conduct that is arbitrary, unjustified or contravenes legitimate expectations. As will be further developed below, what the Respondent opposes is that the scope and content of the FET standard (including the one in the BIT) protects investors against "mere inconsistency (without more)."<sup>808</sup>

635. On the basis of the above, the Respondent denies that its conduct fell short of FET for the following reasons:

***(b) Inconsistency or contradictory conduct***

636. According to the Respondent, tribunals have routinely held that an investor cannot prove a breach of FET simply by labelling certain State acts or statements by State actors as "inconsistent." Rather, tribunals have acknowledged that it may well happen in any functioning government that different arms of the State reach different conclusions of law, fact, or policy within their respective and particular roles and competences in the State's legal framework.<sup>809</sup> In the Respondent's view, inconsistency is relevant to FET when framed in terms of "arbitrary" or "unjustifiable acts," which implies State conduct fact more severe and reproachable than mere "inconsistency."<sup>810</sup>
637. Furthermore, the Respondent argues that when analyzing whether a State's acts have breached the FET standard, tribunals must consider all the circumstances and "balance other legally relevant interests,"<sup>811</sup> including its sovereign right to pass legislation and adopt decisions for the protection of its public interest. In other words, according to the Respondent, complaints about inconsistency may be excused where protection of the public interest or other countervailing interests apply, given that investment treaties are not

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<sup>807</sup> Respondent's Counter-Memorial, para. 241; Respondent's Rejoinder, para. 324.

<sup>808</sup> Respondent's Rejoinder, para. 325.

<sup>809</sup> Respondent's Counter-Memorial, paras. 244, 247.

<sup>810</sup> Respondent's Counter-Memorial, para. 245.

<sup>811</sup> Respondent's Counter-Memorial, para. 246, citing **Exhibit CL-64**, *Lemire v. Ukraine II*, para. 285. See also **Exhibit CL-80**, *Saluka v. Czech Republic*, para. 305.

intended to restrain States from enacting and applying *bona fide* laws of general application in the public interest.<sup>812</sup>

638. Instead, the Respondent proposes that a State's actions would only breach the FET standard if the claimed inconsistencies violate the existing domestic legal framework, *e.g.*, because the entity is acting outside of its own legal competence and functions, or because the acts complained of were sufficiently egregious so as to be considered arbitrary, in bad faith, or a contravention of legitimate expectations.<sup>813</sup> In the case at hand, the Respondent argues that the conduct complained of by the Claimants was either not inconsistent, or entirely justified as a matter of policy and under Peruvian law.

**i. Contradictions in relation to the EGP**

639. Even if inconsistency *per se* were an element of FET, in the Respondent's view, there was no contradiction in relation to Kuntur Wasi's EGP. According to the Respondent, the Concession Contract contemplated a two-tiered review process under which, prior to the MTC's review, OSITRAN had to provide an opinion that the financing met certain minimum requirements. This was not, however, a final decision and the MTC was not bound by OSITRAN's decision.<sup>814</sup> The Concession Contract granted the MTC the right not to approve Kuntur Wasi's financial proposal if it found that the EGP caused an economic prejudice to the State. In this case, the MTC reviewed the financing proposal and determined that the costs to Peru were substantially higher than anticipated and included additional costs that had not been included in Kuntur Wasi's original bid. On this basis, the MTC rejected the proposal.<sup>815</sup>
640. Furthermore, each of these entities reviewed the financial proposal for different purposes, in accordance with their legally entrusted duties.<sup>816</sup>

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<sup>812</sup> Respondent's Counter-Memorial, para. 246; Respondent's Rejoinder, para. 327.

<sup>813</sup> Respondent's Counter-Memorial, para. 247-249, 253.

<sup>814</sup> The Respondent also argues that the CAF's opinion referenced by the Claimants is irrelevant to the question of inconsistency because the CAF is not a government entity or officials (Respondent's Rejoinder, para. 371).

<sup>815</sup> Respondent's Counter-Memorial, para. 256.

<sup>816</sup> Respondent's Counter-Memorial, para. 257.

641. In any event, even if the opinion of OSITRAN and the MTC's decision were contradictory, the Claimants must be deemed to have waived any complaints related to its initial financial proposal when it signed Addendum No. 1, which amended the financial components of the Contract.<sup>817</sup>

**ii. Contradictions with respect to the negotiation of Addendum No. 1**

642. According to the Respondent, the fact that the MTC made several proposals during the negotiations of Addendum No. 1 does not evidence any inconsistencies, but rather, merely reflects a normal process of negotiation. It is the Respondent's case that the MTC's proposals were made in good faith during the ongoing negotiations with Kuntur Wasi and ultimately resulted in a freely reached agreement on one of those proposals.<sup>818</sup> And in any event, even if Peruvian entities had acted inconsistently, the parties agreed to the terms of Addendum No. 1, which evidences that the Claimants suffered no harm.<sup>819</sup>

**iii. Contradictions in relation to Addendum No. 1 and the subsequent termination of the Concession Contract**

643. The Respondent does not deny that several Peruvian entities, including the MTC and the Peruvian President, supported the new financial structure under Addendum No. 1, hoping to move the Project forward. However, the Respondent explains that subsequently, the *Contraloría* determined – within the scope of its authority under Peruvian law – that Addendum No. 1 violated Peruvian law.<sup>820</sup>

644. According to the Respondent, the *Contraloría* reached this conclusion while acting in its unique capacity as defender of the fiscal health of the State, entrusted with the role of reviewing whether State actions preserve the Peruvian treasury.<sup>821</sup> In this capacity, the *Contraloría* determined that Addendum No. 1 violated Peruvian procurement law and risked a substantial loss for Peru. The Respondent further explains that the MTC was

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<sup>817</sup> Respondent's Counter-Memorial, para. 258.

<sup>818</sup> Respondent's Counter-Memorial, para. 259.

<sup>819</sup> Respondent's Counter-Memorial, paras. 259, 260.

<sup>820</sup> Respondent's Counter-Memorial, paras. 261, 264.

<sup>821</sup> Respondent's Counter-Memorial, para. 262.



required by law to follow the recommendations of the *Contraloría* and its personnel could face official sanctions if they disobeyed the *Contraloría*, as well as potential personal criminal liability.<sup>822</sup> According to the Respondent, the legitimate difference in views between duly authorized State entities (namely the MTC and the *Contraloría*) does not trigger a violation of the FET provision of the BIT.<sup>823</sup>

645. Finally, the Respondent also disagrees with the Claimants that certain statements – as opposed to State acts – bind the Peruvian State. In particular, the Respondent’s case is that the public statements made by President Kuczynski, as well as by Minister Vizcarra and a video that the MTC released, are not State acts that can form the basis for an FET claim.<sup>824</sup>

**iv. Contradiction between the contradictions in relation to the public interest supporting the termination of the Contract**

646. The Respondent alleges that there was no contradiction when it first declared that it was in the public interest to continue the Project with Addendum No. 1 and then subsequently declared that it was in the public interest for the State to terminate the Concession Contract. At all times, Peru worked in good faith to try to complete the Project as quickly and at a reasonable cost to the Peruvian public treasury. This was both the reason why the MTC tried to reach a negotiated solution with the Claimants to complete the Project, and also the reason why it terminated the Concession Contract after the *Contraloría*’s report of May 2017.<sup>825</sup> By that time, it became clear that the MTC’s faith in the Claimants’ ability to complete the Project was misplaced (because Kuntur Wasi had yet to obtain financing for the Project even after three years).<sup>826</sup>

**v. Contradictions in respect of the Trato Directo**

647. Finally, according to the Respondent, there was no contradiction in requesting that Kuntur Wasi return the Concession area to Peru while at the same time continuing to negotiate with Kuntur Wasi. According to the Respondent, the MTC had the right to take back the

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<sup>822</sup> Respondent’s Counter-Memorial, para. 263.

<sup>823</sup> Respondent’s Counter-Memorial, para. 264.

<sup>824</sup> Respondent’s Counter-Memorial, para. 265.

<sup>825</sup> Respondent’s Counter-Memorial, para. 266.

<sup>826</sup> Respondent’s Counter-Memorial, para. 267.

land as soon as the Concession Contract was terminated under Clause 15.8.1. Contrary to the Claimants' assertion, in January 2018, when the Contract terminated and the MTC requested the return of the Concession area, the termination was not subject to an arbitral proceeding (which under Clause 15.8.7 would have suspended the effects of the termination until an award was issued).<sup>827</sup>

648. Moreover, there was no barrier to continuing discussions after Kuntur Wasi returned the land because the negotiations at that point were about compensation for the unilateral termination; they were not negotiations about revising the Contract.<sup>828</sup>

***(c) Arbitrary and unjustified conduct***

649. Relying on the standard for unjustified measures of the *EDF v. Romania* case – which the Claimants themselves adopt – the Respondent argues that to prove that unjustified measures harmed the Claimants' investment, there is a “high bar” which requires the Claimants to prove, at a minimum, that the measures they identified did not serve “any apparent legitimate purpose;” were “not based on legal standards;” were “taken for reasons that are different from those put forward by the decision maker;” or were “taken in willful disregard of due process.”<sup>829</sup> As to the term “arbitrary,” the Respondent argues that this sets a similarly high bar, which would require proof that the acts are “opposed to the rule of law;” constitute a “willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety;”<sup>830</sup> or demonstrates “an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subvert[] a domestic law or policy for an ulterior motive.”<sup>831</sup> In the Respondent’s view, determining whether an action is arbitrary does not involve judging whether a measure is the “best

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<sup>827</sup> Respondent’s Rejoinder, para. 370.

<sup>828</sup> Respondent’s Counter-Memorial, para. 268.

<sup>829</sup> Respondent’s Counter-Memorial, paras. 270, 271, citing **Exhibit CL-83**, *EDF v. Romania*, para. 303.

<sup>830</sup> Respondent’s Counter-Memorial, para. 272, citing **Exhibit CL-78**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 319.

<sup>831</sup> Respondent’s Counter-Memorial, para. 272, citing **Exhibit RL-34**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, at para. 293.

response” to achieve a policy, but rather whether the measure evidences “manifest impropriety and raises questions about Peru’s adherence to “the rule of law” itself.<sup>832</sup>

650. According to the Respondent, the fundamental basis of both of the Claimants’ claims for breach of Article 2(3) of the BIT is that Peru terminated the Concession Contract without a proper public interest rationale.<sup>833</sup> In the Respondent’s view, the MTC terminated the Concession Contract pursuant to the Contract’s express provisions and for a public interest reason. Because the MTC merely exercised its contractual right to terminate the Concession Contract, that termination cannot constitute a breach of the BIT.<sup>834</sup>
651. On the facts of the case, the Respondent argues that the Claimants’ allegations that Peru acted in an arbitrary and unjustified manner fail for the simple reason that the MTC did in fact justify the termination of the Concession Contract in the public interest.<sup>835</sup> In particular, the Respondent argues that the MTC terminated the Concession Contract because it had lost faith that Kuntur Wasi would ever be able to begin, much less complete, construction of the new Chinchero Airport. According to the Respondent, after the *Contraloría* had issued its 2017 report, the Parties engaged in negotiations once again to bring the Project forward and agreed, on 1 June 2017, on the parameters for another financing structure. They also agreed that if no agreement could be reached under the proposed terms, then the parties would terminate the Contract jointly, by mutual consent. However, the breaking point occurred when, in subsequent discussions, Mr. Vargas informed Minister Giuffra that it would need at least another six months to obtain the financing necessary to proceed with construction. This indicated to the MTC that extended additional delays were inevitable and it also led the MTC to lose faith that Kuntur Wasi would be able to secure the financing needed and complete the Project at all.<sup>836</sup>
652. Thus, according to the Respondent, because the Chinchero Airport was an important project in the public interest, the continued delays and Kuntur Wasi’s unreliability had

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<sup>832</sup> Respondent’s Counter-Memorial, para. 273.

<sup>833</sup> Respondent’s Counter-Memorial, para. 269.

<sup>834</sup> Respondent’s Counter-Memorial, para. 238.

<sup>835</sup> Respondent’s Counter-Memorial, para. 274.

<sup>836</sup> Respondent’s Counter-Memorial, para. 274-276; Respondent’s Rejoinder, para. 390.

become intolerable. Consequently, after having sought confirmation from the relevant divisions of the MTC and from MINCETUR, Peru exercised its contractual right to terminate the Concession Contract in the public interest.<sup>837</sup> On the Respondent's case, the MTC and MINCETUR reports supported Peru's decision to terminate because they reiterated the public interest in building the Airport, which, in the MTC's view, could no longer be accomplished with Kuntur Wasi.<sup>838</sup> According to Mr. Giuffra, he also received legal advice from outside counsel which confirmed that the Contract could be terminated on this basis.<sup>839</sup>

653. The Respondent further argues that the communication sent by the MTC to Kuntur Wasi on 13 July 2017 provided the rationale for the termination in sufficient detail, namely that the MTC needed to construct the high-priority Chinchero Airport and did not believe that Kuntur Wasi would be able to complete the Project.<sup>840</sup> Furthermore, while admittedly the explanation for the termination is summarized briefly in the letter, according to the Respondent, Minister Giuffra had already delivered the same message to Mr. Vargas during the meetings in May and June 2017, where he explained that if the Parties could not reach an agreement on the terms for the financing, the Contract would have to be terminated by mutual agreement.<sup>841</sup>
654. In response to the Claimants' argument that Minister Vizcarra himself had declared that there was no public interest reason to cancel the Concession Contract, the Respondent alleges that soon after those statements, the *Contraloría* issued a report declaring that Addendum No. 1 violated Peruvian law. This, together with the fact that the Parties could not renegotiate the financing issue (and the history of the Project, which had been plagued with delays), led Minister Giuffra to terminate the Contract, despite espousing the same public interest in the Project as Minister Vizcarra.<sup>842</sup>

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<sup>837</sup> Respondent's Counter-Memorial, paras. 277, 278.

<sup>838</sup> Respondent's Rejoinder, para. 396.

<sup>839</sup> Respondent's Counter-Memorial, para. 278.

<sup>840</sup> Respondent's Counter-Memorial, para. 279; Respondent's Rejoinder, para. 392.

<sup>841</sup> Respondent's Rejoinder, para. 392.

<sup>842</sup> Respondent's Rejoinder, paras. 393, 395.

*(d) Legitimate expectations*

655. Finally, the Respondent also argues that the Claimants' claim for breach of legitimate expectations must fail because the Claimants have not proven what specific, objectively reasonable expectations they developed nor how and when the Claimants directly relied on those expectations in making their investment.<sup>843</sup>
656. According to the Respondent, for a claim for breach of legitimate expectations to succeed, the Claimants would have to prove that the basic expectations (*i.e.*, those that were fundamental to make the decision to invest) were taken into account by the foreign investor to make the investment;<sup>844</sup> that those expectations were legitimate and reasonable; and they must have some degree of specificity.<sup>845</sup>
657. According to the Respondent, although the Claimants identify a series of laws, regulations, decrees, reports, public statements, as well as the Concession Contract and the Guarantee Agreement as sources of their expectations, they only identify two particularized expectations: (i) that Peru would unilaterally terminate the Concession Contract only for reasons of public interest; and (ii) that the Claimants would achieve construction and operation of the Chinchero Airport.<sup>846</sup>
658. The Respondent admits that the first of these expectations can be considered reasonable and legitimate because it is based on the text of the Concession Contract itself. However, according to the Respondent, the Claimants' claim fails because Peru never violated this expectation since, as explained above, the Concession Contract was terminated for a specific public interest reason.<sup>847</sup>
659. As to the second expectation, the Respondent argues that it was neither reasonable nor legitimate. According to the Respondent, if the Claimants can lay claim to an "expectation" that their endeavor will necessarily succeed, then any government action that creates any

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<sup>843</sup> Respondent's Counter-Memorial, para. 281.

<sup>844</sup> Respondent's Counter-Memorial, para. 282.

<sup>845</sup> Respondent's Counter-Memorial, para. 285; Respondent's Rejoinder, paras. 406 *et seq.*

<sup>846</sup> Respondent's Counter-Memorial, paras. 287, 288.

<sup>847</sup> Respondent's Counter-Memorial, para. 289.

barrier to that success will automatically constitute a breach of their “expectation” of project success.<sup>848</sup>

660. Furthermore, the Respondent argues that the Claimants present no documents assessing how they interpreted or formed this purported expectation before they invested in Peru. On the Respondent’s case, the Concession Contract could not create the legitimate expectation that the Claimants would be able to construct the Airport, as the Contract indicated that further approval from the State was necessary to proceed with the Project and allowed the State to unilaterally terminate the Contract for public interest reasons.<sup>849</sup>
661. Moreover, the Respondent also argues that the Guarantee Agreement could not and did not change any expectations that arose out of the Concession Contract, as the Guarantee Agreement merely reaffirmed the provisions set out in the Concession Contract but did not create any additional rights or alter the provisions of the Concession Agreement that allowed the State to unilaterally terminate it.<sup>850</sup>
662. Finally, the Respondent argues that the signing of Addendum No. 1, as well as any subsequent reports and statements issued by Peruvian authorities that allegedly “reinforced” the Claimants’ expectations, are irrelevant because they all occurred several years after Kuntur Wasi invested in Peru (*i.e.*, when the Concession Contract was signed in 2014). And in any event, the Respondent argues, neither Addendum No. 1 nor any of those subsequent statements and reports could have generated any legitimate expectations because any review of the Peruvian legal structure by the Claimants would have shown that the *Contraloría* had unique and legitimate oversight powers that could be exercised to review Addendum No. 1 to determine whether it complied with Peruvian law.<sup>851</sup>

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<sup>848</sup> Respondent’s Counter-Memorial, para. 290.

<sup>849</sup> Respondent’s Counter-Memorial, paras. 291, 292.

<sup>850</sup> Respondent’s Counter-Memorial, para. 293.

<sup>851</sup> Respondent’s Counter-Memorial, paras. 294, 295.

***b. The Tribunal's Analysis***

**(i) Article 2(3) of the BIT**

663. The Parties are in agreement that Article 2(3) of the BIT contains two distinct but overlapping provisions: first, the positive obligation to provide FET to investments of investors of the other party; and second, the negative obligation not to engage in unjustified or discriminatory treatment *vis-à-vis* those investments.
664. They are also in agreement that these two obligations overlap, such that conduct that fulfills the positive obligation will also likely fulfill the negative obligation, although the converse is not necessarily the case. This is because the triggers for the negative obligation (unjustified or discriminatory conduct) are narrower than the potential triggers, at least in the Claimants' view, for the positive obligation.
665. The submissions of the parties have focused principally on the positive obligation, with the limited attention devoted to the negative obligation deriving from the view, discussed further below, that "unjustified" (in terms of the negative obligation) and "arbitrary" (in terms of the positive obligation) are so closely related as to permit the inference that once arbitrary action has been proven, unjustified treatment also occurred.
666. The Tribunal will consider first the parties' submissions in relation to FET, and then turn to the negative obligation set forth in Article 2(3).

**(ii) The Positive Obligation to Provide FET**

***(a) The BIT's FET standard***

667. The Parties disagree with respect to the standard that applies to the positive FET obligation. In the Respondent's view, as set forth earlier, the treaty's standard is essentially the same as the **CIL** standard for the treatment of aliens, as articulated in cases such as *Genin v. Estonia* and *Waste Management II v. Mexico*.<sup>852</sup> In the Claimants' view, the standard is an autonomous one that goes beyond the minimum standard.

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<sup>852</sup> See Respondent's Counter-Memorial, paras. 241, 242 (citing to multiple authorities, in particular **Exhibit RL-23**, *Genin v. Estonia*, and **Exhibit RL-25**, *Waste Management II v. Mexico*).

668. In the Tribunal’s view, the CIL standard does not provide the standard of interpretation for this treaty. The BIT contains no express language to this effect, and no evidence has been provided that, unlike the NAFTA and some other treaties, the parties to the BIT intended for the CIL standard to apply.<sup>853</sup> Rather, the Tribunal considers that the proper approach to Article 2(3)’s positive obligation is to interpret it in accordance with the methodology prescribed by the Vienna Convention on the Law of Treaties (“VCLT”).
669. This methodology focuses on the ordinary meaning of the BIT’s terms, construed in light of its object and purpose.<sup>854</sup>
670. The BIT, not atypically, does not prescribe the content of the FET standard. The plain meaning of the terms “fair and equitable” do not shed much light on its content, either.
671. The object and purpose of the BIT is to promote and protect foreign investment.<sup>855</sup> Like the treaty in *Saluka*, however, this BIT also contains language aimed at intensifying the economic cooperation of the States Parties, namely Argentina and Peru.<sup>856</sup> The tribunal in *Saluka* considered that this language requires a “more balanced” approach that emphasizes the key role played by legitimate expectations, an approach the Tribunal finds persuasive.<sup>857</sup>
672. The Parties appear to agree that FET is an objective standard, and that this specific BIT requires that FET be provided “at all times” (“*en todo momento*”), but are not fully in agreement as to the different factors that may be relevant to FET, and disagree on the

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<sup>853</sup> Cf. **Exhibit CL-76**, *Azurix Corp v. Argentina* and **Exhibit CL-66**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (hereinafter *Biwater Gauff v. Tanzania*), cited in Claimants’ Reply paras. 597-99. The Tribunal notes that some of the authorities on which the Respondent relies, including *SD Myers* and *Waste Management*, are NAFTA cases applying Article 1105 of that treaty, which is expressly tied to the CIL standard. These cases are accordingly less on point than cases involving treaties whose FET standard is framed in terms similar to the present BIT.

<sup>854</sup> VCLT, art. 31. This is consistent with the approach taken by a number of tribunals. See, e.g., **Exhibit CL-69**, *MTD v. Chile*, paras. 112, 113; **Exhibit CL-80**, *Saluka v. Czech Republic*, para. 294.

<sup>855</sup> See **Exhibit C-50**, Perú-Argentina BIT, Preamble: “Recognizing that the promotion and protection of such investments through an agreement can serve as a stimulus to private economic initiative and increase the prosperity of both Nations.” [Tribunal’s translation] The original Spanish reads: “*Reconociendo que la promocion y la proteccion de tales inversiones mediante un convenio pueden server de estimulo a la iniciative economica privada y a incrementar la prosperidad en ambas Naciones.*” See also arts. 2(1), 2(2).

<sup>856</sup> See **Exhibit C-50**, Perú-Argentina BIT, Preamble, art. 2.

<sup>857</sup> **Exhibit CL-80**, *Saluka v. Czech Republic*, paras. 300-302.



content of certain factors. This is particularly the case in relation to the Claimants' position regarding inconsistent/contradictory conduct, which in the Respondent's view is not sufficient, standing alone, to trigger FET. They appear to agree that arbitrariness is relevant to FET as well as legitimate expectations, but disagree as to the application of these elements to the facts of this case.

673. In the Tribunal's view, FET claims are highly factual in nature. They involve an assessment of whether the conduct of a State, viewed in its totality, has crossed a line from permissible to impermissible in relation to the investor's legitimate expectations.<sup>858</sup> It is not a case of a Tribunal substituting its own judgment for the policy or other decisions of the State, but rather looking for those facts and circumstances that are probative on the question of whether key factors, reflecting fundamental principles of international law, have been violated.<sup>859</sup>

674. As the tribunal in *Philip Morris v. Uruguay*, a case emphasized by the Respondent, stated:

*As held by investment tribunals, whether a particular treatment is fair and equitable depends on the circumstances of the particular case. Based on investment tribunals' decisions, typical fact situations have led a leading commentator to identify the following principles as covered by the FET standard: transparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith.*<sup>860</sup>

675. The Tribunal agrees with the Claimants that bad faith, while a highly relevant factor when present, is not a precondition for finding an FET violation. Thus, a State can be found to have acted in good faith and still breach FET as a matter of law.

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<sup>858</sup> **Exhibit CL-80**, *Saluka v. Czech Republic*, para. 285.

<sup>859</sup> The *MTD v. Chile* tribunal quoted Judge Schwebel for the proposition that: "fair and equitable treatment" is "a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality" (**Exhibit CL-69**, *MTD v. Chile*, para. 104).

<sup>860</sup> **Exhibit RL-27**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (hereinafter *Philip Morris v. Uruguay*), para. 320.

676. With this consideration of the overall standard in mind, the Tribunal will examine in turn the theories put forward by the Claimants that they assert have breached the obligation of FET: first, by the inconsistent or contradictory conduct of the Respondent; second, by the arbitrary or unjustified conduct of the Respondent; and third, by conduct of the Respondent violating the Claimants' legitimate expectations.

***(b) The Asserted Breaches of FET***

**i. Inconsistency/Contradictory Conduct**

677. As noted above, the Parties dispute whether inconsistent or contradictory conduct, as such, can constitute a breach of FET. The Respondent submits it does not, and that to the extent the Claimants' FET claim is grounded on this asserted element, it should fail as a matter of law.<sup>861</sup> Inconsistency, it submits, is relevant to whether conduct is arbitrary or unjustifiable, but that inconsistency *per se* does not engage FET, and States may sometimes act inconsistently—especially when different organs or different branches of government are concerned—as long as that conduct is not disproportionate in nature.<sup>862</sup>

678. Inconsistency, standing alone, has not always been identified as an element of FET. The tribunal in *MTD v. Chile* cited with favor the description of FET in *Tecmed*, which identified consistency, along with transparency and other elements, but ultimately tied a lack of consistency to arbitrariness:

*The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*<sup>863</sup>

679. On the other hand, the tribunal in *Saluka*, an oft-cited decision, referenced “manifest inconsistency” in its initial framing of the standard, which it summarized after first referencing the concept of legitimate expectations as follows:

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<sup>861</sup> Respondent's Rejoinder, paras. 325, 338.

<sup>862</sup> Respondent's Rejoinder, paras. 327-337 (discussing *Glencore* and *Philip Morris*).

<sup>863</sup> **Exhibit CL-69**, *MTD v. Chile*, para. 114, citing *Tec-Med*, para. 98. *MTD v. Chile* was a case where there was a fundamental inconsistency between the State's approvals of the foreign investment and its land-use policy.

*A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.*<sup>864</sup>

680. The *Philip Morris v. Uruguay* tribunal accepted that the concept of FET comprised various strands, including those recognized by the *Saluka* tribunal.<sup>865</sup> Likewise, the *Glencore v. Colombia* decision recognizes consistency as part of a relevant set of factors, among others: “whether the State has respected the principles of due process, consistency, and transparency when adopting the measures at issue.”<sup>866</sup>
681. While the matter is thus not free from doubt, the Tribunal accepts that at least in some circumstances, inconsistency as a legal matter can be a distinct strand of FET independent of arbitrariness, as will be developed further below.
682. However, the Tribunal does not consider that the facts of this case that are alleged to reflect such inconsistency constitute a violation of Article 2(3), first sentence, of the BIT. The Claimants make multiple arguments about inconsistency in the FET context, focusing on what they characterize as six “episodes” reflecting inconsistent treatment. The Tribunal will turn first to the three non-termination related episodes, then discuss the termination-related episodes.
683. *EGP Proposal*. First, as to the alleged inconsistencies/contradictions over Kuntur Wasi’s EGP proposal, the Tribunal agrees with the Respondent that the differing opinions of OSITRAN, the *Contraloria* and the MTC do not reflect the type of inconsistency that triggers international responsibility. The Tribunal is persuaded that the different mandates of the various State agencies – and in particular the broad discretion apparently accorded to the MTC to determine whether the EGP would cause economic prejudice to Peru—

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<sup>864</sup> **Exhibit CL-80**, *Saluka v. Czech Republic*, para. 309.

<sup>865</sup> **Exhibit RL-27**, *Philip Morris v. Uruguay*, para. 324: “The Tribunal agrees that the various aspects of State conduct mentioned above are indicative of a breach of the FET standard.”

<sup>866</sup> **Exhibit RL-26**, *Glencore v. Colombia*, para. 1310. See also **Exhibit CL- 79**, *PSEG Global v. [Türkiye]*, para. 240.

explain the differing positions taken by these authorities. The Claimants has not established that there was a failure to apply the relevant norms or an abuse of authority, nor any requirement of Peruvian law that one agency adopt the position of any other authority. The Tribunal therefore concurs with those authorities that have considered that differing views of State authorities applying a pre-existing legal framework are not grounds for finding an FET breach.<sup>867</sup>

684. The analysis of the tribunal in *Glencore v. Colombia* is particularly pertinent in differentiating between those acts which merely reflect a normal diversity of opinion within government and those that rise to the level of problematic inconsistency:

*1419. The Tribunal agrees with Claimants that an investor may legitimately hold the expectation that different branches of government will not take inconsistent actions affecting the investment: a government agency should not make a decision that contradicts a prior decision made by the same or another agency, acting within the same sphere of powers, on which the investor has relied, causing harm to the investor. This is part of the core meaning of the FET standard.*

*1420. There is no inconsistency and no breach of legitimate expectations, however, when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency. The reason is simple: The modern nation-state typically endows different agencies with different legal and policy responsibilities and objectives.<sup>868</sup> [Emphasis added]*

685. The Tribunal agrees in any event with the Respondent that any inconsistency, at least in relation to this “episode” standing alone,<sup>869</sup> was mooted by the Parties’ ultimate agreement to Addendum No. 1, which established a materially different financing scheme for the Project.

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<sup>867</sup> See Respondent’s Counter-Memorial, paras. 244-253 and cases cited therein.

<sup>868</sup> **Exhibit RL-26**, *Glencore v. Colombia*, paras. 1419, 1420.

<sup>869</sup> It may still be relevant when all facts and circumstances are considered, however.

686. *Negotiation of Addendum No. 1.* Second, as to the alleged inconsistency in the negotiation of Addendum No. 1, the Tribunal likewise agrees with the Respondent that these facts do not engage FET. The fact that the MTC, in the course of negotiations, declined to follow an approach suggested by other Peruvian Government agencies does not constitute the type of inconsistency that would breach the FET obligation. As noted above, diversity of opinion among different government agencies operating pursuant to different mandates is not *ipso facto* problematic; this is especially true in the context of the give and take of negotiations, where typically nothing is binding until there is a final agreement. Unless there is evidence of bad faith, which has not been argued here, it would straitjacket a diverse government operation to impose such a rigid standard on a State's conduct in this context. The Tribunal also agrees with the Respondent that the fact that the Parties ultimately reached agreement on the terms of Addendum No. 1 effectively moots this issue, at least in terms of this specific "episode."
687. *Trato Directo.* Third, the Tribunal sees no inconsistency with respect to the State's conduct during *the* period of *Trato Directo*, including its request for an extension of the period at the end of 2017. The State had determined to terminate the Concession Contract and such termination naturally would lead to the taking back of the Concession. As the Respondent sets out in Rejoinder, no arbitral proceedings had been commenced by that time; consequently, Clause 15.8.7 of the Concession Contract had not been triggered.<sup>870</sup> Furthermore, while the period of *Trato Directo* under Article 16.5 of the Contract is aimed at trying to resolve the dispute without resort to legal proceedings; it appears the negotiations were centered on the issue of compensation and the reversal of the termination was not a serious topic.<sup>871</sup>
688. Moreover, even if the Claimants are correct that the termination had not yet become effective and therefore the Concession Contract was still in force at the time Peru sought devolution of the Concession area as a technical matter, an early request for return of the land, even if contractually not justified, does not, in the Tribunal's view, implicate FET.

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<sup>870</sup> See Respondent's Rejoinder, para. 292.

<sup>871</sup> Respondent's Counter-Memorial, para. 268.

The State was not obliged as a matter of international law to refrain from taking steps to recover the Concession area during the period of *Trato Directo*.<sup>872</sup>

689. Peru's actions in terminating the period of *Trato Directo* in January 2018, shortly after it had requested an extension, also does not reflect the type of conduct that would implicate FET. Intervening events (including in relation to the devolution) could well have persuaded it that, contrary to its earlier view, the continuation of *Trato Directo* would not be fruitful.
690. *Termination.* The three termination-related arguments focus on: (1) the asserted contradiction between the termination decision and the adoption of Addendum No. 1; (2) the asserted tension between the public interest arguments supporting Addendum No. 1 and those supporting the termination; and (3) the allegedly contradictory termination process, during which various officials contradicted themselves and others regarding the Contract.
691. All of these “episodes” purport to be based on the public interest. But in the Tribunal's view, the public interest in building the airport on a priority basis<sup>873</sup> only goes so far in relation to the State's decisions and actions regarding the Concession. The Tribunal agrees with the Respondent that this general, overarching public interest does not mean that the State cannot take steps it deems appropriate in dealing with a specific issue with a concessionaire, even if that may slow down the Project.<sup>874</sup> Notwithstanding its priority status, which implies an effort to complete the Project as quickly as possible, the State must in fact determine what steps at a given time best comport with the overall public interest.

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<sup>872</sup> At the same time, it has initiated *consultas amistosas* under Article 10 of the BIT. The same observation applies to those consultations.

<sup>873</sup> **Exhibit CL-93**, Ley No. 27,528, art. 2 declared it to be: “...*de necesidad y utilida publica y de la mas alta prioridad para el Estado el Proyecto Especial Aeropuerto Internacional de Chinchero, en la provincial de Urubamba del departamento del Cusco.*” A *Decreto de Urgencia No. 039-2010*, issued on 9 June 2010 identified a number of projects, among them the Chinchero Airport, as being “*de necesidad nacional y de ejecución prioritaria*” for that year. (**Exhibit CL-6**, *Decreto de Urgencia No. 039-2010*, 9 June 2010). Various pronouncements of PROINVERSION reflect this, including the Convocatoria of 31 August 2010 (**Exhibit C-015**) and the Acuerdo No. 357-01-2010 (**Exhibit C-164**). The Concession Contract, in one of its Antecedentes, states that: “*De acuerdo a lo señalado en la misma norma se declaró de necesidad y utilidad pública y de la más alta prioridad para el Estado, el Proyecto Especial Aeropuerto Internacional de Chinchero, en la provincia de Urubamba del departamento del Cusco.*” (**Exhibit C-4**, Concession Contract, p. 4, second paragraph). The above-cited authorities establish clearly that not only was building the Airport a matter of public interest, but it was viewed as a priority project for the State.

<sup>874</sup> Respondent's Counter-Memorial, para. 267.

It does not strike the Tribunal as contradictory that at one point the State might in good faith consider that proceeding with a contractual amendment to carry a concession contract forward is the course of conduct that best furthers the public interest, while at a later point in time it might conclude otherwise and indeed, that termination of that same contract might be the course of action that best serves that interest based on all the facts and circumstances at that later point in time.

692. Undoubtedly in this case, those two points in time came in close succession, especially given the intervening defense of the Addendum by public officials, and that timing as well as the abruptness of the termination decision in and of themselves raise doubts. But the doubts they raise for the Tribunal are whether the termination decision was arbitrary or unjustified on all the facts and circumstances—whether the public interest reason for termination, in the face of all that had gone before, was sufficiently established. In other words, in the Tribunal’s view, it is not the alleged contradictory nature of the two decisions (and the intervening actions in support of going forward) that it is critical to examine from an FET perspective, but rather the basis for the termination decision, including the role played by the report of the *Contraloría* regarding Addendum No. 1. The Tribunal therefore concludes that the asserted episodes of contradictory behavior on the part of Peru do not implicate FET. It will examine this second bundle of “episodes” in the subsequent section on arbitrariness, which in the Tribunal’s view, is the more relevant issue to consider in relation to this course of conduct.

## **ii. Arbitrary or Unjustified Conduct**

693. The *second* ground on which the Claimants rely for their position that FET has been breached is arbitrary or unjustified conduct. Here, their focus is on the termination of the Concession Contract. Arbitrariness in their view is shown by the contradictions between statements made by Minister Vizcarra to the Congress shortly before the termination, the lack of reasoning in the termination notice, and the absence of technical opinions supporting the termination, as well as the lack of a valid public interest reason for termination.

694. The Respondent relies on the fact that the termination notice justified the action being taken by reference to the public interest, as well as its evidence regarding the “loss of faith” in Kuntur Wasi that caused *Minister* Giuffra to conclude that it would not be in a position to complete the Project. The Respondent also relies on its contractual right to terminate.
695. The Parties are in agreement that arbitrariness is a relevant factor in assessing whether the *treatment* a foreign investment has received is fair and equitable. They further agree that the terms “arbitrary,” “unreasonable” and “unjustified” are essentially synonymous.<sup>875</sup>
696. They subscribe to the standard of arbitrariness formulated by Professor Schreuer and set forth by the *EDF* tribunal as comprising four categories:

*[1] a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*

*[2] a measure that is not based on legal standards but on discretion, prejudice or personal preference;*

*[3] a measure taken for reasons that are different from those put forward by the decision maker;*

*[4] a measure taken in willful disregard of due process and proper procedure.*<sup>876</sup>

697. Despite this apparent agreement on the relevant standard, the Respondent argues for the application of a higher threshold of proof of arbitrariness than the Claimant appears to accept.<sup>877</sup> In the Tribunal’s view, when arbitrariness is considered from the substantive point of view—*i.e.*, not simply as a matter of process—the key issues are the underlying basis for the conduct or measure at issue, and whether that basis is sufficient in light of the significance of that conduct or measure. If the decision reflects a U-turn from previous positions (*i.e.*, is arguably inconsistent), if it is highly consequential, if the matter is one of high public interest—all of these are circumstances which bear on what may be necessary

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<sup>875</sup> Claimants’ Reply, para. 695; Respondent’s Counter-Memorial, paras. 271, 272; Respondent’s Rejoinder, paras. 381, 383.

<sup>876</sup> **Exhibit CL-83**, *EDF v. Romania*, para. 303.

<sup>877</sup> See Claimants’ Reply, paras. 695 *et seq.*



to demonstrate that a government action is not arbitrary, but sufficiently justified. This is not simply a question of what local law may or may not require, but local law may figure in the analysis, depending on the requirements that pertain to the conduct at issue. In the Tribunal's view, when dealing with a concept like arbitrariness, it is more the clarity of the evidence regarding the basis for the decision that is key, rather than whether it is a high or a low bar that must be met.

698. Turning to the case at hand, the Tribunal has already expressed its view that the question of public interest (the basis of the termination here) is more nuanced than the simple invocation of the general policy in favor of building the airport as a matter of national priority. While the existence of such a policy has been amply established, it does not fully assist in addressing the questions before this Tribunal. Taken to its logical extreme, it would mean that termination of a contract with a concessionaire to build a project having such a public interest foundation and priority status could not be justified under any circumstances, as it would inevitably set the project back in time and require additional resources to complete. But that position cannot be correct.
699. Moreover, in this case the Concession Contract permitted termination for “*razones de interés público debidamente fundadas*” (“well-founded reasons of public interest”). Regardless of the meaning in Peruvian law of “*debidamente fundadas*,” the plain language of this provision provides clear evidence that in relation to termination, the question of public interest must be a more nuanced one. The Claimants’ submission that the same public interest cannot justify both continuation of the Contract under the terms of Addendum No. 1 and its termination also well illustrates this point.<sup>878</sup>
700. Given the setbacks that any such termination could bring (*e.g.*, a rebidding process or at least the award of a new contract to a different concessionaire, all of which would take time and result in additional costs being incurred by the State), it seems evident to the Tribunal that the State, in exercising its right to termination, must be able to demonstrate that it took

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<sup>878</sup> Claimants’ Memorial, para. 506-08.

such action on a justified basis. If that were not the case, the State would be free to act in an arbitrary fashion.

701. The Tribunal, in its contractual analysis, has found that even assuming that the Contract's unilateral termination provision only required that there be a real public interest basis for the MTC's decision to terminate it unilaterally,<sup>879</sup> from an international law perspective, the question is somewhat different. As a matter of substance, the action must be shown to serve a legitimate purpose, that is based on legal standards rather than mere caprice or pretext, as well as alignment between the stated reasons and the real reasons.<sup>880</sup> In other words, State needs to be able to demonstrate its justification for termination, not in a conclusory form, but in a way that would enable the Tribunal to understand that the justification meets this standard.
702. This necessity becomes even more important in a context with respect to a project for which the State itself has expressed a strong public interest in going forward as a matter of priority, and as to which the facts indicate a significant and recent change of position on the part of relevant government authorities regarding its direction. In the view of the Tribunal, the more significant and recent the change of position, the more important the justification becomes as to why the public interest is satisfied by the course of action the State has determined to take. This is especially the case when the decision has the types of significant consequences that termination of a 40-year concession contract brings.
703. In the Tribunal's assessment, satisfactory evidence of such a justification has not been put forward in these proceedings. The termination notice in this case failed to explain the justification for termination of the Concession Contract. While the notice refers to the public interest, and its "*más acorde*" language suggests that the Government's termination decision was made after a weighing of options and interests, it is entirely conclusory in nature. It does not explain further what factors were considered in the balance and what the ultimate justification was for termination. As such, it opens the door to the allegation that the decision was, in fact, arbitrary, unreasonable and unjustified. Although

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<sup>879</sup> See, e.g., para. 360 *supra*.

<sup>880</sup> Cf. **Exhibit CL-83**, *EDF v. Romania*. See *supra* para. 696.

contemporaneous Government documents might have shed light on how this determination was made, those documents, if they exist, are not on the record here. And the agency reports that were issued in connection with the official termination notice are not on point, as they only discuss the public interest in building the Airport, not in terminating the Concession Contract.

704. Several other facts and circumstances leading up to the Government's unilateral termination do not dispel this concern, but rather add to it:

- (i) Addendum No. 1, which was agreed only a few months earlier, not only reflected a diametrically contrary direction for the Project, but indicates that the main problem that had plagued the Project's progress, the financing, had been solved. In this regard it is relevant that Addendum No. 1, although greatly simplifying the financing scheme of the Project, still required financing arrangements to be made—a point the Tribunal will return to later. In contrast to the process surrounding the termination, it also reflected a deliberative and well-documented process of the Government, with input from multiple agencies taken before the Addendum was approved, making it possible to understand the basis for the public interest decision that it reflected.
- (ii) The public statements of Executive Branch officials supporting the Project prior to the termination, including the then-President of the country, also indicated that the public interest lay with continuing with the current contract. This is really the relevant point of such statements—not the issue of whether they are binding or not, about which the parties have spilled much ink—but that they underscore the strength of the public interest in going forward with the Concession Contract. And in this case, as with Addendum No. 1, all of the statements were relatively recent, some just a matter of days before the termination decision was announced by Minister Giuffra on June 4.
- (iii) Nor did Minister Giuffra's June 4 statement, or the June 1 *Hoja de Ruta* whose import is much disputed, put unilateral termination by the government on the table;

rather, the June 1 *Hoja de Ruta* framed the alternatives as renegotiation or mutual termination, while the June 4 statement asserted there was a mutual agreement, — both of which are quite different from the unilateral termination that ultimately emerged in July.

705. The Tribunal has already examined, in its contractual analysis, the Respondent’s stated basis for the termination, namely, Minister Giuffra’s determination that Kuntur Wasi was not capable of going forward with the Project, and found the asserted bases for that determination to be wanting.<sup>881</sup> That analysis applies with equal force here and will not be repeated. Given the attention certain factual issues received both in the Parties’ written submissions and at the hearing, and the international law standard that must be applied, the Tribunal considers it important to consider in detail the events leading up to the termination decision, beginning with the May 19 report of the *Contraloría*.
706. As discussed earlier, the *Contraloría*’s report did not require unilateral termination.<sup>882</sup> Rather, it called into question the validity of Addendum No. 1 and consequently the “go forward” position. The Claimants suggest that the *Contraloría*’s opinion was politically motivated, while the Respondent submits that it was serious and could not be ignored. The Tribunal considers that the reality is somewhere in between. The *Contraloría*’s conclusions were rejected by other agencies of the Government of Peru,<sup>883</sup> and in some respects are difficult to reconcile with the terms of Addendum No. 1. Moreover, the *Contraloría* had weighed in on the EGP proposal and its recommendations were not followed in the Addendum. It is clear from the record that its positions were not binding, even if not following them could create risks for the government officials involved. Indeed, Minister Giuffra admitted as much in his testimony before this Tribunal at the Hearing.<sup>884</sup>

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<sup>881</sup> Section A.(1), *supra*.

<sup>882</sup> *See, e.g.*, paras. 379, 381 *supra*.

<sup>883</sup> *See, e.g.*, para. 395 *supra*; **Exhibit C-185**, News article published by Agencia Peruana de Noticias Andina, “MEF: Adenda sobre Chinchero genera ahorro económico y no perjuicio económico,” 22 May 2017; **Exhibit C-120**, News clip from Buenos Días Perú, “Vizcarra sobre Chinchero: Decidimos dejar sin efecto contrato que desde el inicio partió mal,” 22 May 2017; **Exhibit C-121**, News clip from CANAL N “Viceministra Molinelli: Informe de Contraloría no tiene sustento técnico,” 22 May 2017.

<sup>884</sup> *See* para. 396 *supra*.

707. What is clear is that the *Contraloría*'s report was issued in the midst of a political controversy which had gripped the country at that time. This controversy pitted the Executive against the Congress, with the *Contraloría* apparently aligned with the latter. Minister Vizcarra was threatened with impeachment and had to appear before the Congress to defend Addendum No. 1 and a contract made by the predecessor government. The criminal investigation previously initiated was expanded to include the possibility of collusion with respect to Addendum No. 1.
708. Facing censure from the Congress, Minister Vizcarra resigned his post a few days after the issuance of the *Contraloría*'s report and his appearances before the Congress. The day prior to his resignation, he announced that the Contract as modified by Addendum No. 1 would have no effect. His 180-degree turn demonstrates the degree to which the Project had become politicized.
709. It was at this juncture, on 25 May 2017, one day after Kuntur Wasi was asked to agree to extend the Contract's suspension,<sup>885</sup> that Bruno Giuffra became Minister of Transportation and Communications. From this point, it was a mere 10 days before the new Minister announced, on June 4, 2017, that Kuntur Wasi would not continue with the Project and the Concession Contract would be terminated, allegedly by mutual agreement.<sup>886</sup>
710. The Respondent has submitted that Minister Giuffra resolved to terminate the Contract after Kuntur Wasi advised him that it would need another six months to secure the construction financing on the basis of the terms then under discussion, at which point he lost faith in Kuntur Wasi's ability to complete the Project at all.<sup>887</sup>
711. The only evidence in support of this position is Minister Giuffra's testimony in these proceedings. Peru has put forward no documentation that makes this point, and it is disputed by the Claimants. In its contractual analysis, the Tribunal concluded it was

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<sup>885</sup> **Exhibit C-79**, *Oficio No. 2118-2017-MTC/25*, 24 May 2017; **Exhibit C-80**, Letter No. 075-2017-KW, 26 May 2017.

<sup>886</sup> **Exhibit C-40**, News article published by El Comercio, "*Gobierno y Kuntur Wasi acordaron resolver contrato por Chinchero, anuncia Giuffra*," 4 June 2017. The formal termination notice was not issued until 6 weeks later, on July 13, 2017. **Exhibit C-44**, *Oficio No. 142-2017-MTC/01*, 13 July 2017.

<sup>887</sup> Respondent's Counter-Memorial, para. 267.

unnecessary to determine whether Kuntur Wasi in fact made such an assertion, given its view that even if such a statement had been made, six months would have been a reasonable period of time to secure financing and would not have demonstrated the Concessionaire's lack of capacity to complete the Project.<sup>888</sup>

712. Moreover, the formal notice of 13 July 2017 from the MTC unilaterally terminating the Concession under Section 15.5.1 of the Contract does not reflect the conclusion put forward by Minister Giuffra in his witness statement and at the hearing. The MTC and MINCETUR opinions that were issued in connection with the termination<sup>889</sup> reiterate the public interest in building the Airport, but for the reasons articulated earlier, do not express the public interest in termination, which was the action requiring justification. Nor do they reflect the conclusion to which Mr. Giuffra has testified in these proceedings.
713. Minister Giuffra indicated he sought and received external legal advice regarding the termination, but that documentation has not been submitted as evidence in these proceedings.<sup>890</sup>
714. Minister Giuffra may well have come to the conclusion to which he has testified, *i.e.*, that he lost confidence in Kuntur Wasi's ability to complete the Project. But even if that was his view at the time, the decision to terminate on that basis and in the manner it was implemented was unreasonable and unjustified, for the reasons the Tribunal has already expressed in the contractual section. First, even if Addendum No. 1 simplified the financing, it still needed to be arranged. And further changes were under discussion in early June, including shortening the Concession period, which could well have further implications for the financing requirements for the Project. It would be unreasonable for

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<sup>888</sup> See para. 411 *supra*.

<sup>889</sup> **Exhibit R-17**, *Oficio No. 050-2017-MINCETUR/DM-GA*, 13 July 2017, attaching *Informe No. 016-2017/MINCETUR/VMT/DGET/DIOT*, MINCETUR's Opinion Regarding Public Interest of Chinchero Airport, 12 July 2017; **Exhibit R-18**, Memorandum No. 0524-2017-MTC-12.08, 13 July 2017, attaching *Informe No. 0347-2017-MTC/12.08*, MTC's Opinion Regarding Public Interest of Chinchero Airport, 13 July 2017; **Exhibit R-19**, Memorandum No. 3410-2017-MTC/25, 13 July 2017, attaching Report No. 0567- 2017-MTC/25, MTC's Legal Opinion Regarding Public Interest of Chinchero Airport, 13 July 2017.

<sup>890</sup> Respondent's Counter-Memorial, para. 130 (stating that "Minister Giuffra also sought advice of outside and internal legal counsel to confirm that the bases upon which the MTC was considering terminating the Contract were consistent with the provisions provided for in the Contract"). Note 241 to this paragraph refers to Minister Giuffra's statement and to the legal advice of MTC (**Exhibit R-19**) but does not cite to any external advice.

the State to assume that even a simpler financing arrangement than the PAO/FPAO scheme could be completed overnight. Thus, a request for a reasonable amount of time to arrange financing under a different scheme than that previously pursued would not, in the Tribunal's view, indicate a lack of capacity to complete the Project.

715. Second, the unilateral termination decision was in fact an abrupt change of position from the June 1 *Hoja de Ruta* and the June 4 announcement, by a new Minister who had assumed his position in the midst of political turmoil in the country. Termination was not mandated by the report of the *Contraloria*, which as already noted, was non-binding.<sup>891</sup>
716. Given all these circumstances, and given the official stated basis of termination, the Tribunal concludes that, if Minister Giuffra's stated reasons in these proceedings were the real reasons, then the government's official reasons do not state the real reasons; if, on the other hand, the official reasons are the real reasons, then they are inapposite as they do not explain the public interest *in termination of the Contract*. Either way the position is troubling from an international law perspective. Harking back to the *EDF v. Romania* tests for arbitrariness set forth earlier, the termination inflicted damage on the Claimants without setting forth a sufficient justification for the action taken, it appears to have been based on subjective views rather than objective legal standards, and the ultimate reasons are cast into doubt by the different explanations given in the official termination documents and in these proceedings. Moreover, the manner in which the decision was taken, in contrast to prior actions in relation to the Contract, and the fact that it represented an about-face from recent actions, deepen the concerns about the termination decision.
717. Taken in the context of all of the circumstances, as is appropriate for FET determinations, the Tribunal concludes that the evidence put forward in these proceedings indicates that the unilateral termination decision was arbitrary, unreasonable, and unjustified.

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<sup>891</sup> See **Exhibit CER-6**, Quiñones Alayza Report, para. 166 *et seq.* The Tribunal notes that its position appears to be consistent with how the parties treated the opinion of the *Contraloria* with regard to EGP as well. See paras. 397-402 *supra*.

718. This finding also deals with the Respondent’s position that termination in accordance with a contract can never implicate FET.<sup>892</sup> In the Tribunal’s view, when termination reflects an arbitrary course of conduct on the part of the State and is therefore wrongful, reliance on a termination right in the contract does not prevent that act from constituting an FET breach. Had the termination been properly justified in terms of the Contract, a different question would have been presented here. But it was not.
719. In the Tribunal’s view, the termination decision here, while expressed through the State’s purported exercise of a contractual right, was in fact an exercise of *puissance publique*. This was not, in the words of the tribunal in *Biwater Gauff*, on which the Respondent relies, the “ordinary behavior” of a contractual counterparty that was long-anticipated.<sup>893</sup> Nor, despite some surface parallels, is this situation akin to the one in *Convial Callao*, on which the Respondent particularly relies. There, the Claimants argued that the existence of a contractual termination right grounded in the public interest rendered any such termination inherently an exercise of sovereign authority. The tribunal concluded there was no such inherent right in Peruvian law, and that it only existed as a matter of contract.<sup>894</sup> The tribunal went on to determine that the termination, pursuant to a clause substantially different from the one here, that provided for termination “[a]t any moment and for reasons of opportunity, merit or convenience to the public interest” [Tribunal’s translation], without any requirement that they be well-founded (“*debidamente fundadas*”).<sup>895</sup>
720. Several aspects of the tribunal’s analysis in *Convial Callao* merit highlighting here. The tribunal recognized early in its consideration of the issue that several tribunals had implicitly recognized the possibility of contractual rights providing the basis for an international treaty violation, “when the contractual breach implies non-compliance with

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<sup>892</sup> Respondent’s Counter-Memorial, para. 238; Respondent’s Rejoinder, paras. 318-320.

<sup>893</sup> **Exhibit CL-66**, *Biwater Gauff v. Tanzania*, para. 492.

<sup>894</sup> **Exhibit RL-43**, *Convial Callao S.A. and CCI – Compañía de concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Award, 21 May 2013 (hereinafter *Convial Callao v. Peru*), paras. 513-527.

<sup>895</sup> The Spanish original reads: “[e]n cualquier momento y por razones de oportunidad, mérito o conveniencia al interés público.” **Exhibit RL-43**, *Convial Callao v. Peru*, para. 518.



an obligation under the treaty,” not limited to situations of treaties featuring an umbrella clause.<sup>896</sup> [Tribunal’s translation]

721. The tribunal also recognized that some acts that at first blush may be considered contractual in nature are in reality sovereign acts that as a consequence engage state responsibility.<sup>897</sup> But it found nothing at the end of the day in the State’s conduct to convince it that the termination decision was anything more than the proper exercise of a contractual right.<sup>898</sup> The Claimants’ allegations of political pressure and arbitrary motives were deemed unproven.<sup>899</sup>
722. The Tribunal is persuaded that the facts of this case justify the conclusion that the termination decision was a sovereign one, even if it purported to have been taken within the contractual framework. As set forth above in Section A.(1), it has not been established that the decision was for well-founded (“*debidamente fundadas*”) reasons as a matter of Peruvian law even on the Respondent’s narrower reading of that requirement. Moreover, from an international law perspective, the justification for the termination decision was likewise defective leading to the conclusion that the decision was arbitrary. While the Tribunal has not determined the unilateral termination was pretextual, as some other tribunals have identified as an exception to the general rule,<sup>900</sup> its findings are a close cousin and similar logic holds.
723. The existence of the Guarantee Agreement in this case also put the full authority of the State behind proper Contract performance, as will be discussed in further detail in the next section in connection with the issue of legitimate expectations. The question framed by the *Vigotop* tribunal, whether “[the State] has stepped out of the contractual shoes?”<sup>901</sup> must therefore in this case be answered in the affirmative.

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<sup>896</sup> The Spanish original reads: “*cuando la violación contractual conlleva el incumplimiento de una obligación bajo el tratado.*” **Exhibit RL-43**, *Convial Callao v. Peru*, para. 503.

<sup>897</sup> **Exhibit RL-43**, *Convial Callao v. Peru*, para. 511.

<sup>898</sup> **Exhibit RL-43**, *Convial Callao v. Peru*, para. 540.

<sup>899</sup> **Exhibit RL-43**, *Convial Callao v. Peru*, para. 544.

<sup>900</sup> See Respondent’s Rejoinder, paras. 451, 452, 454, and cases cited therein.

<sup>901</sup> See Claimants’ Reply, paras. 796-800, **Exhibit RL-45**, *Vigotop Limited v. Republic of Hungary*, ICSID Case No. ARB/11/22, Award, October 1, 2014, para. 328.

### iii. Legitimate Expectations

724. The final element that must be considered in the FET analysis is the issue of legitimate expectations.
725. Legitimate expectations are a key factor in FET determinations. Prominent commentators consider them to be a pillar of FET,<sup>902</sup> and many investment tribunal decisions have highlighted their importance.<sup>903</sup>
726. The Respondent agrees with the relevance of this factor, but emphasizes the need for reasonableness regarding such expectations, and the need for specificity with respect to them.<sup>904</sup> The Tribunal agrees with these points, but finds that they present no obstacle here.
727. The Claimants' asserted expectations fall into at least two distinct categories: (1) expectations from generally applicable documents that support the building of the Airport as a matter of priority national public interest; (2) specific commitments arising from the Concession Contract and the Guarantee Agreement, including the signature of Addendum No. 1.
728. In the Tribunal's view, the first group of documents can contribute to the Claimants' expectations only to a limited extent. Although they precede the making of the investment, they merely establish that the building of the Airport is a matter of strong public interest to Peru that should be carried out as a matter of priority. But in the same way that this general public interest only goes so far in justifying termination, so it only goes so far in shaping the legitimate expectations of the Claimants.
729. Far more relevant in the Tribunal's view are the Concession Contract and Guarantee Agreement, both of which are documents reflecting specific commitments on the part of the State to the Claimants and the investment. The Tribunal accepts the submission of the Respondent, based on the writings of Professor Schreuer, that not every contractual

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<sup>902</sup> E.g., **Exhibit CL-87**, Rudolf Dolzer, "*Fair and Equitable Treatment: Today's Contours*," 12 Santa Clara J. INT'L L. 7, 17 (2014).

<sup>903</sup> E.g., **Exhibit CL-80**, *Saluka v. Czech Republic*, **Exhibit CL-91**, *Gold Reserve v. Venezuela*; **Exhibit CL-9**, *Olin Holdings v. Libya*.

<sup>904</sup> Respondent's Counter-Memorial, paras. 282-288.

provision can give rise to legitimate expectations on the part of a foreign investor and that only those expectations as to the future created by a contract that are specific and fundamental should be recognized.<sup>905</sup>

730. It would clearly be unreasonable for the Claimants to have an expectation that the Project would be built and they would retain the Concession for its full 40-year term, regardless of performance, contingencies, required approvals, or the like. Such an expectation is belied by the terms of the Contract itself, and the Tribunal does not understand the Claimants' position to be that any such expectations would be legitimate.
731. But an expectation that if the Concession Contract came to the point of termination, especially the exercise of a unilateral termination right by the State, the Government would not exercise that right in an arbitrary, unreasonable or unjustified manner, especially in light of the undisputed public interest in building the Project on a priority basis, is in the Tribunal's view a legitimate one, particularly in light of the Contract's specific unilateral termination provision.
732. The Guarantee Agreement reinforces this expectation. Although the Respondent has sought to minimize its importance, the Guarantee Agreement is a commitment that puts the full force of the State behind compliance with the terms of the Concession Contract, including the clauses governing its termination.<sup>906</sup> It therefore reinforces those expectations from the Contract that are legitimate, such as those in relation to termination. Indeed, according to the Claimants' legal expert Ms. Quiñones, the Guarantee had the force of law and could only be modified with the assent of the Congress.<sup>907</sup> To consider that it had no effect on expectations would be to deny any *effet utile* to the Guarantee. In the context of termination, therefore, the Tribunal considers that the Guarantee Agreement created a legitimate expectation, under the provisions of the BIT, that the Concessionaire

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<sup>905</sup> See Respondent's Rejoinder, paras. 409-412.

<sup>906</sup> According to Ms. Quiñones, it follows from entering the Guarantee Contract that the provisions governing the termination of the Concession Contract are also part of the assurances the Peruvian government gave to the Concessionaire. **CER-6**, Quiñones Alayza Report, para. 43.

<sup>907</sup> Ms. Quiñones explains that by entering a "*contrato-ley*," the Peruvian government restricts its own *ius imperium*, and compliance with its obligations are governed by private law. Thereby, unilateral amendments are not valid, not even if approved by Congress. **CER-6**, Quiñones Alayza Report, paras. 46, 47.

would be protected by the State against a termination decision by the MTC that did not conform to the terms of the Contract.

733. Both the Concession Contract and the Guarantee Agreement thus give rise, in the view of the Tribunal, to legitimate expectations with respect to the exercise of a termination right on a proper basis. Although the Tribunal concluded that Peru did not violate the doctrine of *actos propios* under Peruvian Law for the unjustified termination of the Concession Contract (see para. 444 *supra*), it finds that the Claimants acquired a legitimate expectation under the BIT that the Contract would only be terminated according to its own terms.
734. With respect to the element of reliance, there is no doubt that investments were made by the Claimants in response to the Concession Contract and Guarantee Agreement--in establishing Kuntur Wasi, in preparing the EDI, and otherwise in pursuing the Project. These investments show the reliance of the Claimants on the legitimate expectations created by those Concession Contract provisions and Guarantee with respect to the risk that the Contract would be terminated.
735. It is less clear to the Tribunal what legitimate expectations, if any, can be said to have arisen from Addendum No. 1. It post-dated the initial investment and, given that the Project was suspended by mutual agreement just a few weeks after the Addendum's signature, it is unlikely significant investments were made in reliance on it (and indeed, none have been proven here). Any expectation would thus be a more general one harking back to the original Contract and Guarantee Agreement, essentially that given the public interest in building the Airport on a priority basis, the State would work in good faith with the Concessionaire to develop a financing plan that would allow the Project to move forward. But the Addendum did not operate to create legitimate expectations that the Contract could not be unilaterally terminated. To the extent it could be said to create any expectations, they would be limited by and subject to those Contract provisions allowing for such termination in certain circumstances. The most therefore that can be said, when the Concession Contract, Guarantee Agreement, and Addendum No. 1 are considered together, is that the Claimants had legitimate expectations of good faith and careful consideration on the part of the State in resolving issues that might arise during the term of

the Concession, including the financing scheme for construction, and that the State would ensure that the MTC would not invoke its unilateral termination right without a proper justification for such termination, given not only the Contract requirements but also the setbacks such an action would bring to a Project whose construction as a priority matter was a matter of high public interest.

736. Before reaching a final conclusion on FET, however, the Tribunal must consider the Respondent's arguments concerning the Claimants' conduct, especially the position that the Claimants through their EGP proposal sought to "game the tender process," in particular by manipulating the formula by which the PAO Trimestral would be calculated.<sup>908</sup> The Respondent has also suggested in passing in its Rejoinder that the Claimants have failed to put forward evidence of the due diligence on which they based their investments.<sup>909</sup> However, this is not the affirmative obligation of the Claimants to prove and has not been raised by the Respondent as an affirmative defense. The Tribunal will therefore focus on the "gaming the system" allegation as potentially justifying termination, even though it has likewise not been put forward by the Respondent as a defense under a rubric of bad faith, unclean hands, or other similar theory.

***(c) Kuntur Wasi's Alleged "Gaming of the System"***

737. The "gaming the system" allegation relates to the EGP proposal that was first presented by Kuntur Wasi to the MTC and OSITRAN in September 2015,<sup>910</sup> only to be rejected in December 2015 by OSITRAN due to Kuntur Wasi's failure to submit all necessary documents with the proposal.<sup>911</sup> It was re-presented in May 2016 to the MTC and subsequently to OSITRAN as well.<sup>912</sup>

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<sup>908</sup> See, e.g., Respondent's Counter-Memorial, paras. 5, 78, 81, 96, 212; Respondent's Rejoinder, para. 5, 378, 464; **Exhibit RD-1**, Respondent's Opening Statement Presentation, 13 September 2021 "Theme 1- Kuntur Wasi Tried to Game the Tender Process", pp. 4-50; Transcript, Day 1 (English), 134:1322; 144:15-21; 145:18-22; 146:1-11; 152:7-22; 153-156:1-18.

<sup>909</sup> Respondent's Rejoinder, para. 435.

<sup>910</sup> **Exhibit R-71**, Letter No. 246-2015-KW, 17 September 2015.

<sup>911</sup> **Exhibit R-38**, Annex 25 to Letter No. 089-2016-KW, 4 May 2016.

<sup>912</sup> **Exhibit C-20**, *Oficio Circular No. 039-16-SCD-OSITRAN*, 22 July 2016.

738. The Respondent has argued strongly that the EGP proposal reverse engineered the formula set forth in the Concession Contract to generate an “i” variable that allowed Claimants to shift costs to the Respondent that they had not factored into their bid and that were not intended to be passed through to the Respondent.<sup>913</sup>
739. It is important to consider the chronology of this proposal in some detail. OSITRAN approved the EGP proposal in July 2016, just a few days before a new government took office in Peru and Martin Vizcarra became Minister of Transport and Communications.<sup>914</sup>
740. The new government asked for reports from the *Contraloría* and the CAF on Kuntur Wasi’s financing proposal, leading the MTC to suspend the deadline for EGP approval.<sup>915</sup> The *Contraloría* issued its report in mid-October 2016, recommending negotiation of the discount rate “i.”<sup>916</sup> This led to Kuntur Wasi’s making amended proposals consistent with the recommendation of the *Contraloría*.<sup>917</sup> The State’s rejection of these proposals resulted in a counterproposal that ultimately became Addendum No. 1.<sup>918</sup>
741. It is worth re-emphasizing that Addendum No. 1 materially changed the concept for the State’s financial support of the Project in the construction phase. Instead of paying quarterly quotas (“*cuotas trimestrales*”) under the FPAO/PAO scheme, the State would advance the cost of the work in a pay-as you-go (PPO) scheme, similar to the approach taken in prior phase of site preparation.
742. Despite the issues raised with the EGP from the time it was re-proposed in May 2016 through the finalization of Addendum No. 1 and its approval by OSITRAN, the Ministry

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<sup>913</sup> Respondent’s Counter-Memorial, para. 94.

<sup>914</sup> **Exhibit C-21**, *Oficio Circular No. 039-16-SCD-OSITRAN*, 22 July 2016. OSITRAN approved the EGP proposal on 20 July 2016; the new government, headed by Pedro Pablo Kuczynski, took office on 28 July 2016.

<sup>915</sup> **Exhibit R-39**, *Oficio No. 3144-2016-MTC/25*, 9 August 2016.

<sup>916</sup> **Exhibit C-22**, *Oficio No. 4268-2016 MTC/25*, 27 October 2016. The subsequent CAF report recommended a reduction in the quarterly PAO. **Exhibit C-23**, *Reporte de Conclusiones y Recomendaciones*, CAF, 7 November 2016.

<sup>917</sup> **Exhibit C-62**, Letter No. 183-2016-KW, 28 October 2016.

<sup>918</sup> **Exhibit C-63**, *Oficio No. 4362-2016-MTC/25*, 7 November 2016.

of Economy and Finance, the MTC, the Council of Ministers, and the President himself,<sup>919</sup> the Tribunal is aware of no evidence during this period that any authority claimed that Kuntur Wasi was “gaming the system.” This includes the MTC’s rejection of the EGP proposal.<sup>920</sup>

743. To be sure, there were criticisms made of the proposal. The CAF opined that the method of calculation used by Kuntur Wasi was at variance with those used in the financial markets and those markets’ understanding of the cost of financing.<sup>921</sup> The MTC picked up these criticisms in its rejection of Kuntur Wasi’s proposal.<sup>922</sup> OSITRAN, on the other hand found it to be “in accordance with the requirements of the Concession Contract.”<sup>923</sup>
744. Most significant, however, to the Tribunal is the report of the *Contraloría* in relation to the proposal. As set forth above and in the Tribunal’s discussion of these issues in relation to the Claimant’s contractual claims,<sup>924</sup> it noted that the Concession Contract did not set out any limits to the variable “i” and did not identify the assumptions used to calculate that variable. They also flagged the question whether bidders had access to the calculations of “i” by Peru’s outside consultants, ALG, during the bidding process.<sup>925</sup> Subsequently, it emerged that they did not and that material was confidential.<sup>926</sup>
745. The lack of definition of the variable “i” in the Contract and the public unavailability of certain other documents that might have raised additional questions about the calculation

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<sup>919</sup> See **Exhibit C-72**, *Oficio Circular No. 006-17-SCD-OSITRAN*, attaching the *Acuerdo No. 2009-607-17-CD-OSITRAN*, 20 January 2017; **Exhibit C-73**, *Informe No. 016-2017-EF/68.01*, 27 January 2017; **Exhibit C-74**, Video published by Latina Noticias, *Aeropuerto de Chinchero: Pedro Pablo Kuczynski se pronuncia tras suspensión de proyecto*, 30 January 2017; **Exhibit C-75**, News article published by RPP NOTICIAS, *Vizcarra: “PPK viajará este Viernes al Cusco para iniciar obras en Chinchero*,” 1 February 2017; **Exhibit C-76**, *Informe No. 105-2017-MTC/25*, 2 February 2017.

<sup>920</sup> **Exhibit C-67**, *Oficio No. 4601-2016-MTC*, 25 November 2016. In its *Oficio No. 4601-2016-MTC*, the MTC provided the reasons for rejecting the EGP proposal, concluding it would cause economic prejudice to the Grantor, i.e., the State. The MTC did not claim the proposal was an attempt to “game the system.”

<sup>921</sup> See para. 153 *supra*.

<sup>922</sup> See para. 156 *supra*.

<sup>923</sup> See para. 143 *supra*.

<sup>924</sup> See paras. 363 *et seq. supra*.

<sup>925</sup> See para. 148 *supra*.

<sup>926</sup> See para. 366 *supra*.

of “i,” suggest that the EGP proposal may well have arisen from a simple lack of communication and consequent misunderstanding about this issue on the part of the parties.

746. Indeed, Addendum No. 1—signed by the MTC and approved by other Government agencies -- states in its preamble that:

*...The vagueness of the terms of the Contract, as it has been drafted and without any limits having been set for the indebtedness rate, does not allow to identify the inputs applicable for estimating the “i” Rate, so that the approval of such rate, estimated by the Concessionaire, could be different from the cofinancing levels estimated by the Peruvian State during the process for the promotion of the Tender of Integral Projects for awarding the concession of the new International Airport Chinchero-Cuzco...<sup>927</sup> [Tribunal’s translation]*

747. The Addendum thus squarely points to lack of a definition of the variable “i” in the Concession Contract, and indicates that it opened the door to differences in the estimates prepared by the Peruvian State during the bidding process versus proposals from the Concessionaire regarding the levels of co-financing that would be required. Had the Peruvian State believed at the time of Addendum No. 1—with full information about the Concessionaire’s EGP proposal in hand—that the Concessionaire had effectively participated in the tender or otherwise acted in bad faith—not only would such a clause not appear in Addendum No. 1, but it is hard to imagine that the State would have even been willing to negotiate an alternative financing structure at that time.
748. The Tribunal therefore concludes that there is insufficient evidence on which to conclude that Kuntur Wasi was seeking to “game the tender process” with its EGP proposal. The Tribunal is well aware that some bidders do seek to game such processes in various ways. But that behavior is not proven here, in its judgment, and is negated by the State’s own contemporaneous conduct. As the Addendum itself says, given the Contract provisions and the lack of information given to bidders about Peru’s assumptions, different bidders could

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<sup>927</sup> The Spanish original reads: “la generalidad del Contrato de Concesión, tal como ha quedado redactado y sin haberse planteado límites a la tasa de endeudamiento, no permite identificar los supuestos aplicables para la estimación de la Tasa “I”, por lo que la aprobación de dicha tasa, estimada por el Concesionario, podría diferir de los niveles de cofinanciamiento estimado por el Estado Peruano durante el proceso de promoción del Concurso de Proyectos Integrales para el otorgamiento en concesión del nuevo Aeropuerto Internacional de Chinchero – Cusco...”  
**Exhibit C-24**, Addendum No. 1, Cl. 1, para. 3.



have come to different conclusions about what would be permitted by the Contract's formula. The procurement process and the Contract terms were developed by Peru, not by bidders such as Kuntur Wasi. If they were unclear or ambiguous, the fault for that cannot be put on the bidders. While the Peruvian State may have had certain expectations about how the variable "i" should be calculated, as previously analyzed by the Tribunal, it appears these expectations were not conveyed to bidders.<sup>928</sup> Given those expectations, the Tribunal can appreciate that the MTC would have been concerned and even surprised by the financial burden on the State under the PAO/FPAO scheme resulting from Kuntur Wasi's EGP proposal. But there is a difference between "gaming the tender process," which implies something close to bad faith, and simply utilizing what might be characterized as a loophole or a lack of clarity in the original scheme.<sup>929</sup>

749. In any event "gaming the tender process" was not the stated basis for termination. Consistent with the prior analysis, if a concern that Kuntur Wasi was doing so was the underlying motivation for termination, then the real reason for termination diverged even further than has previously been analyzed from the publicly stated reason, which is problematic for the same reasons as already indicated. And if it was not, then the issue would seem to be irrelevant to the question of arbitrariness.
750. The Tribunal also notes the efforts of Kuntur Wasi to find a solution to the Project construction financing problem. When the EGP proposal was rejected by the MTC as being unduly burdensome for the State, as was its prerogative, Kuntur Wasi engaged in a dialogue to try to develop an alternative approach. It made proposals to the MTC and continued with the efforts to find an alternative when the MTC rejected its proposals. It agreed to Addendum No. 1, the State's alternative proposal. It agreed to suspend the Contract's performance after the *Contraloría* issued its report on Addendum No. 1 and agreed to an extension of that suspension when requested by the MTC. It engaged in negotiations with newly installed Minister Giuffra to try to identify an alternative financing approach for the

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<sup>928</sup> See para. 366 *supra*.

<sup>929</sup> The Tribunal notes that Minister Vizcarra, in his 21 May announcement that the Contract would be left *sin efecto* criticized the predecessor government and characterized the contract as a bad contract. See **Exhibit C-120**, News clip from Buenos Días Perú, "Vizcarra sobre Chinchero: Decidimos dejar sin efecto contrato que desde el inicio partió mal," 22 May 2017.

Airport's construction and agreed to his June 1 *Hoja de Ruta*. Nor, as the Tribunal has previously determined, would it have been unreasonable for Kuntur Wasi to indicate to Minister Giuffra, as he alleges, that it would need six months to finalize construction financing for the Project under whatever scheme was to emerge from the June 1 negotiations. All of these actions, in the view of the Tribunal, showed the good faith of Kuntur Wasi in trying to find a mutually agreeable alternative financing approach for the Project, and cut against any finding that the Claimants were simply trying to "game the tender process."

***(d) Conclusion on FET***

751. The Tribunal appreciates that by mid-2017 the State might have felt frustration with the limited progress on the Project, and therefore with the Concessionaire, especially given the political situation at the time. But while the failed EGP proposal undoubtedly cost the Project in terms of time, it was not, in the Tribunal's view, a product of Kuntur Wasi's trying to "game the tender process." Nor did it demonstrate that Kuntur Wasi could not arrange construction financing under any scenario. Whatever concerns the episode may have raised, the State was not justified in simply acting in an arbitrary manner to abruptly and unilaterally terminate the Contract. The Claimants had legitimate expectations based on the Contract and the Guarantee Agreement, fortified by the overall public interest in building the Project as a matter of priority, that any such extreme action would be properly justified through the same type of deliberative processes that had previously occurred in relation to the Contract and Addendum No. 1. This required, as the Tribunal has set forth earlier, a clearer, more consistent, and reasoned basis for the termination than that which has been put before this Tribunal.

752. Accordingly, the Tribunal finds that the BIT's FET standard has been violated.

**(iii) The Negative Obligation of Article 2(3): Unjustified Conduct**

753. The conclusion that the positive FET obligation set forth in Article 2(3) has been violated makes the analysis of whether the Respondent engaged in unjustified conduct in terms of the negative obligation of Article 2(3) quite straightforward.

754. It is not disputed that the termination undoubtedly affected the use, enjoyment, etc., of the investment in the terms of Article 2(3)'s negative obligation. The only question, therefore, is whether it was "unjustified."
755. As indicated above, the parties are in agreement that for purposes of this matter, the terms "arbitrary," "unreasonable" and "unjustified" are essentially the same thing.<sup>930</sup> "Arbitrary" or "unreasonable" are the most common descriptors of the relevant factors in an FET context; "unjustified" is the language used by the negative obligation of 2(3).<sup>931</sup> In the Tribunal's view, while the three terms might not always be coterminous, in this case, they coincide.
756. While not all conduct violative of FET would necessarily implicate this negative obligation, in this case, the basis of the Tribunal's finding that FET has been violated readily carries over into this provision. The lack of a proper justification for the termination as set forth in detail in the preceding section is in fact the basis of the finding that FET was breached in this case. It is the converse of the *Lemire v. Ukraine* situation cited by the Claimants,<sup>932</sup> but that distinction is of no import since the Tribunal could equally have considered the two provisions of Article 2(3) in reverse order and reached the same conclusion.
757. Accordingly, the Tribunal finds that the termination also breached the negative obligation of Article 2(3) of the BIT.

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<sup>930</sup> The Respondent has not only accepted that the relevant terms are synonymous, it has essentially conflated the analysis of the two provisions in its submissions. See Respondent's Counter-Memorial, paras. 269-281 (arguing that Respondent has not acted in either an arbitrary or unjustified manner) and Respondent's Rejoinder, paras. 381-383.

<sup>931</sup> The "discriminatory" element of this provision is not at issue here and is therefore not considered further.

<sup>932</sup> Claimants' Memorial, para. 532, citing **Exhibit CL-64**, *Joséph Charles Lemire v. Ukraine II*, ICSID case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010.

## **(2) Expropriation**

### ***a. The Parties' Positions***

#### **(i) The Claimants' Position**

758. The Claimants' third claim is that Peru expropriated its investment, without "prompt, adequate and effective" compensation, in breach of Article 4(2) of the BIT.<sup>933</sup>

*None of the Contracting Parties shall take nationalization or expropriation measures or any other measure having the same effect, against investments that are in its territory and that belong to investors of the other Contracting Party, unless such measures are taken for reasons of national security or public utility, on a non-discriminatory basis and under due process of law. The measures will be accompanied by provisions for the payment of prompt, adequate and effective compensation.*<sup>934</sup>

759. According to the Claimants, it is well settled in the jurisprudence that both tangible and intangible assets may be the subject of an expropriation, including economic rights derived from contracts. In this case, the Claimants argue that Peru expropriated its rights to and under the Concession Contract and the EDI, which constitutes Kuntur Wasi's intellectual property.<sup>935</sup>

#### ***(a) Expropriation of the Concession Contract***

760. First, the Claimants argue that Peru directly and illegally expropriated their economic rights under the Concession Contract. In particular, through the Concession Contract, Peru granted to the Claimants, the following rights, to be enjoyed for a period of 40 years: (i) the right to Airport and non-Airport related income; and (ii) the access tariffs, which constitute "[e]conomic concessions granted by law or by contract" ("*[c]oncesiones económicas conferidas por ley o por contrato*") [Tribunal's translation] under the BIT's

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<sup>933</sup> Claimants' Memorial, para. 553, citing **Exhibit C-50**, Perú-Argentina BIT, art. 4(2).

<sup>934</sup> This is an English translation taken from Respondent's Counter-Memorial, para. 297. The Spanish original reads: "*Ninguna de las Partes Contratantes tomará medidas de nacionalización o expropiación ni ninguna otra medida que tenga el mismo efecto, contra inversiones que se encuentren en su territorio y que pertenezcan a inversores de la otra Parte Contratante, a menos que dichas medidas sean tomadas por razones de seguridad nacional o utilidad pública, sobre una base no discriminatoria y bajo el debido proceso legal. Las medidas serán acompañadas de disposiciones para el pago de una compensación pronta, adecuada y efectiva.*" **Exhibit C-50**, Perú-Argentina BIT, art. 4(2).

<sup>935</sup> Claimants' Memorial, paras. 555-558.

definition of protected investments.<sup>936</sup> In the Claimants' view, Peru expropriated these economic rights when it declared the unilateral termination of the Concession Contract, as this terminated all of the economic rights thereunder, and Peru never paid any compensation.<sup>937</sup>

***(b) Expropriation of the EDI***

761. Secondly, the Claimants allege that the EDI, which Kuntur Wasi prepared to comply with its obligations under the Concession Contract and which contains the shop drawings of the Project, as well as sufficient details to begin the construction works, qualifies as “intellectual property rights” (“*derechos de propiedad intelectual*”) protected under the BIT. The Claimants explain that Kuntur Wasi incurred significant costs – of more than US\$27 million – to prepare the EDI and that Peru is currently benefiting from the EDI without having paid for it. In particular, the Claimants point out that Peru used Kuntur Wasi's EDI as the basis for the new tender process which it opened to find a new concessionaire.<sup>938</sup>
762. According to the Claimants, these expropriations were, in addition, illegal because Peru has not paid any “prompt, adequate and effective” compensation to Kuntur Wasi. The Claimants suggest that it is not disputed by Peru that it has never paid Kuntur Wasi for the expropriation of the Claimants' investment and that this alone is enough to prove that the expropriation was unlawful.<sup>939</sup>
763. The Claimants also argue that the fact that Peru offered to pay for the EDI does not take away that Peru expropriated the Claimants' investments. According to the Claimants, the Respondent's offer was only made once this arbitration had begun, and it was conditioned on the Claimants' waiver of all claims under this arbitration.<sup>940</sup> The Claimants argue that they were not obligated to waive their right to claim for US\$ 248 million and accept the mere US\$27 million that Peru offered to pay for the EDI. According to the Claimants, the

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<sup>936</sup> Claimants' Memorial, para. 560, citing **Exhibit C-50**, Perú-Argentina BIT, art. 1(1)(e).

<sup>937</sup> Claimants' Memorial, para. 561.

<sup>938</sup> Claimants' Memorial, paras. 562-564.

<sup>939</sup> Claimants' Memorial, paras. 566, 567.

<sup>940</sup> Claimants' Reply, para. 805.

fact that the EDI has not been paid in full to PyC is irrelevant because PyC is a company within Kuntur Wasi's group, and the fact that Kuntur Wasi currently has a debt with a sister company does not justify Peru's lack of payment or preclude the EDI from qualifying as an investment.<sup>941</sup>

764. Although the Claimants acknowledge that they received another offer from Peru between June and July 2017, the Claimants consider that this offer was also not acceptable or made in good faith because Peru was trying to coerce the Claimants into agreeing to the mutual termination of the Concession Contract. According to the Claimants, this offer was not acceptable because all of the costs to be compensated would have had to be approved by OSITRAN and because it excluded compensation for the damages caused for the termination of the Concession Contract, and as such, it breached the Claimants' rights under the Contract.<sup>942</sup>
765. The Claimants further allege that while the BIT only allowed Peru to expropriate for legitimate public reasons, no such reasons exists in this case. It is the Claimants' case that Peru has not provided a single public interest reason that justified the termination of the Concession Contract and that the MTC formal notice which informed Kuntur Wasi of the termination contains no reasoning to that effect. According to the Claimants, Minister Vizcarra's statement of May 2017 indicating that there was no public interest reason that could allow the State to exit the Contract proves that the termination was not supported by a real public interest concern. With respect to the EDI, the Claimants argue that Peru has not even attempted to provide any explanation as to why it was expropriated.<sup>943</sup>
766. Finally, the Claimants allege that the expropriation was not made in accordance with due process.<sup>944</sup> According to the Claimants, the fact that Peru contradicted itself on several occasions meant that the whole process that led to the expropriation of their economic rights was not transparent. Furthermore, the Claimants were not given an opportunity to be heard before Peru took the decision to terminate the Concession Contract; and even when

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<sup>941</sup> Claimants' Reply, paras. 802-806, 820.

<sup>942</sup> Claimants' Reply, para. 819.

<sup>943</sup> Claimants' Memorial, paras. 568-572.

<sup>944</sup> Claimants' Memorial, para. 574; Claimants' Reply, para. 825.

it did, Peru gave no explanations to the Claimants as to why it had reached the conclusion to terminate the Concession Contract.<sup>945</sup>

767. In response to the Respondent's argument that the termination was not an *act iure imperii* that could constitute an expropriation, the Claimants argue that Peru did not act as a mere contracting party when it terminated the Concession Contract. The Claimants point to the following acts of authority and circumstances which, on its case, support its case for expropriation:<sup>946</sup>

1. The stark contrast between the exhaustive process that led to Addendum No. 1 (in which OSITRAN, MTC, MEF, Council of Ministers participated) and the termination of the Concession Contract on the other hand, in which only the MTC participated;
2. The fact that the termination of the Concession Contract was not based on the *Contraloría's* report but was rather based on political motivation;
3. The repeated statements by the President of the Republic and the Ministers in relation to the Concession Contract;
4. The impeachment process before the Congress in relation to the Concession Contract;
5. The State's threat to the Claimants that their other investments in the country might be prejudiced or in relation to the return of the Concession area; and
6. The seizure of the Claimants' offices and the commencement of criminal investigations, which ultimately destroyed the Project.

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<sup>945</sup> Claimants' Memorial, para. 576.

<sup>946</sup> Claimants' Reply, para. 790. The Claimants also strongly oppose the comparison with the *Convial Callao* case (see Claimants' Reply, paras. 791-795).

## (ii) The Respondent's Position

768. The Respondent argues that it did not expropriate the Claimants' investment for three reasons:

### *(a) Expropriation of the Concession Contract*

769. First, according to the Respondent, the MTC terminated the Concession Contract with Kuntur Wasi pursuant to the express terms of that Contract, which allowed the MTC to unilateral terminate for "well-founded public interest reasons." It did so in its capacity as a contracting party, not as a sovereign entity (as evidenced by the fact that the termination was notified to the Claimants through a letter, not through a formal decree or a law).<sup>947</sup> On the Respondent's case, tribunals have consistently held that the cancellation of concession contracts by States, when done as contracting parties, do not constitute an expropriation.<sup>948</sup> Relying on *Convial Callao v. Peru*, *Biwater Gauff v. Tanzania* and *Malicorp v. Egypt*, the Respondent argues that the fact that the Concession Contract was terminated for a public interest reason does not imply that the State was exercising some sovereign power, given that the Contract itself is the source of the State's power to terminate for public interest reasons.<sup>949</sup>

### *(b) Expropriation of the EDI*

770. Secondly, the Respondent argues that it did not expropriate the Claimants' intellectual property rights in the EDI (which the Claimants acquired from PyC) because the Respondent offered to pay to the Claimants the full costs that the Claimants paid to PyC for the EDI, as long as the Claimants could substantiate those costs in accordance with the contractual procedures. The Claimants refused Peru's offer and now claim that the Respondent has not paid any compensation. Furthermore, according to the Respondent, the

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<sup>947</sup> Respondent's Counter-Memorial, para. 305.

<sup>948</sup> Respondent's Counter-Memorial, para. 299, citing, among others, **Exhibit RL-43**, *Convial Callao v. Peru*, paras. 496-555; **Exhibit CL-66**, *Biwater Gauff v. Tanzania*, paras. 458-60, 492-93.

<sup>949</sup> Respondent's Counter-Memorial, para. 300; **Exhibit RL-43**, *Convial Callao v. Peru*, para. 537.



Claimants have never even paid the full costs to PyC (PyC invoiced US\$27 million to Kuntur Wasi for the EDI, and Kuntur Wasi has only paid US\$9 million).<sup>950</sup>

771. According to the Respondent, even if the Tribunal were to find that an expropriation occurred, the Respondent would still not have breached the BIT, because the Claimants cannot satisfy the test for proving that an illegal expropriation occurred. The test is three-fold: the Claimants would have to show that the State did not act for a public purpose; that the State did not act in accordance with due process of law; and that the State did not provide prompt, adequate and effective compensation.<sup>951</sup>
772. With respect to the first of these elements, the Respondent argues that the MTC terminated the Contract for public interest reasons, namely, to press forward with the construction of the Chinchero Airport that had stalled for years due to the Claimants' inability to finance the project.<sup>952</sup>
773. According to the Respondent, investment treaty tribunals have limited their inquiry into whether a State's actions were actually taken pursuant to the stated public interest, and should not second-guess a State's determination of what is in the public interest and whether the actions taken are the best strategy for achieving that public purpose. In this case, the Claimants have not demonstrated that the MTC's public-interest rationale for terminating the Concession Contract was a mere pretext that concealed a different, actual rationale.<sup>953</sup>
774. The Respondent points out that the Claimants do not argue that building the Chinchero Airport was in the public interest; rather, the Claimants' argument is that terminating the Contract was not the best means of achieving that purpose. But the Tribunal is not tasked with determining whether the Respondent's actions best fulfilled the public interest goal: it should only analyze whether there was a public interest and the actions were taken to

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<sup>950</sup> Respondent's Counter-Memorial, para. 306.

<sup>951</sup> Respondent's Counter-Memorial, para. 307.

<sup>952</sup> Respondent's Counter-Memorial, para. 308.

<sup>953</sup> Respondent's Counter-Memorial, para. 308.

address that goal. In this case, the facts show that the MTC terminated the Contract because it believed that the Claimants were never going to be able to complete the Project.<sup>954</sup>

775. With respect to the Claimants' argument that Minister Vizcarra admitted in 2017 that there was no public-interest reason for terminating the Concession Contract, the Respondent argues that Minister Vizcarra's statements before Congress do not bind Peru. According to the Respondent, the Tribunal cannot attribute to the State the statement of an individual minister debating policy. Moreover, the Respondent argues that Minister Vizcarra's statements were made in May 2017, when the MTC still hoped that it could continue with the Project with the Claimants. In fact, precisely for this reason, Minister Giuffra sat down with the Claimants to try to negotiate a solution to the problem; and it was not until after this unsuccessful negotiation that it became clear to the MTC that the Project could not progress with the Claimants and therefore, the State decided to terminate the Contract for public interest reasons.<sup>955</sup>
776. The second criterion of a lawful expropriation under the BIT is that the State takes measures "in accordance with due process of law." The Respondent denies falling short of this requirement. First, contrary to what the Claimants suggest, they were afforded an opportunity to be heard prior to the termination of the Contract. In fact – the Respondent argues – the Contract was terminated only after substantial negotiations with the Claimants. These began on 1 June 2017, when Minister Giuffra met with Mr. Vargas and documented certain broad terms (in the *Hoja de Ruta*) that would serve as a basis for moving the Project forward; they also agreed that, if the Parties were unable to reach an agreement on the basis of those broad terms, they would terminate the Contract by mutual agreement. The Claimants thus had sufficient opportunity to explain to the MTC why the best option was to move the Chinchero Airport forward.<sup>956</sup>
777. Secondly, the Respondent argues that the Claimants were made aware of the Respondent's reasoning in terminating the Contract. In particular, the 13 July 2017 notification that the

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<sup>954</sup> Respondent's Counter-Memorial, para. 309.

<sup>955</sup> Respondent's Counter-Memorial, para. 310.

<sup>956</sup> Respondent's Counter-Memorial, paras. 312, 313.

MTC sent to Kuntur Wasi explained that the situation was seriously impeding the State's goal of building a new airport for Cuzco, and the Claimants were well aware of the context in which the Contract was being terminated.<sup>957</sup>

778. Finally, the Respondent argues that it offered to pay the Claimants compensation. According to the Respondent, the Tribunal must look to the circumstances of the negotiations and the Respondent's offer to determine whether the Respondent has complied with the obligation to provide prompt, adequate and effective compensation. In this case, the Respondent argues that it offered the Claimants compensation at least as generous as the explicit terms of the Contract on more than one occasion, including during the June and July 2017 negotiations and again in November 2019 after the MTC had unilaterally terminated the Concession Contract. As to the actual compensation offer, the Respondent explains that it offered to pay: (a) US\$8.6 million of the performance bond (*Garantía de Fiel Cumplimiento*); (b) the cost of the EDI; and (c) the costs of any reasonable and verified amounts invested.<sup>958</sup>

***b. The Tribunal's Analysis***

779. Given the Tribunal's determination that the termination of the Concession Contract constituted a breach of both the positive and negative obligations contained in Article 2(3) of the BIT, the Tribunal considers that judicial economy renders it unnecessary for it to decide whether the decision to terminate and subsequent termination also constituted an expropriation of that Contract. This is particularly the case since the Claimants' damage position does not rely on a separate analysis for unlawful expropriation and a breach of FET.
780. The Claimants have also asserted that Peru expropriated the EDI. As a result of the Tribunal's decision that Article 2(3) of the BIT has been breached by the Respondent's conduct, the Claimants will be entitled, as discussed *infra* in connection with Damages Section VI.C.(4), to recover damages that are a consequence of those breaches. Inasmuch as the loss of the EDI was a consequence of Peru's unlawful termination of the Concession

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<sup>957</sup> Respondent's Counter-Memorial, para. 314.

<sup>958</sup> Respondent's Counter-Memorial, paras. 316, 317.

Contract, as Peru has effectively conceded,<sup>959</sup> the Tribunal sees no need to examine whether the EDI was expropriated, either.

### **(3) Full protection and security**

#### ***a. The Parties' Positions***

##### **(i) The Claimants' Position**

781. The Claimants' fourth claim under the BIT is that Peru breached its obligation to provide the Claimants' investment full protection and legal security at all times.<sup>960</sup> According to the Claimants, given that Article 4(1) of the BIT expressly refers to "*seguridad jurídica*," there is no doubt that this obligation is meant to protect the investment not only from physical harm but also to provide legal security.<sup>961</sup>
782. The Claimants further argue that "*seguridad jurídica*" implies a certain notion of "protection, predictability and due reparation within a certain legal framework, that is, the state undertakes the obligation to guarantee the integrity of the rights acquired by the investor in the legal framework of the state receiving the investment" [Tribunal's translation];<sup>962</sup> it implies protection against "the arbitrary application of the law" ("*la aplicación arbitraria de las leyes*") [Tribunal's translation];<sup>963</sup> and requires certainty in the application of the legal system.<sup>964</sup>
783. According to the Claimants, Peru failed to provide legal security and protection to their investments by: (i) terminating the Concession Contract in a manner that was "sudden, contradictory and arbitrary" ("*intempestiva, contradictoria, injustificada y arbitraria*") [Tribunal's translation];<sup>965</sup> (ii) proposing, negotiating and supporting Addendum No. 1 and

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<sup>959</sup> Peru has admitted use of the EDI and maintained its offer to compensate the Claimants for it. *See, e.g.*, paras. 515, 516, *supra*.

<sup>960</sup> Claimants' Memorial, para. 578.

<sup>961</sup> Claimants' Memorial, para. 580.

<sup>962</sup> Claimants' Memorial, para. 581. The original Spanish reads: "*protección, previsibilidad y debida reparación dentro de un marco jurídico determinado, esto es, el estado adquiere la obligación de garantizar la integridad de los derechos adquiridos por el inversor en el marco del ordenamiento jurídico del país que recibe la inversión.*"

<sup>963</sup> Claimants' Memorial, para. 582.

<sup>964</sup> Claimants' Memorial, para. 582.

<sup>965</sup> Claimants' Memorial, para. 583.

then later terminating the Concession Contract;<sup>966</sup> and (iii) illegally appropriating Kuntur Wasi's EDI, which is its intellectual property, without paying compensation.<sup>967</sup>

784. The Claimants reject the Respondent's argument that, absent an allegation that there is a systemic defect or wrongful change in the State's legal system, State actions that are not discriminatory and consistent with the host State's laws cannot violate the legal security standard.<sup>968</sup> According to the Claimants, the purpose of the FPS clause is precisely to impose limits on the State's capacity to take decisions that, albeit consistent with the country's legal framework, breach the State's obligations towards investors.<sup>969</sup>

### **(ii) The Respondent's Position**

785. The Respondent does not deny that the BIT's full protection and security standard expressly covers "legal security" ("*seguridad jurídica*"). However, the Respondent denies that it failed to provide legal security to the Claimants' investment.<sup>970</sup>
786. According to the Respondent, there is substantial overlap between the standards for a legal security claim under the FPS provision and the FET provision. The Respondent argues that the Claimants' claim for breach of FPS mirrors their FET claim, and must, consequently, fail for the same reason the FET claim must fail.<sup>971</sup>
787. Secondly, the Respondent points out that the Claimants acknowledge that a BIT's promise of legal security does not preclude a host State from taking action that is consistent with the country's legal framework. In the Respondent's view, absent an allegation that there is a systemic defect or wrongful change in a State's legal system itself, State actions that are non-discriminatory and consistent with the host-State's law cannot violate the legal security standard.<sup>972</sup> The Respondent further alleges that if a claimant does not challenge the law as such, and if the claimant cannot show that the State's action misapplied the law,

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<sup>966</sup> Claimants' Memorial, para. 584.

<sup>967</sup> Claimants' Memorial, para. 585. *See also* Claimants' Reply, paras. 844-847.

<sup>968</sup> Claimants' Reply, paras. 837 *et seq.*

<sup>969</sup> Claimants' Reply, para. 843.

<sup>970</sup> Respondent's Counter-Memorial, paras. 319, *et seq.*

<sup>971</sup> Respondent's Counter-Memorial, paras. 320, 321.

<sup>972</sup> Respondent's Counter-Memorial, para. 322.

there is no violation of the legal security standard, whether or not the State's action was detrimental to the investor. According to the Respondent, investments entail some risks, including the risk that the State may legitimately apply its laws in a manner that is detrimental to the investor's interest.<sup>973</sup>

788. In the Respondent's view, the Claimants cannot make out a legal security claim under this framework, as they cannot show that Peru applied its own laws in a manner that was unfair. Rather, the Respondent argues that Peru acted in accordance with Peruvian law with respect to the Claimants' investment at all times.<sup>974</sup>

***b. The Tribunal's Analysis***

789. The parties agree that this provision of the BIT extends, by its express terms, to juridical as well as physical, security, but disagree as to the proper interpretation of this standard, including its relationship to the BIT's FET standard. Given the findings of the Tribunal with respect to Article 2(3), the Tribunal considers that for reasons of judicial economy it need not address this claim.

**(4) Umbrella clause**

***a. The Parties' Positions***

**(i) The Claimants' Position**

790. The Claimants' final claim under the BIT is that Peru breached the umbrella clause. Given that the Argentina-Peru BIT does not contain an umbrella clause, the Claimants rely on Article 3(1) of the BIT, which sets out the so-called most-favoured-nation provision ("**MFN provision**") to import an umbrella clause into the BIT.<sup>975</sup> Article 3(1) of the BIT reads as follows:

*Each Contracting Party, once it has admitted in its territory investments of investors of the other Contracting Party, shall provide treatment no less favorable than that granted to investments of its own national investors or of third-country investors, considering whichever is more favorable for*

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<sup>973</sup> Respondent's Counter-Memorial, para. 324.

<sup>974</sup> Respondent's Counter-Memorial, para. 325.

<sup>975</sup> Claimants' Memorial, para. 588; Claimants' Reply, para. 848.

*investments of investors of the other Contracting Party.*<sup>976</sup>

791. According to the Claimants, the BIT's MFN clause is particularly wide, in the sense that it does not set out any limitations in relation to the type of standards that may be invoked through its application.<sup>977</sup> Furthermore, according to the Claimants, the Respondent's argument that by virtue of the *ejusdem generis* principle, investors may only rely on standards contained in other treaties that are of the same nature as those contained in the BIT in question, leads to absurdity because there would be no benefit in claiming the MFN clause at all.<sup>978</sup>

792. On the basis of the MFN provision, the Claimants argue that Peru breached Article 4(e) of the bilateral investment treaty between Thailand and Peru (the **Umbrella Clause**), pursuant to which:

*Each Contracting Party shall observe any obligation, additional to those specified in this Agreement, into which it may have entered with regard to investments of nationals or companies of the other Contracting.*<sup>979</sup>

793. According to the Claimants, the aim of umbrella clauses such as this is to extend the BIT protection to obligations that would otherwise not be covered by the BIT, for their contractual nature. In the Claimants' view, the scope of the umbrella clause in the Thailand-Peru BIT is particularly wide, given that it expressly refers to "any obligation, additional to" ("*cualquier otra obligación, adicional*"), and covers any commitments the State has entered into with investors.<sup>980</sup>

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<sup>976</sup> This an English translation taken from Respondent's Counter-Memorial. The Spanish original reads: "*Cada Parte Contratante, una vez que haya admitido en su territorio inversiones de inversores de la otra Parte Contratante, les acordará un tratamiento no menos favorable que el otorgado a las inversiones de sus propios inversores nacionales o de inversores de terceros Estados, considerando el que sea mas favorable para las inversiones de inversores de la otra Parte Contratante.*" **Exhibit C-50**, Perú-Argentina BIT, art. 3(1).

<sup>977</sup> Claimants' Reply, para. 851.

<sup>978</sup> Claimants' Reply, para. 854.

<sup>979</sup> Claimants' Memorial, para. 589, citing **Exhibit CL-112**, Peru-Thailand BIT, art. 4(e): "*Cada parte contratante cumplirá cualquier otra obligación, adicional a lo especificado en este Convenio, que haya contraído con relación a las inversiones de los nacionales o sociedades de la otra Parte Contratante.*"

<sup>980</sup> Claimants' Memorial, para. 590.

794. In this case, the Claimants argue, Peru’s breaches of the Concession Contract, including Addendum No. 1 and the Guarantee Agreement are “*obligaciones*” entered into by Peru and the Claimants, and amount, pursuant to the umbrella clause, to breaches of the BIT.<sup>981</sup>

**(ii) The Respondent’s Position**

795. The Respondent argues that the Claimants’ umbrella clause claim must fail for several reasons:

796. First, there is no umbrella clause in the Argentina-Peru BIT and therefore, there is no basis for asserting an umbrella clause claim. Had the contracting parties wanted to include an umbrella clause in their treaty, they would have done so – as they did with other treaties that predate the Argentina-Peru BIT.<sup>982</sup>

797. Second, the Respondent argues that investment treaty tribunals must determine, on a case-by-case basis, whether the parties to the treaty intended for “treatment no less favorable” to reach, and to permit the importation of, an umbrella clause from another BIT. According to the Respondent, an interpretation of the treaty pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties should lead the Tribunal to conclude that it is not possible to introduce an umbrella clause into the BIT through the BIT’s MFN provision. In particular, the Respondent points to the absence of an umbrella clause as evidence of the contracting parties’ intent that the MFN provision should not extend to umbrella clauses.<sup>983</sup>

798. Furthermore, according to the Respondent, the MFN provision may, at most, be used to import provisions dealing with the same subject matter that is included in the original BIT, according to the well-known *ejusdem generis* principle. In other words, in the Respondent’s view, both international treaties would have to contain a provision dealing with the same subject matter.<sup>984</sup>

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<sup>981</sup> Claimants’ Memorial, para. 595; Claimants’ Reply, paras. 867 et seq.

<sup>982</sup> Respondent’s Counter-Memorial, para. 327.

<sup>983</sup> Respondent’s Counter-Memorial, para. 330-332.

<sup>984</sup> Respondent’s Counter-Memorial, para. 334.



799. Finally, the Respondent argues that the Claimants have failed to analyze the specific MFN provision at issue in the BIT. Instead, the Claimants rely on two other investment treaty cases to support their arguments, when in fact, neither of those cases support the Claimants' assertions; and fail to distinguish, or even acknowledge the existence of, cases in which tribunals have declined to import umbrella clauses into a BIT that lacks one via an MFN provision.<sup>985</sup>

***b. The Tribunal's Analysis***

800. In light of the Tribunal's finding that both sentences of Article 2(3) of the BIT have been breached, as well as its decisions regarding jurisdiction and certain claims based on the Concession Contract, the Tribunal considers that there is no need to address the question whether the BIT's MFN clause permits the importation of an umbrella clause from the Peru/Thailand bilateral investment treaty.

**VI. DAMAGES**

**A. CLAIMANTS' DAMAGES SUBMISSIONS**

**(1) Compensation under the Contract provisions**

***a. The applicable standard***

801. According to the Claimants, they are entitled to *full* reparation for Peru's breaches of the BIT, the Concession Contract and the Guarantee Agreement under both Peruvian law *and* international law.<sup>986</sup> This was, in the Claimants' view, first and foremost acknowledged by the former Transport Minister, Martín Vizcarra, who made the following statement:

*To unilaterally breach the contract would have taken the Government of Peru to an arbitration proceeding at the International Centre for Settlement of Investment Disputes (ICSID). In the event Peru did not prevail in such proceedings, compensation to be paid to Kuntur Wasi would amount, at least, to USD 8 million plus lost profit under the contract (USD 264.8 million),*

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<sup>985</sup> Respondent's Counter-Memorial, para. 336-342.

<sup>986</sup> Claimants' Memorial, para. 600; Claimant's Reply, para. 877.

among other items.<sup>987</sup>[Tribunal's translation]

802. According to the Claimants, compensation for breach of the Concession Contract is to be determined by Peruvian law.<sup>988</sup> In this regard, the Claimants argue that the legal basis on which Kuntur Wasi terminated the Concession Contract on 7 February 2018 is Articles 1428 and 1429 of the Peruvian Civil Code and not the termination clauses of the Concession Contract.<sup>989</sup> On the Claimants' case, this implies that they are entitled to seek reparation under Article 1321 of the Peruvian Civil Code, which provides that in cases of breach of contract, the standard of compensation is *full* reparation, including the right to claim lost profits;<sup>990</sup> and that they are not limited by the compensation provided for under Clause 15 of the Concession Contract.<sup>991</sup>
803. In relation to Clause 15 of the Concession Contract, the Claimants further argue that even if the Tribunal were to find it applicable, they would not be precluded from claiming lost profits because Clause 15.4.3 only establishes the specific procedure to determine the amounts payable to Kuntur Wasi for costs incurred in the Project in case the contract termination takes place before the commencement of the works; it does not refer to or limit the right to claim for lost profits.<sup>992</sup>
804. Furthermore, even if the Tribunal were to consider that Clause 15.4.3 of the Concession Contract limits the amounts that Peru owes Kuntur Wasi for breach of contract, said clause

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<sup>987</sup> **Exhibit C-33**, *Respuestas al pliego interpelatorio de 83 preguntas formuladas por los Congresistas de la República en relación al proyecto Aeropuerto Internacional de Chinchero – Cusco*, 18 May 2017, p. 24. The original Spanish reads: “Haber roto unilateralmente el contrato hubiese implicado que el Estado incurra en un arbitraje en el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI). De perder el caso, la indemnización a Kuntur Wasi incluiría, por lo menos, US\$ 8 millones por indemnización, más el lucro cesante del contrato (US\$264.8mm) entre otros.” Claimants’ Memorial, paras. 597-599; Claimants’ Reply, para. 879.

<sup>988</sup> Claimants’ Memorial, paras. 606, 615. According to the Claimants, Peruvian law is not, however, applicable to the issue of damages resulting from the Respondent’s breach of the BIT.

<sup>989</sup> Claimants’ Memorial, para. 607; Claimants’ Reply, para. 888.

<sup>990</sup> Claimants’ Memorial, paras. 603-606, 609, 614; Claimants’ Reply, paras. 894, 895, 897. According to the Claimants, Peru does not deny that Peruvian law requires full reparation (Claimants’ Reply, para. 897).

<sup>991</sup> Claimants’ Memorial, para. 607.

<sup>992</sup> Claimants’ Memorial, paras. 608, 609; Claimants’ Reply, para. 889.

would not be applicable in cases of *dolo* or *culpa inexcusable* by virtue of Article 1328 of the Peruvian Civil Code.<sup>993</sup>

805. Finally, the Claimants assert that even if the Tribunal considers that Peru's responsibility for breach of the Concession Contract is limited by Clause 15, the Claimants would be entitled to full reparation for Peru's breach of the Guarantee Agreement, which does not contain a similar limitation.<sup>994</sup>

***b. Assessment of damages***

806. The Claimants and its experts chose not to submit a separate calculation of damages for the breaches based on the Contract terms. Instead, they presented one single assessment of damages based on an income approach which includes lost profits. However, in their second report, the Claimants' quantum experts, Compass Lexecon, responded to the Respondent's damages calculation based on a cost approach.
807. In particular, Compass Lexecon argued that the cost valuation of the Respondent's expert, Mr. Kaczmarek, is incomplete and contains errors. In Compass Lexecon's view, these errors are due to the fact that Mr. Kaczmarek fails to properly take into account Kuntur Wasi's historic operating costs based on several asserted grounds for exclusion: that it is either not possible to ascertain whether the costs claimed have contributed to the Concession or to determine whether the costs correspond to investments that are "compensable" under the Concession Contract; or the Claimants have not submitted supporting documentation, other than Kuntur Wasi's financial statements.<sup>995</sup>
808. In response, Compass Lexecon argues that the Concession Contract does not require that payments would have had to "contribute to the value of the Concession," inasmuch as Clause 15.4.3.a of the Contract only refers to "general expenses" ("*gastos generales*").<sup>996</sup> Moreover, in the Claimants' view, a company's financial statements constitute sufficient

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<sup>993</sup> Claimants' Memorial, paras. 610-615; Claimants' Reply, paras. 890, 891.

<sup>994</sup> Claimants' Reply, para. 896.

<sup>995</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 115.

<sup>996</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 116.

evidence of the costs incurred, and the fact that they are expressed in a currency other than US\$ is not a problem given that the historical exchange rates are publicly available.<sup>997</sup>

809. Taking the above considerations into account, the Claimants' experts calculate that if the Tribunal were to apply Clause 15.4.3 of the Concession Contract, the compensation due to the Claimants would amount to US\$ 51.2 million, plus US\$ 4.9 million for costs related to the construction delays (the recoverability of which, in Compass Lexecon's view, is a legal issue that falls to be determined by the Tribunal). This amount would have to be updated as of the date of the award, using either the Project's WACC (7.18%) or the interest rate of the Peruvian Central Bank (average of 4.4%), which would result in US\$ 70.3 million or US\$ 63.3 million, respectively.<sup>998</sup>

**Tabla 6: Compensación Contractual: Terminación por Culpa de Perú  
(millones de US\$ nominales)**

|   | Kaczmarek   | Corregido   |
|---|-------------|-------------|
| <b>Garantía de Fiel Cumplimiento</b>              |             |             |
| Pago por Garantía a la Fecha de Resolución        | no incluye  | 8,7         |
| <b>Subtotal</b>                                   | <b>0,0</b>  | <b>8,7</b>  |
| <b>Gastos Operativos</b>                          |             |             |
| Gastos de Explotación                             | 4,3         | 4,3         |
| Mobiliario  | 0,1         | 0,1         |
| <b>Subtotal</b>                                   | <b>4,4</b>  | <b>4,4</b>  |
| <b>Gastos operativos capitalizados</b>            |             |             |
| Costos de Asesoría de Construcción - PROINVERSIÓN | no incluye  | 6,1         |
| Impuesto General a las Ventas                     | 1,3         | 1,3         |
| Costos de Supervisión y Otros - OSITRAN           | 1,1         | 1,1         |
| <b>Subtotal</b>                                   | <b>2,4</b>  | <b>8,5</b>  |
| <b>Gastos de Capital</b>                          |             |             |
| Estudio Definitivo de Ingeniería - EDI            | 27,6        | 27,6        |
| Gastos de Estructuración Financiera               | 2,0         | 2,0         |
| <b>Subtotal</b>                                   | <b>29,5</b> | <b>29,5</b> |
| <b>Total</b>                                      | <b>36,4</b> | <b>51,2</b> |

*Fuente: Primer Informe Abdala-López Zadicoff, Sección III.4, Tabla 5; Estados Contables Kuntur Wasi: 2014, p. 20; 2015, pp. 5-6, 21, 27; 2016, pp. 5, 29; 2017, pp. 6, 29, 30, 36 (CLEX-029). Ver también Primer Informe de Kaczmarek, Tabla 3.*

<sup>997</sup> Exhibit CER-4, Second Compass Lexecon Report, para. 119.

<sup>998</sup> Exhibit CER-4, Second Compass Lexecon Report, para. 121.

810. As shown in the table above, Compass Lexecon provided an alternative calculation of the costs incurred by Kuntur Wasi in the period beginning with the signing of the Concession Contract in 2014 to its termination in 2017. These costs and Compass Lexecon's responses to Mr. Kaczmarek are further explained below:<sup>999</sup>
811. US\$1.1 million of *OSITRAN* supervisory costs.<sup>1000</sup> This item does not seem to be disputed by the Respondent, provided sufficient documentary evidence is provided.
812. US\$1.3 million paid by Kuntur Wasi as tax liabilities, which would have been recoverable but for the Contract breach. This item does not seem disputed by the Respondent, provided sufficient documentary evidence is provided.
813. US\$4.4 million in operating costs. This item does not seem to be disputed by the Respondent, provided sufficient documentary evidence is provided.<sup>1001</sup>
814. US\$27.6 million owed to PyC. This item corresponds to costs associated with the preparation of the engineering study (EDI).<sup>1002</sup> In response to the Respondent's argument that the Claimants are only entitled to amounts actually paid to PyC (*i.e.*, US\$ 9 million, as opposed to amounts invoiced), the Claimants allege that they are under a legal obligation to pay said amounts.<sup>1003</sup>
815. US\$ 2 million incurred for setting up the financial structure of the Project (prior to Addendum No. 1).<sup>1004</sup> As explained above (para. 808), Compass Lexecon disputes Mr. Kaczmarek's exclusion of these costs on the basis that they did not "advance" the Project, whereas the Claimants argue that the Concession Contract does not set out any such requirement.<sup>1005</sup>

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<sup>999</sup> **Exhibit CER-1**, First Compass Lexecon Report, paras. 63-65, Table 5 (p. 33); **Exhibit CER-4**, Second Compass Lexecon Report, paras. 114-122 and Table 6 (p.72).

<sup>1000</sup> **Exhibit CLEX-29**, Kuntur Wasi Financial Statements, 2017, p. 20.

<sup>1001</sup> **Exhibit CER-4**, Second Compass Lexecon Report, Table 6; **Exhibit RER-1**, First Kaczmarek Report, para. 75.

<sup>1002</sup> **Exhibit CLEX-29**, Kuntur Wasi Financial Statements, 2015, pp. 14, 20.

<sup>1003</sup> Claimant' Reply, para. 637.

<sup>1004</sup> **Exhibit CLEX-29**, Kuntur Wasi Financial Statements, 2017, p. 20.

<sup>1005</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 118.

816. US\$ 6.1 million for costs associated with obtaining the Concession Contract, such as consultancy work, structuring of the Project company and preparing for the tender process, all of which are compensable according to Compass Lexecon;<sup>1006</sup>
817. US\$ 8.7 million for the contract performance bond. According to the Claimants, this is a compensable expense under Clause 15.4.5 of the Concession Contract.<sup>1007</sup>
818. US\$ 4.9 million of additional construction delay costs incurred vis-à-vis PyC.<sup>1008</sup> In response to Mr. Kaczmarek's view that these costs should be excluded from the scope of the compensable costs, Compass Lexecon regarded this as a question of legal interpretation.<sup>1009</sup> The Tribunal notes, however, that the Claimants have not dealt with this in their pleadings.
819. Finally, in response to the Respondent's argument that the Claimants should have submitted to OSITRAN a statement of the costs incurred under Clauses 15.4.1 and 15.4.3 of the Concession Contract, the Claimants argue that: (1) given Peru's breach of the Concession Contract, it would have been futile to do so; (2) Peru's "offer" was made in the context of an on-going dispute and only sought to strengthen Peru's position in this arbitration, which evidences that the offer was not credible; and (3) in any event, Clauses 15.4.1 and 15.4.3 of the Concession Contract are not applicable because Peru did not provide any reasoning for its decision to terminate the Concession Contract.<sup>1010</sup>

## **(2) Compensation for breach of the BIT and international law**

### ***a. The applicable standard***

820. With respect to international law – which according to the Claimants is applicable to the compensation for breach of the BIT – the Claimants argue that the BIT does not set out any rule regarding the appropriate redress for any breach of the BIT other than a lawful

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<sup>1006</sup> **Exhibit CLEX-29**, Kuntur Wasi Financial Statements, 2015, pp. 14, 20; *see also* **Exhibit CER-4**, Second Compass Lexecon Report, para. 120(b).

<sup>1007</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 120.a.

<sup>1008</sup> Neither the Claimants in their pleadings nor Compass Lexecon in their reports provided any documentary support (in the financial statements or elsewhere) for this item.

<sup>1009</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 117.

<sup>1010</sup> Claimants' Reply, para. 892.

expropriation. Therefore, the rules that will govern the issue of compensation are to be found in customary international law, which establishes that a State must make *full reparation* if it commits an international wrong. Reparation must wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>1011</sup> In this particular case, the Claimants argue that the Respondent must pay damages sufficient to compensate them in full for the loss caused by the Respondent's violations of the BIT, including compensation for lost profits.<sup>1012</sup>

821. In the Claimants' view, the Respondent acknowledges that the Contract's termination clauses do not apply to breaches of the BIT.<sup>1013</sup>
822. The Claimants and their expert, Compass Lexecon, suggest that the Claimants' lost profits should be calculated on an income approach using the discounted cash flow ("DCF") methodology. According to the Claimants, the income approach is best suited for this case because, among other reasons, (1) the value of the Concession Contract does not depend on the amounts invested into the Project over the years, but rather on its capacity to generate profits; (2) PROINVERSIÓN itself used a DCF method when assessing the viability of the Project in 2003;<sup>1014</sup> (3) the Chinchero Airport will replace the Velasco Airport, which had been operating since 1964 with a track record of air traffic that is particularly useful to calculate this variable for the Chinchero Airport; (4) the cash flows of a concession are easily ascertainable given the regulated tariffs; and (5) the Project had already secured government financing for the initial work required for the construction.<sup>1015</sup>
823. In the Claimants' view, the fact that the Project was at an early stage is no impediment to using the DCF methodology to calculate damages, as is evidenced by the fact that the only

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<sup>1011</sup> Claimants' Memorial, paras. 616-619, citing among others: **Exhibit CL-122**, *Factory at Chorzów (Germany v. Poland)*, Award, 1927 P.C.I.J. (ser. A) N.º 13, p. 47; Claimants' Reply, para. 898.

<sup>1012</sup> Claimants' Reply, paras. 901, 902.

<sup>1013</sup> Claimants' Reply, para. 884, citing Respondent's Counter-Memorial, para. 378, where the Respondent states as follows: "Unless Claimants can prove that the MTC acted in a sovereign capacity and not as a contractual counterparty exercising rights under the Concession Contract, the termination clauses in the Contract must prevail."

<sup>1014</sup> Claimants' Memorial, para. 630.

<sup>1015</sup> Claimants' Memorial, paras. 631 *et seq.*

two investment treaty cases that have concerned disputes over airport concessions (namely *ADC v. Hungary* and *Flughafen Zürich v. Venezuela*) have applied this methodology.<sup>1016</sup> The Claimants also find support in the fact that the income from the Concession was guaranteed by the Contract terms, which set out the particular tariffs that Kuntur Wasi would have been able to charge.<sup>1017</sup>

824. According to the Claimants' experts, the cost or book value approach is not an appropriate approach for valuing a concession such as the Chinchero Airport, which is an ongoing business that generates profits (which would not be captured in the book value).<sup>1018</sup> Compass Lexecon further suggests that the cost approach is not an appropriate methodology in this case because both the future income and costs of the Chinchero Airport are easy to ascertain (as cash flows would be highly dependent on the aeronautical regulated tariffs and the costs can be calculated on the basis of the models developed by PROINVERSIÓN and similar information from the Lima airport), and because it underestimates the value of the Project.<sup>1019</sup>

*b. Assessment of damages*

825. The Claimants rely on their economic experts, Dr. Manuel A. Abdala and Mr. Pablo López Zadicoff of Compass Lexecon LLC, for their assessment of the quantum of the damages caused by Peru's breaches of the BIT, the Concession Contract and the Guarantee Agreement. The Claimants also retained Mr. Rossi of Mott MacDonald as an industry expert for the calculation of air traffic projections.
826. The Claimants argue that they are entitled to two categories of damages based on Peru's breaches of the BIT, the Concession Contract and the Guarantee Agreement:

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<sup>1016</sup> Claimants' Memorial, para. 632, citing **Exhibit CL-107**, *ADC Affiliate Limited v. Hungary*, ICSID case No. ARB/03/16, Award, 27 September 2006 (hereinafter *ADC v. Hungary*), paras. 501-504; **Exhibit CL-128**; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/10/19, Award, 18 November 2014 (hereinafter *Flughafen Zürich v. Venezuela*), para. 780.

<sup>1017</sup> Claimants' Reply, para. 910.

<sup>1018</sup> **Exhibit CER-4**, Second Compass Lexecon Report, paras. 74-76.

<sup>1019</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 78 *et seq*; Claimants' Reply, para. 927.



- (i) US\$244.8 million (plus interest) in lost profits that they would have earned had they been able to complete the Chinchero Airport and related termination expenses;<sup>1020</sup> and
- (ii) an additional 20% of the principal amount in “moral damages” for the harm caused to Corporación América’s reputation, due to the termination of the Contract and the alleged harm to certain Kuntur Wasi officers who were subject to criminal investigations in Peru.<sup>1021</sup>

827. To quantify damages under category (i), Compass Lexecon calculates the difference between the value of the Concession Contract in a counter-factual scenario under which the Concession Contract has not been breached and the Project’s value as of the valuation date of 13 July 2017 (the “**Present Value**”). To calculate the hypothetical value of the Claimants’ investment, Compass Lexecon estimates the Project’s anticipated cash flows and discounts those future cash flows to present value using a discount rate of 7.68% (equivalent to Kuntur Wasi’s WACC). Compass Lexecon also deducts the debts toward third-parties (*i.e.*, costs of financing and short-term debt).<sup>1022</sup> To calculate the present value, Compass Lexecon adds the costs that the Claimants have incurred or will incur since the date of valuation because of the Contract breach (at present, the Project does not generate any income).<sup>1023</sup>
828. The following aspects of Compass Lexecon’s DCF calculation are either disputed by the Parties or – as will be explained below – in the Tribunal’s view, too speculative to be determined with sufficient certainty:

### (iii) Aeronautical projections and revenues

829. Compass Lexecon estimated that the main source of income of an airport are the regulated tariffs to be received for a period of 40 years (*i.e.*, 80.9% of the Project’s income).<sup>1024</sup> To

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<sup>1020</sup> Claimants’ Reply, paras. 877-951

<sup>1021</sup> Claimants’ Reply, paras. 952-965.

<sup>1022</sup> **Exhibit CER-1**, First Compass Lexecon Report, para. 77.

<sup>1023</sup> Claimants’ Memorial, para. 625; **Exhibit CER-1**, First Compass Lexecon Report, paras. 68, 122.

<sup>1024</sup> **Exhibit CER-1**, First Compass Lexecon Report, para. 89.

estimate the expected aeronautical revenues of the Chinchero Airport during the term of the Concession Contract, the Claimants rely on Mott MacDonald's estimates for air traffic (flight and passenger) projections.

830. Mott MacDonald's projections are based primarily on historical data of airport traffic to the Velasco Airport (*i.e.*, Cuzco's current airport), with certain adjustments which seek to reflect the information available as of the valuation date (*i.e.*, 13 July 2017). In particular, Mott MacDonald's projections consider two limits to the "unrestrained projections": (1) the limitations imposed by Peru on the maximum number of tourist visits to certain sites (such as Macchu Picchu); and (2) the capacity restrictions of the projected Airport.<sup>1025</sup>
831. Based on these projections, Mott MacDonald estimates that the Chinchero Airport would have received 8.787.927 million passengers (6.175.398 domestic and 2.612.529 international) by the end of the Concession term in 2054.<sup>1026</sup>
832. According to the Claimants, Mr. Ricover – the Respondent's air traffic expert – relies on PROINVERSIÓN's 2013 projections, instead of incorporating data from 2017, leading to methodological flaws. In particular, Mott MacDonald points out that between 2013 and 2016, the observed number of passengers and flights to Cuzco significantly increased by 28.4% above the September 2013 PROINVERSIÓN projections.<sup>1027</sup> For these reasons, the Claimants reject the Respondent's "cap" of 5.07 million annual passengers starting in 2027.<sup>1028</sup>
833. Mott MacDonald also projects a higher number of international flights as compared to the PROINVERSIÓN 2013 report. The difference, according to Mott MacDonald, is explained by the fact that the Chinchero Airport would not be affected by the operational limitations affecting the current Velasco Airport (related to the occupancy and the types of airplanes

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<sup>1025</sup> Claimants' Memorial, para. 633(b); **Exhibit CER-2**, First Mott MacDonald Report, pp. 16, 17, Figure 10.

<sup>1026</sup> Claimants' Memorial, para. 633 (b); **Exhibit CER-1**, First Compass Lexecon Report, para. 9.

<sup>1027</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 3; **Exhibit RER-4**, First Ricover Report, paras. 7, 8.

<sup>1028</sup> Claimants also point out that the PROINVERSIÓN 2013 report projected up to 7.5 million passengers in its optimistic scenario.

that can land in and depart from Cuzco).<sup>1029</sup> This would, in Mott MacDonald's view, increase the chances for international flights as opposed to flights arriving from Lima.

834. To calculate the aeronautical revenue of the Chinchero Airport, Compass Lexecon applied the tariffs set out in the Concession Contract to the passenger and flight estimates.

#### **(iv) Operating costs and operating margin**

835. In the counterfactual scenario, Compass Lexecon includes the operating costs that Kuntur Wasi would have had to pay. Among those costs are administration, maintenance, and surveillance costs, costs associated with the guarantees under Clause 10 of the Concession Contract, fire-fighting costs, and operating costs during the construction phase, etc..<sup>1030</sup> According to Compass Lexecon:

- Its calculation of operating costs is based on PROINVERSIÓN's 2013 estimates included in the feasibility study, adjusted to the valuation date to account for inflation. For the operating costs that are dependent on air-traffic projections, Compass Lexecon adjusted the 2013 PROINVERSIÓN estimates to those of Mott MacDonald;<sup>1031</sup>
- Kuntur Wasi had recurrent costs related to the three financial guarantees set out in Clause 10 of the Concession Contract, which amount to US\$8.7 million; US\$11.6 million and US\$19.3 million, respectively, all of which form part of Kuntur Wasi's operating costs throughout the duration of the Concession Contract;<sup>1032</sup>
- The calculation should also take into account the operating costs during the construction phase (calculated in the EDI), which amount to US\$2.8 million

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<sup>1029</sup> **Exhibit CER-1**, First Compass Lexecon Report, para. 87.c); **Exhibit CER-4**, Second Compass Lexecon Report, paras. 4, 44 *et seq*; **Exhibit CER-3**, Second Mott MacDonald Report, Executive Summary, pp. 4-8.

<sup>1030</sup> **Exhibit CER-1**, First Compass Lexecon Report, para. 97.

<sup>1031</sup> **Exhibit CER-1**, First Compass Lexecon Report, para. 98.

<sup>1032</sup> **Exhibit CER-1**, First Compass Lexecon Report, para. 99.

between 2017 and 2021; US\$7.8 million in 2022; US\$12.6 million in 2023 and up to US\$14.7 million in 2032;<sup>1033</sup>

- In response to the Respondent's argument that Compass Lexecon's calculations show an operating margin that far exceeds the market standard, Compass Lexecon argues that when interpreted correctly, its damages calculation yields an EBITDA for the Project of 54% for the entire duration of the concession, which is considered a well-accepted margin for other similar airports (as cited by Mr. Ricover) and is below the EBITDA that was considered by PROINVERSIÓN in 2013 (of 63.1%).<sup>1034</sup> In particular, the Claimants' experts argued that Mr. Ricover's calculation overstated the EBITDA by not deducting the amounts payable by Kuntur Wasi to Peru for income from the concession rights exceeding US\$35 million.<sup>1035</sup> The Claimants also allege that, under the Concession Contract, there was no cap on the margins that Kuntur Wasi could earn and that margins across airports vary greatly.<sup>1036</sup>

#### **(v) Debts with PyC and other providers**

836. To estimate Kuntur Wasi's net value as of the valuation date, Compass Lexecon deducted the debt obligations that Kuntur Wasi had at the valuation date. In particular, Compass Lexecon explains that at the valuation date, Kuntur Wasi had the following debt obligations for works carried out before Addendum No. 1: (A) US\$23.4 million vis-à-vis PyC for the EDI; (B) US\$4.2 million (for consulting services, supplies and working-capital related financing) with other entities related to Kuntur Wasi's shareholders (other than PyC); and (C) US\$0.3 million in commercial debt, all of which should be deducted to calculate Kuntur Wasi's net value.<sup>1037</sup>

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<sup>1033</sup> **Exhibit CER-1**, First Compass Lexecon Report, paras. 100, 101.

<sup>1034</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 5.

<sup>1035</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 41.

<sup>1036</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 41.

<sup>1037</sup> **Exhibit CER-1**, First Compass Lexecon Report, paras. 117, 118.

**(vi) NPV**

837. The Claimants' experts argue that the net present value ("NPV") of the Project cannot be zero or close to zero for at least four reasons:

- In any bidding process, the winning proposal will undoubtedly include the costs incurred to participate in the bid (which for the Chinchero Airport took over 3 years), and that would require the rate of return to be above the cost of capital;
- In December 2013, PROINVERSIÓN itself acknowledged that the IRR of the Project for a private investor would need to be 10.12% (equivalent to a NPV of US\$158.4 million), far higher than the cost of capital, to attract investment;
- The industry standard is to provide higher rates of returns to entice investments in the sector (especially in cases of greenfield or brownfield investments); and
- Two relevant changes in market conditions between the bidding process in 2014 and the valuation date (in 2017) increased the Chinchero Airport's profitability and the Project's value: (1) a steady increase in air traffic between 2013 and 2017; and (2) the depreciation of the Peruvian *Sol*.<sup>1038</sup>

838. Taking all of these factors into account, Compass Lexecon calculates that Kuntur Wasi's net present value in the counterfactual scenario would have been US\$ 174 million.

**(vii) Costs incurred after the valuation date**

839. To account for Kuntur Wasi's net present value in the actual scenario (*i.e.*, where the Concession Contract has been terminated), Compass Lexecon adds certain debt obligations that represent costs that have been incurred by Kuntur Wasi because of the breach of the Concession Contract.<sup>1039</sup>

840. The "real scenario" includes:

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<sup>1038</sup> **Exhibit CER-4**, Second Compass Lexecon Report, paras. 58 *et seq.*

<sup>1039</sup> Claimants' Memorial, paras. 625, 636- 665; **Exhibit CER-1**, First Compass Lexecon Report, paras. 77, 122-124, Table 8.

- (i) Operational costs for the period between 13 July 2017 to the date when the Concession was transferred back to Peru (US\$0.7 million);
- (ii) Costs for the EDI and other services by PyC (for a total of US\$23.4 million);
- (iii) Debts that Kuntur Wasi has with related companies for a value of US\$4.2 million and short-term obligations resulting from costs of labor for a total of US\$322,000, which together result in a total of US\$4.5 million in commercial debts); and
- (iv) The “derivative” PyC claim, for a total of US\$48.5 million, as will be explained in the following section.

**(viii) The derivative PyC Claim**

841. The Claimants argue that under the Construction Contract with PyC, if Kuntur Wasi were to prevail in this arbitration and receive compensation for lost profits, Kuntur Wasi would be under an obligation to pay lost profits to PyC. To the extent that this obligation only materializes as a result of Peru’s wrongful termination of the Concession Contract, in the Claimants’ view, Peru should pay for the lost profits potentially due to PyC.<sup>1040</sup> The amounts that Kuntur Wasi would have to pay PyC for lost profits under the construction contract total US\$48.5 million as of the date of valuation.<sup>1041</sup>
842. Based on all of the above considerations, the Claimants valued their damages at US\$244.8 million as of the valuation date.<sup>1042</sup>

**(ix) Interest**

843. Finally, the Claimants submit that interest in this case should be calculated on the basis of Kuntur Wasi’s cost of financing in relation to the Chinchero Airport, and that the best way to value that cost of financing is by using its WACC.<sup>1043</sup> This results in an interest rate of 7.18%, compounded annually.<sup>1044</sup> According to the Claimants, Peru has not denied that it

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<sup>1040</sup> Claimants’ Memorial, paras. 638, 639.

<sup>1041</sup> Claimants’ Memorial, para. 638; Claimants’ Reply, paras. 123, 124.

<sup>1042</sup> Claimants’ Reply, para. 951.

<sup>1043</sup> Claimants’ Memorial, para. 669; **Exhibit CER-1**, First Compass Lexicon Report, paras. 129-131.

<sup>1044</sup> Claimants’ Memorial, para. 671; Claimants’ Reply, para. 968.

has to pay interest, nor does it object to Compass Lexecon's proposed interest rate in its Counter-Memorial (only Mr. Kaczmarek does) and therefore, this issue is not disputed between the Parties.<sup>1045</sup>

844. Alternatively, the Claimants ask that the Tribunal uses the average US dollar lending rate in Peru as a "normal interest rate" – as referred in Article 4.3 of the Treaty for expropriation – which in this case would be 4.4% average between the valuation date and 5 May 2022.<sup>1046</sup>

845. Finally, the Claimants submit that its proposed interest rate is "within range" of the alternative interest rates proposed by Mr. Kaczmarek, which result in a rate of 6.35% (in case of the LIBOR + 4 percent) and 6.91% for the US preferential rate + percent.<sup>1047</sup>

#### **(x) Tax Gross Up**

846. According to the Claimants' experts, their calculations are net of the income taxes that the Project would have had to pay in Peru and therefore, any compensation determined by the Tribunal would have to be net of taxes. Were that not the case (*i.e.*, if the compensation to be received by the Claimants is subject to taxes in Peru), the Tribunal would have to award a tax gross up equivalent to the amount of tax levied on the award.<sup>1048</sup>

#### **(xi) Moral damages**

847. According to the Claimants, Peru's actions harmed their image, honor and reputation and as such the Respondent must compensate Kuntur Wasi for moral damages under both Peruvian and international law.<sup>1049</sup>

848. In the Claimants' view, under Peruvian law, a claim for damages would, in general have to show: (1) the breach of contract or illicit act; (2) the damage; (3) the causal link; and (4) *culpa* or *dolo*.<sup>1050</sup> However, in case of damage to the Claimants' reputation, it would be

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<sup>1045</sup> Claimants' Reply, para. 969. *But see* Claimants' Rejoinder on Jurisdiction, para. 622.

<sup>1046</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 108.

<sup>1047</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 110.

<sup>1048</sup> **Exhibit CER-1**, First Compass Lexecon Report, para. 13.

<sup>1049</sup> Claimants' Memorial, paras. 641, 642; Claimants' Reply, paras. 952 *et seq.*

<sup>1050</sup> Claimants' Memorial, para. 643.

enough to prove the existence of defamatory acts, as this would in itself prove the illicit conduct, the harm and the causal relation.<sup>1051</sup>

849. Under international law, the Claimants argue that the principle of *full* reparation, as embodied in Article 31(2) of the Articles on State Responsibility, in the jurisprudence of the ICJ and of investment treaty tribunals, requires payment of moral damages.<sup>1052</sup>

850. Turning to the facts of the case, the Claimants argue that Peru committed at least two acts which should give rise to moral damages in this case:

- The *Fiscalía*'s criminal investigations into Kuntur Wasi's employees, which according to the Claimants were abstract and not very clear and which were later found by the judiciary to not to be sufficiently specific.<sup>1053</sup> The Claimants argue that through or as a result of these investigations, Peru harassed Kuntur Wasi's employees and limited the rights of Kuntur Wasi's employees;
- Secondly, the Claimants complain that Peru's "arbitrary" termination of the Concession Contract will have a negative impact on future tender processes in which Corporación América decides to participate. That is because most tender processes require a confirmation that the bidder has never had a contract cancelled by a State.<sup>1054</sup>

851. Based on these arguments, the Claimants claim moral damages for a total of 20% of the total damages calculated by Compass Lexecon.<sup>1055</sup>

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<sup>1051</sup> Claimants' Memorial, para. 643.

<sup>1052</sup> Claimants' Memorial, paras. 647-653.

<sup>1053</sup> Claimants' Memorial, paras. 656-659; Claimants' Reply, paras. 955, 961.

<sup>1054</sup> Claimants' Memorial, para. 662; Claimants' Reply, para. 956.

<sup>1055</sup> Claimants' Reply, para. 964.



## **B. RESPONDENT’S DAMAGES SUBMISSIONS**

### **(1) Compensation under the Contract provisions**

#### ***a. The applicable standard***

852. The Respondent argues that the Concession Contract contemplated six different ways in which the Contract could be terminated and for each of those scenarios the Contract set out the consequences that would follow.<sup>1056</sup> Out of those six scenarios, only three are relevant in this case (explained below) and none contemplated that Kuntur Wasi could claim for lost profits.
853. As explained above, the Respondent’s case on the merits is that the MTC terminated the Concession Contract for reasons of public interest. Pursuant to the express terms of the Contract, in case of termination for a public purpose, the compensation that the State would have to provide to Kuntur Wasi would be limited to (i) an amount equivalent to the performance guarantee bond in place at the time of termination (and in this case, the MTC terminated the Concession Contract during the pre-operational stage of the Project when the performance guarantee bond in place was US\$8,687,826); and (ii) return to Kuntur Wasi any outstanding performance bonds.<sup>1057</sup>
854. Even if the Tribunal accepts that Kuntur Wasi terminated the Concession Contract due to the MTC’s contractual breach – as Kuntur Wasi alleges – the Concession Contract specified that Kuntur Wasi would only be entitled to the reasonable and verified amounts invested in the Project that OSITRAN had assessed and approved pursuant to Clause 15.<sup>1058</sup>
855. The third potential scenario which could be of relevance in this case is one in which Kuntur Wasi and the MTC terminated the Concession Contract by mutual agreement, in which

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<sup>1056</sup> Respondents’ Counter-Memorial, paras. 256 *et seq*; Respondent’s Rejoinder, paras. 560, 566-571.

<sup>1057</sup> Respondent’s Counter-Memorial, paras. 352, 358-361; Respondent’s Rejoinder, para. 554; **Exhibit C-4**, Concession Contract, Cl. 15.5.3, 15.5.5 and 10.2.2; **Exhibit RER-1**, First Kaczmarek Report, para. 70.

<sup>1058</sup> Respondent’s Counter-Memorial, paras. 352, 362; Respondent’s Rejoinder, para. 554; **Exhibit C-4**, Concession Contract, Cl. 15.4.1, 15.4.3(a); **Exhibit RER-1**, First Kaczmarek Report, paras. 229, 239.

case the compensation would be any amounts agreed between the parties and reviewed and approved by OSITRAN.<sup>1059</sup>

856. Therefore, none of the potentially applicable termination clauses gave the Claimants the right to demand lost profits for the Chinchero Airport following termination of the Concession Contract.<sup>1060</sup>

857. In Respondent's view, the Claimants have presented no legitimate reason why the Tribunal should set aside these contractual limitations and instead order Peru to pay US\$248 million in lost profits:<sup>1061</sup>

(i) The Claimants have not shown that the Respondent has committed wilful misconduct or acted in a grossly negligent manner, as defined in Peruvian law, such as to allow excluding the limitations of liability contained in the Contract.<sup>1062</sup> In particular, the Respondent argues that to circumvent the contractual limitations, the Claimants would have to show that the MTC intentionally breached the Concession Contract and terminated knowing that it had no public interest rationale to terminate, which they have not done.<sup>1063</sup>

(ii) The Respondent also takes issue with the Claimants' characterization of Mr. Vizcarra's statement as an admission that Peru would have to pay lost profits. In Respondent's view, Mr. Vizcarra's statement was "merely defending a policy position that Addendum No. 1 would help to advance the stalled Project" and "cannot represent a definitive interpretation of the Concession Contract or Peruvian law and should hold no persuasive value before this Tribunal."<sup>1064</sup>

(iii) According to the Respondent, the Claimants argue that they can claim lost profits because the Respondent also breached the Guarantee Agreement, which contains

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<sup>1059</sup> Respondent's Rejoinder, para. 560.

<sup>1060</sup> Respondent's Counter-Memorial, paras. 352, 356-357; Respondent's Rejoinder, para. 560.

<sup>1061</sup> Respondent's Rejoinder, para. 554, 561;

<sup>1062</sup> Respondent's Counter-Memorial, para. 375; Respondent's Rejoinder, paras. 578 *et seq.*

<sup>1063</sup> Respondent's Rejoinder, paras. 578, 579.

<sup>1064</sup> Respondent's Counter-Memorial, para. 376. *See also* Respondent's Rejoinder, para. 582.

no limitation on damages. In response, the Respondent argues that: (i) in the Guarantee Agreement, Peru renounced its right to use its sovereign capacity to breach the Concession Contract and Peru never implicated its State sovereignty in terminating the Contract; and (ii) in any event, the Guarantee Agreement is nothing more than an affirmation that Peru would abide by the terms of the Concession Contract, but cannot be used to repudiate Clause 15 of the Concession Contract.<sup>1065</sup>

(iv) Finally, the Respondent disputes the Claimants' contention that the legal basis invoked for the termination was Peruvian civil law rather than the Contract, and that the Contract does not expressly prohibit Kuntur Wasi from seeking lost profits. In Respondent's view, the obvious intent of the Parties, as evidenced by the plain language of the Contract, was to limit and specify any compensation owed for Contract termination and the Claimants cannot circumvent these merely by invoking Peruvian law.<sup>1066</sup>

***b. Assessment of damages***

**(i) Compensation in case of termination for public purpose**

858. Respondent's main case is that the MTC terminated the Contract for public interest reasons in accordance with the terms of the Contract. In that scenario, Clauses 15.5.1 and 15.5.3 of the Contract provide that Kuntur Wasi would be paid for the value of the performance bond. The performance bond during the pre-construction and construction stages was US\$ 8.7 million, which Peru has offered to pay Kuntur Wasi.<sup>1067</sup>

859. In addition, because Peru intends to use the EDI developed by Kuntur Wasi for the Project, it has also offered (and has expressed that it is still willing to pay for) the costs incurred by Kuntur Wasi to develop the EDI.<sup>1068</sup> However, the Respondent argues that although the documentation submitted by Kuntur Wasi shows that PyC invoiced US\$27 million for the

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<sup>1065</sup> Respondent's Rejoinder, para. 581.

<sup>1066</sup> Respondent's Rejoinder, para. 580.

<sup>1067</sup> Respondent's Rejoinder, para. 567; **Exhibit RER-1**, First Kaczmarek Report, Table 4 (p. 49).

<sup>1068</sup> Respondent's Rejoinder, para. 568.

EDI, Kuntur Wasi has only paid US\$9 million for it; and therefore, Claimants are only entitled to the US\$9 million actually paid (or else, it would be unjust enrichment).<sup>1069</sup>

860. If the Tribunal were to accept, however, that the Respondent also has to pay for the remaining amounts allegedly due to PyC for the EDI (*i.e.*, US\$18.6 million), and the Claimants submitted proof of these costs, then, according to the Respondent's calculation, the total amount of compensation due to Kuntur Wasi would be US\$36.3 million for the unilateral termination of the Concession Contract by the Respondent plus the performance bond.<sup>1070</sup>

### **(ii) Compensation in case of breach by the MTC**

861. The Respondent argues that even if the Tribunal were to find that Kuntur Wasi terminated the Concession Contract due to the MTC's breaches, the appropriate compensation is clearly defined in Clauses 15.4.1 and 15.4.3(a) of the Contract: amounts invested as proven to and approved by OSITRAN.<sup>1071</sup>
862. Yet, the Respondent asserts, Kuntur Wasi never submitted its investment costs to OSITRAN for review and approval, not has Kuntur Wasi submitted them to this Tribunal to assess and adjudicate. According to the Respondent, OSITRAN's review was crucial because it sought to ensure that the costs submitted by Kuntur Wasi were reasonably substantiated and actually incurred. Therefore, if the Tribunal were to award damages on the basis of investment costs, it would need to assess these factors itself, standing in the shoes of OSITRAN.<sup>1072</sup>
863. Furthermore, turning to the actual calculation of costs, the Respondent complains that Kuntur Wasi has not provided adequate documentation to support its alleged expenses.<sup>1073</sup> In this sense, the Respondent emphasizes that Kuntur Wasi's financial statements are not sufficient proof to substantiate the costs incurred. To illustrate this, the Respondent points

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<sup>1069</sup> Respondent's Rejoinder, para. 569.

<sup>1070</sup> **Exhibit RER-1**, First Kaczmarek Report, Table 4 (p. 49); **Exhibit RER-5**, Second Report Kaczmarek, para. 178.

<sup>1071</sup> Respondent's Counter-Memorial, para. 362; Respondent's Rejoinder, paras. 572 *et seq.*

<sup>1072</sup> Respondent's Counter-Memorial, para. 363.

<sup>1073</sup> Respondent's Counter-Memorial, paras. 364-366.

out that although the amount of the total costs claimed by Kuntur Wasi appear as liabilities on Kuntur Wasi's accounting records for the year 2017, the balance sheet reflects accounts payable related to these expenditures for US\$27.9 million only. This leads the Respondent to conclude that Kuntur Wasi would only have made payments for nearly 60 percent of its alleged expenses.<sup>1074</sup> Furthermore, Mr. Kaczmarek also takes issue with the absence of evidence on the exchange rates utilized to convert costs to US dollars.<sup>1075</sup>

864. In light of this, the Respondent explains that its assessment of costs incurred is preliminary and would need to be updated once the Claimants present further proof. In Respondent's view, this documentation would be crucial to assessing whether each of the claimed cost items contributed to the value of the concession and whether each reflects an investment consistent with the definition of the terms set out in the Concession Contract.<sup>1076</sup>
865. Bearing these preliminary objections in mind, the below table summarizes the Respondent's preliminary views on the costs incurred by the Claimants:<sup>1077</sup>

**Table 2 - Summary of Kuntur Wasi's Alleged Investment (2014-2017)**

| <i>US\$ millions</i>                     | Claimed Investment | Compensable Under Contract | Compensation for Peru's Breach | Costs Paid to Advance Project | Compensation Under BIT |
|--|--------------------|----------------------------|--------------------------------|-------------------------------|------------------------|
| <u>Operating Costs</u>                   |                    |                            |                                |                               |                        |
| Operating Expenses                       | 4.3                | Possibly                   | 4.3                            | Possibly                      | 4.3                    |
| Furniture                                | 0.1                | Possibly                   | 0.1                            | Possibly                      | 0.1                    |
| <b>Total Operating Costs</b>             | <b>4.4</b>         |                            | <b>4.4</b>                     |                               | <b>4.4</b>             |
| <u>Capitalized Operating Costs</u>       |                    |                            |                                |                               |                        |
| Advisory Costs Related to Tender Process | 6.1                | No                         | 0                              | No                            | 0                      |
| Sales Taxes                              | 1.3                | Possibly                   | 1.3                            | Possibly                      | 1.3                    |
| OSITRAN Supervision Costs                | 1.1                | Possibly                   | 1.1                            | Possibly                      | 1.1                    |
| <b>Total Capitalized Operating Costs</b> | <b>8.5</b>         |                            | <b>2.4</b>                     |                               | <b>2.4</b>             |
| <u>Capital Expenditures</u>              |                    |                            |                                |                               |                        |
| Engineering Study                        | 27.6               | Possibly                   | 27.6                           | Possibly                      | 27.6                   |
| Financial Structuring Costs              | 2.0                | Possibly                   | 2.0                            | No                            | 0                      |
| Construction Delay Related Costs         | 4.9                | No                         | 0                              | No                            | 0                      |
| <b>Total Capital Expenditures</b>        | <b>34.5</b>        |                            | <b>29.6</b>                    |                               | <b>27.6</b>            |
| <b>Total Investment</b>                  | <b>47.4</b>        |                            | <b>36.4</b>                    |                               | <b>34.4</b>            |

<sup>1074</sup> Exhibit RER-1, First Kaczmarek Report, para. 75.

<sup>1075</sup> Exhibit RER-1, First Kaczmarek Report, paras. 150, 182.

<sup>1076</sup> Exhibit RER-1, First Kaczmarek Report, para. 148.

<sup>1077</sup> Exhibit RER-5, Second Report Kaczmarek, Table 2.

866. Out of the total of US\$47.4 million (later updated to US\$51.2 million) of operating expenses and capital expenditures calculated by Compass Lexecon between 2014 and 2017, the largest component is the US\$27.6 million that Kuntur Wasi allegedly owed to PyC in relation to the engineering study produced in 2014 and 2015.<sup>1078</sup> In relation to this item, Respondent alleges that although it would in principle be willing to pay Kuntur Wasi for the incurred engineering costs (if and when substantiated), only approximately US\$9 million of those were actually paid by Kuntur Wasi to PyC for the EDI. The remaining amounts were invoiced by PyC to Kuntur Wasi for the EDI, but Kuntur Wasi has not provided evidence of having paid them.<sup>1079</sup>

867. The remaining US\$ 20 million in expenditures listed in Compass Lexecon's First Report consists of:

- (i) US\$6.1 million for "*consulting and structuring costs of the company and the tender offer*" which, according to the Respondent, are costs associated with the tender process that are not compensable under the bidding terms and which, in any event, predate the investment and cannot be considered related to work on the Project;<sup>1080</sup>
- (ii) US\$4.9 million in amounts owed to PyC for "*other construction costs payable to PyC*" which according to the Respondent are not compensable because they correspond to construction delays that Claimants have not proven to be attributable to Peru and which Kuntur Wasi and the MTC already agreed would not be passed on to Peru.<sup>1081</sup> Furthermore, according to the Respondent, these costs appear to be costs that PyC has recorded but have not been paid by Kuntur

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<sup>1078</sup> **Exhibit CER-1**, First Compass Lexecon Report, Table 5.

<sup>1079</sup> Respondent's Counter-Memorial, paras. 360 (footnote 677), 368; **Exhibit RER-1**, First Kaczmarek Report, paras. 75, 151; **Exhibit RER-5**, Second Kaczmarek Report, paras. 177-178; **Exhibit CLEX-11**, PyC, Letter 2019-PIC, 20 February 2019, pp. 2, 3 as support for the proposition that Kuntur Wasi has only paid USD 9 million. Although these authorities put the paid amount at USD 9 million, the amount actually appears to be USD 9.3 million. See Respondent's Counter-Memorial, para. 369, footnote 693, citng to **Exhibit RER-1**, First Kaczmarek Report, para. 151.

<sup>1080</sup> Respondent's Counter-Memorial, para. 367; **Exhibit RER-5**, Second Kaczmarek Report, para. 179. **Exhibit C-18**, Final Bidding Terms, Cl. 4.5.

<sup>1081</sup> Respondent's Counter-Memorial, para. 366; **Exhibit RER-5**, Second Kaczmarek Report, para. 179. **Exhibit C-31**, *Acta de Acuerdo, Suspensión Temporal de Obligaciones Contractuales*, 2 March 2017, p. 4.

Wasi, “such that they are likely subsumed under the total US\$27.9 million of accounts payable” (see para. 859 *supra*).<sup>1082</sup>

(iii) US\$ 2 million of “financial structuring costs,” which, according to the Respondent appeared to have been incurred in connection with the original construction financing package that the MTC rejected. In the Respondent’s view, this is not a legitimate and justified cost because it relates to a financing package that was unreasonable and ultimately rejected and it ultimately did not add any value to the Project.<sup>1083</sup> However, Mr. Kaczmarek includes it as an item that might “possibly” be compensable under the Contract.<sup>1084</sup>

(iv) US\$4.4 million of operating costs; US\$ 1.1 million of OSITRAN Supervisory costs; US\$1.3 million of unrecoverable sales taxes. Although the Respondent’s expert accepts that these might “possibly” be compensable under the Contract in case of breach, it argues that the Claimants have not submitted proof to show that these amounts were actually paid.<sup>1085</sup>

(v) Taking into account all of the above adjustments, the Respondent submits that the Claimants would be entitled to damages of approximately US\$ 34.4 million for costs incurred in the Project in case of breach of the Concession Contract, provided that they submit sufficient supporting documentation of these costs.<sup>1086</sup>

868. Finally, in its Second Report, Compass Lexecon provided an alternative calculation under Clause 15.4.3 of US\$51.2 million, in which they excluded US\$4.9 million in construction delay costs – because this is an issue of legal interpretation that would require determination by the Tribunal – but included the performance guarantee bond of US\$8.7

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<sup>1082</sup> Respondent’s Counter-Memorial, para. 366.

<sup>1083</sup> Respondent’s Counter-Memorial, para. 367.

<sup>1084</sup> **Exhibit RER-1**, First Kaczmarek Report, para. 149 and Table 3 (p. 47).

<sup>1085</sup> **Exhibit RER-1**, First Kaczmarek Report, paras. 75, 147.

<sup>1086</sup> Respondent’s Counter-Memorial, para. 368; **Exhibit RER-1**, First Kaczmarek Report, Table 4 (p. 49); **Exhibit RER-5**, Second Kaczmarek Report, Table 2 (p. 54).

million as an additional cost.<sup>1087</sup> In Mr. Kaczmarek's view, however, the performance guarantee bond US\$8.7 million is not compensable under Clause 15.4.3.<sup>1088</sup>

## **(2) Compensation for breach of the BIT and international law**

### ***a. The applicable standard***

869. With respect to international law, the Respondent's argument is twofold: First, that there is no need in this case to resort to the standard for compensation under international law at all because even if the Tribunal were to determine that the MTC's termination of the Contract breached the BIT, the Concession Contract already provides remedies for termination of the Contract in such scenario.<sup>1089</sup> Therefore, according to the Respondent, unless the Claimants can prove that the MTC acted in a sovereign capacity, the termination clauses in the Contract must prevail.<sup>1090</sup>

870. Secondly, even if the Tribunal considered that international law warrants a departure from the contractually-mandated compensation, the Respondent argues that the standard of *full* reparation does not require the Tribunal to award lost profits as the standard compensation for a breach of international law.<sup>1091</sup> In fact, according to the Respondent, awarding damages based on Claimants' income approach would risk awarding Claimants a windfall and speculative profits and would put the Claimants in a better position than they originally were in *but for* the breach.<sup>1092</sup> According to the Respondent, at the time of termination, the Claimants did not have an operational business venture and substantial doubts existed as to whether the Claimants would ever be able to complete the Chinchero Airport and earn profits because Kuntur Wasi had neither obtained adequate financing to complete the Project, nor had it begun construction of the Chinchero Airport (and even if Kuntur Wasi

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<sup>1087</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 120.

<sup>1088</sup> **Exhibit RER-1**, First Kaczmarek Report, para. 182.

<sup>1089</sup> Respondent's Counter-Memorial, para. 378.

<sup>1090</sup> Respondent's Counter-Memorial, para. 378; Respondent's Rejoinder, para. 583.

<sup>1091</sup> Respondent's Counter-Memorial, para. 377; Respondent's Rejoinder, para. 583.

<sup>1092</sup> Respondent's Counter-Memorial, para. 379; Respondent's Rejoinder, paras. 555, 562, 584 *et seq.*



had obtained construction financing, that does not mean that the MTC would have approved the package).<sup>1093</sup>

871. Instead, the appropriate valuation approach in this case would be the cost approach, which calculates the value that Claimants invested into the Project and adds a reasonable profit.<sup>1094</sup> According to the Respondent, the cost approach is a more straight-forward and accurate measure of the fair market value of the Concession Contract on the date it was terminated given the limited progress that had been made to advance the Project.<sup>1095</sup>

***b. Assessment of damages***

**(i) Income approach**

872. Moreover, the Respondent argues that the Claimants' DCF lost profits model is not an appropriate measure of damages in this case because of the fundamental conceptual errors described below.<sup>1096</sup>

***(a) Aeronautical projections and revenues***

873. On Respondent's case, the Claimants overestimate the number of international and domestic passenger flights that would utilize the Chinchero Airport.<sup>1097</sup> Mr. Ricover points out that the projections from the MTC studies in 2017 on which Claimants rely were subsequently revised downward by 700,000 passengers per year.<sup>1098</sup>

874. Moreover, Mr. Ricover also considers that it is speculative and unlikely that international traffic would increasingly route through the Chinchero Airport because, in his view, most

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<sup>1093</sup> Respondent's Counter-Memorial, paras. 379, 380; Respondent's Rejoinder, para. 562, 584-587. On the Respondent's case, the terms of the Concession Contract do not contain any binding contractual revenue obligation that establish the expectation of profit at a certain level. The terms of the Concession Contract do not reduce the uncertainty in this case that Kuntur Wasi would never obtain the financing to begin the construction.

<sup>1094</sup> **Exhibit RER-5**, Second Kaczmarek Report, para. 12.

<sup>1095</sup> Respondent's Rejoinder, para. 564.

<sup>1096</sup> Respondent's Counter-Memorial, para. 381; Respondent's Rejoinder, paras. 589, 593 *et seq.*

<sup>1097</sup> **Exhibit RER-4**, First Ricover Report, paras. 48-81.

<sup>1098</sup> Respondent's Rejoinder, para. 610.

international travelers would still enter Peru through Lima, which is not only a regional “hub,” but also a gateway for travelers from North and South America.<sup>1099</sup>

875. In Mr. Ricover’s view, the Claimants overestimate the number of visitors who would be permitted to visit the Macchu Picchu historical site, given the restrictions imposed by Peru on visitors. According to Mr. Ricover, because Macchu Picchu remains the driving force for tourism in the Cuzco region, government restrictions would limit travel to the Chinchero Airport.

876. Adapting for these flaws, and using Mr. Ricover’s projections, results in a fair market value of US\$48.4 million under the DCF approach.<sup>1100</sup>

***(b) Operating costs and operating margin***

877. In the Respondent’s view, Compass Lexecon has underestimated the Chinchero Airport’s operating costs. Mr. Ricover explains in this report that it is common practice in the industry to compare operating margins to assess whether the operating costs have been properly accounted for.<sup>1101</sup> In this case, the operating margin that results from Compass Lexecon’s model is between 71.8% and 90.0% in 2053 (due both to the overestimation of the number of flights and the aeronautical revenues resulting therefrom and to the underestimation of costs).<sup>1102</sup> According to Mr. Kaczmarek and Mr. Ricover, a comparison of the operating margins of 56 different airport operators and 200 different airports show that the average operating costs are 45.8%; Corporación América’s operating margin for its other airports between 2013 and 2016 was 29.5%. Therefore, in Respondent’s view, the operating costs estimated by Compass Lexecon are not reasonable.<sup>1103</sup>

878. Assuming an operating margin of 45%, Mr. Ricover calculated that the Chinchero Airport would have the following operating costs:

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<sup>1099</sup> Respondent’s Rejoinder, para. 611.

<sup>1100</sup> **Exhibit RER-5**, Second Kaczmarek Report, paras. 12, 139.

<sup>1101</sup> **Exhibit RER-4**, First Ricover Report, paras. 18, 19.

<sup>1102</sup> **Exhibit RER-5**, Second Kaczmarek Report, paras. 127-137.

<sup>1103</sup> **Exhibit RER-4**, First Ricover Report, para. 20.

**Figura 1.3 - Comparación de las proyecciones de costos operativos de CL y Ricover**

| Costos operativos (USD m) | 2023 | 2029 | 2035 | 2041 | 2047 | 2053 |
|---------------------------|------|------|------|------|------|------|
| Compass Lexecon           | 12,6 | 13,9 | 15,7 | 17,7 | 19,9 | 22,2 |
| Ricover                   | 23,5 | 32,7 | 37,3 | 42,5 | 48,4 | 55,2 |

Fuente: Anexo CLEX-08, Modelo de Valuación CL; Ricover Business Model

Nota\*: no se incluyen los montos de los años 2022 y 2054 al tratarse de periodos con únicamente 6 meses de operación

879. Responding to the Claimants, Mr. Ricover argues that it would not be appropriate to account for the regulatory costs that Kuntur Wasi was obligated to pay to the Peruvian State under the Concession Contract when comparing airport operations because those costs will vary greatly across different countries.<sup>1104</sup> Furthermore, according to Mr. Kaczmarek, Compass Lexecon confuses EBITDA margin (a comparison of revenues with operating costs and regulatory costs) with “operating margin” (which is a comparison of operating costs and revenues), whereas only the second is relevant, given that regulatory costs between airports vary greatly for reasons that have no connection to market conditions.<sup>1105</sup>

### ***(c) NPV***

880. According to Mr. Kaczmarek, correcting Compass Lexecon’s air-traffic and operating cost projections with those of Mr. Ricover (as described above), Compass Lexecon’s projections yield a logical NPV result (at US\$51.4 million as of the valuation date), which approximates Claimants’ expenditures in the Project.<sup>1106</sup> This, in Respondent’s view, is further evidence that the cost approach would be the proper valuation technique to adopt in this case.

881. However, absent these corrections to the air-traffic and operating cost projections, the Respondent and Mr. Kaczmarek argue that the Claimants’ valuation of the Concession (at US\$195.6 million) significantly overstates the fair market value of the Project. According to Mr. Kaczmarek, Compass Lexecon seeks to justify its calculation by suggesting that the

<sup>1104</sup> Respondent’s Rejoinder, paras. 613-615.

<sup>1105</sup> Respondent’s Rejoinder, paras. 613-615; **Exhibit RER-8**, Second Ricover Report, paras. 269-277.

<sup>1106</sup> **Exhibit RER-1**, First Kaczmarek Report, paras. 183 *et seq.* In fact, all other aspects of Compass Lexecon’s model were left unchanged.

Concession already had a value of US\$158.4 million on the date it was awarded. This, in Mr. Kaczmarek's view fails for reasons of basic economic logic.

882. In particular, Mr. Kaczmarek takes the view that it is undisputed that the Concession was uneconomic and loss-making (thus, with a negative NPV), but given that Peru wanted the Airport to be built (for other non-economic reasons), it agreed to subsidize the Project.<sup>1107</sup> It is logical to assume that Kuntur Wasi's winning bid required the smallest subsidy needed to convert the negative NPV project into a zero or near-zero NPV project. According to the Respondent, Mr. Kaczmarek's calculation is backed by a September 2013 report from PROINVERSIÓN, which concluded that the Project's NPV was negative US\$272 million and with the subsidies provided by Peru, the NPV would reach zero or near zero.<sup>1108</sup> Any private investor would undertake a Project with an NPV of zero, given that it would need to earn an acceptable profit, or an IRR on the Project, equal to its WACC.<sup>1109</sup>
883. Compass Lexecon's reliance on a December 2013 PROINVERSIÓN study to argue that the Project's initial NPV was US\$158.4 million is inapposite, as that analysis cited by the Claimants refers to the combined NPV for private investors and the State (whereas the NPV for the private investor alone in that report was estimated at US\$71).<sup>1110</sup> In any event, Mr. Kaczmarek suggest that the December 2013 study was prepared before the bidding took place; and that the results of the bidding process would only be reflected in the bid model prepared by Kuntur Wasi, which the Claimants have chosen not to disclose.<sup>1111</sup>
884. Given his conclusion that the initial NPV of the Project was close to zero, Mr. Kazmarek argues that Compass Lexecon has failed to explain how the value of the Concession Contract increased to the extent submitted by Claimants.<sup>1112</sup> Mr. Kazmarek explains that the NPV would have increased as the Claimants invested in the Project, yet Claimants' investment costs only amount to US\$34 million. Even adding in Claimants' costs during

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<sup>1107</sup> Respondent's Rejoinder, para. 593; **Exhibit RER-5**, Second Kaczmarek Report, para. 8.

<sup>1108</sup> Respondent's Rejoinder, para. 596, citing **Exhibit CLEX-21**, PROINVERSIÓN, *Perfil Aeropuerto Chinchero, Análisis Técnico*, Vol. 3, September 2013, pp. 50, 51, 67.

<sup>1109</sup> **Exhibit RER-5**, Second Kaczmarek Report, para. 9.

<sup>1110</sup> Respondent's Rejoinder, para. 597; **Exhibit RER-5**, Second Kaczmarek Report, paras. 9, 51.

<sup>1111</sup> **Exhibit RER-5**, Second Kaczmarek Report, para. 9.

<sup>1112</sup> Respondent's Rejoinder, paras. 594, 595.

the bidding process (US\$6.1 million, as discussed below) and the improved market factors (which allegedly increased the NPV by US\$8 million, also as discussed below), would leave approximately US\$ 150 million as the extra subsidies that Peru provided to Claimants to take on the Project.<sup>1113</sup> This would mean that the Claimants presume that Peru needed to give Kuntur Wasi a “free” US\$158 million in profits as a subsidy to entice Kuntur Wasi to take on the Project, something which the Respondent regards as “entirely unjustified.”<sup>1114</sup>

***(d) Bidding costs***

885. The Respondent and Mr. Kaczmarek also dispute Compass Lexecon’s assumption that bidding costs should be reimbursed as part of the value of the Concession.<sup>1115</sup> According to the Respondent, the bidding terms expressly state that the costs to prepare the bid were to be borne by the bidders.<sup>1116</sup>

***(e) Impact of market changes***

886. Finally, Mr. Kaczmarek concludes that the two market conditions that the Claimants identify as having increased the Project’s NPV do not affect his analysis. According to Mr. Kaczmarek, the relevant point of comparison for the increase in air traffic is not what Peru expected in the bidding process, but rather what Kuntur Wasi included in its financial proposal, of which the Claimants’ have not submitted any proof.<sup>1117</sup> With respect to the change in value of the Peruvian *Sol*, Respondent argues that the Claimants have not explained how this change reduced Kuntur Wasi’s operating costs.<sup>1118</sup>

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<sup>1113</sup> Respondent’s Rejoinder, para. 595.

<sup>1114</sup> Respondent’s Rejoinder, para. 563. Mr. Kaczmarek also points out that when modeling a hypothetical sale of the Concession as of 13 July 2017, Compass Lexecon assumes the buyer would not require any free value (*see Exhibit RER-5*, Second Kaczmarek Report, para. 10).

<sup>1115</sup> Respondent’s Rejoinder, para. 601. **Exhibit RER-5**, Second Kaczmarek Report, para. 11.

<sup>1116</sup> **Exhibit RER-5**, Second Kaczmarek Report, para. 11.

<sup>1117</sup> Respondent’s Rejoinder, para. 606.

<sup>1118</sup> **Exhibit RER-5**, Second Kaczmarek Report, para. 11.

***(f) Costs incurred after the valuation date***

887. Respondent's arguments in relation to the costs incurred after the valuation date included in Compass Lexecon's calculation have been summarized above (*supra*, paras. 877 *et seq.*).

**(ii) The derivative PyC Claim**

888. In relation to the derivative PyC Claim, the Respondent argues that the Claimants have not identified any obligation that would require Peru to compensate Kuntur Wasi for a contractual debt that Kuntur Wasi might owe to its contractor, PyC. Kuntur Wasi cannot bind the Peruvian State to pay its contractor, nor can it increase the alleged harm it suffered by promising to compensate a third party and demand money from Peru. The Respondent also points out that the construction contract explicitly states that Kuntur Wasi's obligation to pay PyC US\$48.5 million would only arise if these funds were "specifically included in the compensation granted to Kuntur Wasi."<sup>1119</sup>

889. Finally, the Respondent points out that this contingent liability is particularly problematic in light of the Claimants' revelation that PyC is a company exclusively owned by the two shareholders in Kuntur Wasi. The Respondent reads this as a manipulation by Kuntur Wasi, which seeks to increase its damages claim by exchanging promises between related entities and passing on the bill to Peru.<sup>1120</sup>

**(iii) Cost approach**

890. As explained above, the Respondent's view is that if the Tribunal were to find that Peru breached the BIT, damages should be assessed using a cost approach in which the Concession is valued according to the amounts invested to advance the Project, plus a reasonable entrepreneurial profit. The entrepreneurial profit refers to the profit a project developer would expect as reimbursement for moving the Project three years closer to operation.<sup>1121</sup>

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<sup>1119</sup> Respondent's Rejoinder, para. 618.

<sup>1120</sup> Respondent's Rejoinder, para. 619.

<sup>1121</sup> **Exhibit RER-5**, Second Kaczmarek Report, para. 12.

891. Mr. Kaczmarek calculates that the fair market value of the Project under the cost approach is US\$43.6 million, which results from expenditures of US\$34.4 million (albeit not substantiated), plus US\$9.2 million in entrepreneurial profit.<sup>1122</sup>
892. The entrepreneurial profit calculation is based on the average of two calculations: the Claimants' WACC over the three years they managed the Project, and a revised DCF comparison.<sup>1123</sup> The first of these calculations yields a total profit of 25.62%, which, applied to US\$34.4 million, amounts to an entrepreneurial profit of US\$8.8 million (and a market value conclusion of US\$43.2 million).
893. As to the second calculation, Mr. Kaczmarek relied on the DCF approach, making one adjustment to his DCF model (which includes Mr. Ricover's corrections): Mr. Kaczmarek assumed that the Chinchero Airport would have opened on schedule and therefore, all cash flows would affectively be discontinued by three fewer years as of 14 July 2017 (compared with 4 July 2014) given that the Project would have been three years closer to being operational.<sup>1124</sup> Under this approach, the entrepreneurial profit element would be calculated as the difference between the two DCF model results, which is US\$9.7 million. Adding that amount to the costs (US\$34.4 million), yields a market value conclusion of US\$44.1 million.
894. The average profit margin in the two approaches is US\$ 9.2 million, yielding a final market value conclusion of US\$ 43.6 million.<sup>1125</sup> However, recognizing that a willing buyer would also utilize a DCF approach to value the Concession, Mr. Kaczmarek also calculated the average results of the (adjusted) DCF approach and the cost approach, and reach a market value conclusion of US\$ 46 million.<sup>1126</sup>

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<sup>1122</sup> **Exhibit RER-5**, Second Kaczmarek Report, paras. 12, 140. Mr. Kaczmarek argues, however, that the Claimants have not provided sufficient evidence to substantiate the amounts Claimants allegedly invested (**Exhibit RER-5**, Second Kaczmarek Report, para. 13.) *See also* Respondent's Rejoinder, para. 621.

<sup>1123</sup> Respondent's Rejoinder, para. 621.

<sup>1124</sup> **Exhibit RER-5**, Second Kaczmarek Report, paras. 142, 147.

<sup>1125</sup> **Exhibit RER-5**, Second Kaczmarek Report, para. 148.

<sup>1126</sup> **Exhibit RER-5**, Second Kaczmarek Report, paras. 149, 150; Respondent's Rejoinder, para. 621.

#### (iv) Interest

895. The Respondent does not appear to contest that the Claimants would be entitled to pre-award interest for breach of the BIT.<sup>1127</sup> For breach of the Concession Contract, the Respondent's case is that if the Tribunal awards Claimants the specific compensation provided for in the Concession Contract, it should not award interest because the Claimants refused the compensation that Peru offered to pay for the termination of the Contract.<sup>1128</sup>
896. The Respondent also objects to the interest rate claimed by the Claimants, which is equal to Kuntur Wasi's WACC.<sup>1129</sup> In Respondent's and Mr. Kaczmarek's views, the WACC is a long-term interest rate, whereas the interest rate in this case will only be applied for a few years and is therefore inappropriate.<sup>1130</sup> Instead, the Respondent's expert proposes the following alternatives: (1) the 10-year US government bond yield; (2) the average US dollar lending rate in Peru (which is also endorsed by the Claimants' experts, see above); (3) LIBOR (12 months) +4 percent; or (4) US Prime+2 percent.<sup>1131</sup> According to the Respondent, Compass Lexecon has endorsed the use of the average US dollar lending rate in Peru.<sup>1132</sup>

#### (v) Moral damages

897. According to the Respondent, the actions upon which the Claimants base their request for moral damages are allegations of unfair and inequitable treatment, but these actions are not even close to being sufficiently egregious as to warrant an award of moral damages.<sup>1133</sup> If actions that constitute unfair and inequitable treatment were sufficient to constitute moral damages, then moral damages would be awarded in a substantial number of treaty-based

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<sup>1127</sup> **Exhibit RER-5**, Second Kaczmarek Report, paras. 188, 189.

<sup>1128</sup> Respondent's Rejoinder, para. 623.

<sup>1129</sup> The Respondent's main case is that if the Tribunal awards the Claimants the specific compensation provided for in the Concession Contract, it should not award interest because the Claimants refused the compensation that Peru offered to pay for the termination of the Contract. If Peru's offer is upheld as the only compensation to which the Claimants are entitled, then the Claimants are responsible for any delay in payment. Respondent's Rejoinder, para. 623; **Exhibit RER-5**, Second Kaczmarek Report, para. 190.

<sup>1130</sup> Respondent's Rejoinder, para. 622; **Exhibit RER-5**, Second Kaczmarek Report, para. 194.

<sup>1131</sup> Respondent's Rejoinder, para. 622; **Exhibit RER-5**, Second Kaczmarek Report, paras. 202, 203.

<sup>1132</sup> Respondent's Rejoinder, para. 622; **Exhibit CER-4**, Second Compass Lexecon Report, para. 111.

<sup>1133</sup> Respondent's Counter-Memorial, para. 395; Respondent's Rejoinder, paras. 624 *et seq.*



cases; yet investor-state tribunals rarely award moral damages and only do so in cases involving particularly egregious State behavior that results in physical harm or illegal detention.<sup>1134</sup>

898. Relying on the *Lemire* case, the Respondent argues that both Parties agree that the Claimants would have to prove the following three elements to be awarded moral damages:

*[1] the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;*

*[2] the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and*

*[3] both cause and effect are grave or substantial.*<sup>1135</sup>

899. Yet the Claimants present no evidence that these elements are met. In particular, with respect to the Claimants' two claims that allegedly justify an award of moral damages, the Respondent argues that:

- (i) the preliminary investigations of certain of the Claimants' representatives following the issuance of the *Contraloría's* final conclusions about Addendum No. 1 did not involve a "physical threat, illegal detention or other analogous situation" that would justify an award of moral damages.<sup>1136</sup> On Respondent's case, the investigations complained of were justified and in any event, did not involve the arrest or detention of anyone, were conducted in accordance with due process of law and have been dropped.<sup>1137</sup> Even if Claimants were to prevail on their contractual claims, the Respondent argues that the claim of moral damages can only succeed under Peruvian law if they can show that the *Fiscalía's*

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<sup>1134</sup> Respondent's Counter-Memorial, para. 395. Both Parties rely in particular on the *Lemire* case for the standard for moral damages (**Exhibit RL-70**, *Lemire v. Ukraine*).

<sup>1135</sup> Respondent's Rejoinder, para. 625; citing **Exhibit RL-70**, para. 333 and Claimants' Reply, para. 954.

<sup>1136</sup> Respondent's Counter-Memorial, para. 400.

<sup>1137</sup> Respondent's Counter-Memorial, para. 400; Respondent's Rejoinder, paras. 626-634.

investigations against certain individuals caused harm to the Claimants, which they have failed to do with any specificity.<sup>1138</sup>

(ii) the claim that the termination of the Contract resulted in reputational loss is entirely speculative and, in any case, does not support a finding of moral damages because: (i) the Claimants present no evidence of any bids where this issue has been raised, much less resulted in harm; and (ii) this case could not logically cause moral harm to the Claimants because even if the Tribunal finds in favor of the Claimants, the Tribunal would then have recognized their complaints with respect to the termination of the Contract or the State's treatment of Claimants or their investments; and (iii) if, as Claimants argue, Kuntur Wasi terminated the Concession Contract (and not Peru), then it is unclear how Claimants would even suffer reputational harm on account of an act of Peru.<sup>1139</sup> In any event, the Respondent argues that an award of moral damages requires far more than merely a showing that an investor's reputation was harmed.<sup>1140</sup>

900. With respect to the Claimants' reliance on Peruvian law to claim moral damages, the Respondent alleges that Peruvian law is only relevant for Claimants' contract law claims, not Claimants' treaty-based claims. And even with respect to Claimants' contract claims, the Respondent argues that under Peruvian law, moral damages are only available to companies to the extent that they prove that their commercial reputation – not that of their employees – was impaired by illegal conduct against the company itself.<sup>1141</sup>

901. Finally, the Respondent argues that the amount Claimants are requesting in moral damages is unjustifiable because it is based on a single arbitral decision issued in accordance with Peruvian procurement law with very different facts from the ones at hand (*i.e.*, in that case, a public entity had publicly accused the claimant of corruption without conducting a

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<sup>1138</sup> Respondent's Rejoinder, para. 634; citing **Exhibit RER-6**, Second Ferrando Report, para. 209.

<sup>1139</sup> Respondent's Counter-Memorial, para. 401; Respondent's Rejoinder, paras. 635-637.

<sup>1140</sup> Respondent's Counter-Memorial, paras. 402-405; Respondent's Rejoinder, para. 636.

<sup>1141</sup> Respondent's Counter-Memorial, para. 406, citing **Exhibit RER-2**, First Ferrando Report, paras. 250-258, 261; Respondent's Rejoinder, para. 634.

previous investigation, whereas here, the *Fiscalía*, acting within its competence, conducted preliminary investigations respecting individual due process rights).<sup>1142</sup>

### C. THE TRIBUNAL'S ANALYSIS

902. At the outset, the Tribunal recalls the decisions it has reached on the merits that have an impact on the damages to be awarded in this case. These are that:

- (i) the Respondent breached the Concession Contract as a result of the manner in which it decided to terminate, and ultimately terminated, the Concession Contract;
- (ii) such conduct also constituted a breach of the Guarantee Agreement;
- (iii) neither breach, however, was characterized by *dolo* or *culpa inexcusable* as those terms are defined in Peruvian law;
- (iv) the Respondent's termination of the Contract constituted a violation of the FET standard set forth in Article 2(3) of the BIT, first sentence, as well as the proscription against unjustified treatment set forth in Article 2(3) of the BIT, second sentence.

903. The Tribunal has also determined that it has jurisdiction over the claims asserted by Kuntur Wasi. As a result, any damage claims that it rather than Corporacion America is in a position to assert (such as claims under the Concession Contract), can be asserted.

904. Respondent has not contested its liability to compensate Claimants for the EDI, subject to verification and approval of the amount by OSITRAN.<sup>1143</sup> The amount claimed for the EDI is US\$23.4 million plus taxes, for a total of US\$27.6 million.<sup>1144</sup> The Tribunal will return

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<sup>1142</sup> Respondent's Counter-Memorial, para. 407, citing **Exhibit CL-144**, *Gobierno Regional de Cusco vs Ingenieros Civiles y Contratistas Generales S.A.*, Award, 31 March 2016, p. 125; Respondent's Rejoinder, para. 638.

<sup>1143</sup> Respondent's Counter-Memorial, para. 360.

<sup>1144</sup> **Exhibit CLEX-1**, Concession Contract, para. 56.

to this issue below. Prior to doing so, however, consideration needs to be given to the overall approach to be taken to questions of damages.

905. Respondent has argued that the contractual damage provisions should provide the only measure of damages, even for treaty breaches. In the Tribunal's view, this is not the appropriate approach. In its view, to the extent the Claimants have prevailed on contractual claims, the Contract should govern such claims, with Peruvian law playing any gap-filling or other role that is appropriate. To the extent that Claimants have prevailed on treaty claims, on the other hand, the provisions of the treaty or principles of international law (in the absence of treaty provisions) should govern. To the extent these approaches result in overlapping or duplicative compensation, it will be necessary for the Tribunal to decide what steps should be taken to avoid double recovery. Accordingly, the Tribunal will consider first the issue of contractual damages, and then the issue of damages under the BIT.

**(1) Contract Claims – Damages Under Peruvian Law Versus the Contract**

906. The effect of the Tribunal's decision that the termination was not done with *dolo* or *culpa inexcusable* means that the liability limitations of the Contract remain applicable (*supra*, paras. 565 *et seq.*). As a result, Kuntur Wasi has no right to recover lost profits under the Contract. As discussed further below, the Tribunal agrees with the Respondent that reading Section 15.4.3 of the Concession Contract as only prescribing a process for addressing out-of-pocket costs and permitting by silence the recovery of lost profits based on Peruvian law is not a logical construction, especially taking into account the detailed scheme set forth in the Contract for damages under different termination scenarios. It also agrees with the Respondent that former Minister's Vizcarra's statements to the Peruvian Congress about the amount of damages that could arise from the termination of the Concession Contract should not be taken as constituting binding admissions of the State as to the amount of damages under any standard of measurement.
907. The Tribunal already established that the Contract was effectively terminated by Kuntur Wasi under the rules of the Peruvian Civil Code (*supra*, paras. 460 *et seq.*). The issue

therefore becomes whether the Contract's termination provisions govern to determine damages, and particularly which damages are recoverable under the relevant provisions.

908. Respondent has cited to three termination-related provisions of the Concession Contract: Clause 15.4 (providing for termination by the Concessionaire for MTC's breach); Clause 15.5 (providing for unilateral termination by MTC for public interest reasons); and Section 15.2 (providing for mutual termination).<sup>1145</sup>
909. The Tribunal considers that the facts of this matter do not support the hypothesis that the termination was by mutual agreement under Clause 15.2. Although it was identified as a possibility in the June 1 *Hoja de Ruta*, and was also the basis on which the Respondent announced the Concession Contract's termination on June 4, that is not what the evidence shows ultimately transpired.
910. Kuntur Wasi did not invoke the grounds specified in the Contract to terminate it,<sup>1146</sup> but couched its termination in 2018 under Section 1429 of the Civil Code.<sup>1147</sup> However, as noted in paragraph 906 *supra*, the Tribunal agrees with Respondent that notwithstanding the conclusion that Kuntur Wasi was justified in terminating the Concession Contract, damages upon any termination should be governed by the provisions of the Concession Contract, which were negotiated and agreed by the Parties, rather than generally applicable provisions of Peruvian law. Under Clause 15.4.4, the payments specified in the Contract are the exclusive damages to which the Concessionaire is entitled in the event of termination under this provision.
911. Clause 15.4.3 sets forth different compensation alternatives depending on the stage of the Project at the time of termination, with a lesser measure where the construction phase has not begun, *i.e.*, only "the general expenses incurred up to the date of the effective termination of the Contract, which expenses shall be duly evidenced and admitted by OSITRAN," than the measure applicable after that phase has been initiated or after

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<sup>1145</sup> Respondent's Counter-Memorial, paras. 345 *et seq.* See **Exhibit C-4**, Concession Contract. The Contract's other termination provisions are: termination upon the expiration of the term of the Concession (Cl. 15.1); termination due to the Concessionaire's breach (Cl. 15.3); and termination for force majeure or unforeseen events (Cl. 15.6).

<sup>1146</sup> See **Exhibit C-4**, Concession Contract Cl. 15.4.1.

<sup>1147</sup> See para. 802 *supra*.

operations have begun. Under these other scenarios, the Concessionaire is entitled to additional compensation, including in relation to the *Valor Neto del Intangible*, as provided in Clause 15.7.

912. Given this detailed contractual scheme, in which the amount of compensation for termination is carefully calibrated according to the stage of the Project at which termination occurs, and the Contract's exclusivity provision (Clause 15.4.4), the Tribunal cannot accept Claimants' argument that Clause 15.4.3 is only a process provision for determining costs and does not limit a Concessionaire's ability to claim for lost profits. The provisions the parties agreed would apply to determine damages in the event of termination by breach of the MTC before the beginning of construction (which ultimately occurred) are the ones under Clause 15.4.3 subclause a). Therefore, the Tribunal considers that these are the relevant provisions on which to assess damages in this case.
913. Notwithstanding the foregoing, the Tribunal agrees with the Claimants that the Concessionaire has also the right to be paid the value of the performance bond (Clause 15.5.3, "*Garantía de Fiel Cumplimiento del Contrato de Concesión*") in addition to the amount payable under Clause 15.4.3. This conclusion has been reached after analyzing (i) the termination-related provisions of the Contract, and (ii) the Respondent's conduct in this matter during the Parties' dispute.
914. Although Peru accepted that Clause 15.5 gives the Concessionaire the right to receive the value of the performance bond (*i.e.*, US\$ 8.6 million) in case of unilateral termination for public interest reasons,<sup>1148</sup> the Tribunal finds that the scope of the provision is broader. According to the clear text of such clause, a termination for public interest reasons would force Peru to pay all costs incurred ("*gastos generales en que haya incurrido*") according to Clause 15.4.3 (Clause 15.5.4), plus the value of the performance bond (Clause 15.5.3). In contrast, a termination resulting from MTC's breach would only force Peru to pay the amounts indicated in Clause 15.4.3, without the payment of the value of the performance bond. This would lead to a result under which the unilateral termination of the Contract for public interest reasons would be more convenient for Peru than breaching the Contract.

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<sup>1148</sup> Respondent's Rejoinder, para. 567.

The Tribunal finds this interpretation unacceptable, as it would create a perverse incentive to undermine the Contract, rather than to fulfill in good faith the requirements to terminate the Contract for public interest reasons.

915. The Tribunal also considers that this interpretation is in accordance with the Respondent's conduct during the Parties' dispute. Peru offered from the beginning of the dispute to pay the costs incurred by Kuntur Wasi in relation to the investment, plus the value of the performance bond.<sup>1149</sup> Moreover, Peru has never disputed awarding damages to Kuntur Wasi for this latter concept.
916. The Tribunal thus concludes that the maximum damages Kuntur Wasi could obtain for its contractual claims would be its duly proven costs (including the EDI), plus the value of the performance bond.
917. There is no basis, as Claimants appear to concede at least implicitly, for the recovery of lost profits under the Contract. Assuming for the moment all costs have been sufficiently proven, the maximum amount of damages that could be awarded as a matter of contract is: US\$ 47.4 million for *gastos incurridos*, plus US\$8,687,826 million for the performance bond, for a total of approximately US\$56 million, plus interest.<sup>1150</sup>
918. There are two categories of dispute between the parties with respect to the *gastos incurridos* claimed by Claimants: The first is whether these expenses have been incurred or are recoverable under the Contract; the second is whether their recovery is precluded by Kuntur Wasi's failure to submit them to OSITRAN for approval.
919. The Tribunal does not consider that Kuntur Wasi's non-submission of its out-of-pocket costs to OSITRAN constitutes a waiver of its right to recover such costs or otherwise precludes their recovery in these proceedings given the Parties' dispute. The question is whether they fall within the Contract provisions and are established in these proceedings to the reasonable satisfaction of the Tribunal.

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<sup>1149</sup> **Exhibit R-108**, *Oficio No. 583-2019-MTC/02*, November 6, 2019.

<sup>1150</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 122.

920. With respect to the first question, the US\$ 47.4 million in claimed *gastos incurridos* breaks down into the following components:

- (i) EDI costs: US\$27.6 million, of which US\$9 million has been paid to PyC and the balance is pending (leaving a balance of US\$18.6 million);
- (ii) Bidding and structuring costs for Kuntur Wasi: US\$6.1 million;
- (iii) Construction delay costs (payable to PyC): US\$4.9 million;
- (iv) Financial structuring costs: US\$2.0 million;
- (v) Operating Costs: US\$4.4 million;
- (vi) OSITRAN supervisory costs: US\$1.1 million; and
- (vii) Unrecoverable sales tax: US \$1.3 million.<sup>1151</sup>

921. The Respondent, in its Rejoinder, also questioned what it characterized as US\$9.3 million in amounts payable.<sup>1152</sup> However, at the hearing, Respondent did not include this amount, which in any event does not appear to tally with the numbers put forward by its expert.<sup>1153</sup> The Tribunal considers that this position has either been abandoned by the Respondent, or in the alternative not proven.

922. The Tribunal understands that the Respondent does not dispute the recoverability of the costs in categories (v), (vi) and (vii) (operating costs, OSITRAN supervisory costs and unrecoverable sales tax), totaling US\$6.8 million, subject to their verification.<sup>1154</sup> It does, however, dispute the recoverability of the costs in categories (ii), (iii) and (iv) (bidding and structuring costs, construction delay costs, and financial structuring costs).<sup>1155</sup> Regarding the EDI costs in category (i), the Respondent raises a question about the recoverability of

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<sup>1151</sup> See **Exhibit CER-1**, First Compass Lexecon Report, Table 5 at p. 33.

<sup>1152</sup> Respondent's Rejoinder, para. 576.

<sup>1153</sup> See **Exhibit RD-1**, Respondent's Opening Statement Presentation, p. 91; Transcript, Day 1 (English), 247:4-8.

<sup>1154</sup> See **Exhibit RER-1**, First Kaczmarek Report, para. 150, Table 3, "Compensable Under Contract" column with respect to these expenses.

<sup>1155</sup> *Id.*



the full amount claimed, given that only a portion of the amounts invoiced (US\$9 million) has been paid out to PyC.<sup>1156</sup>

923. Turning first to the cross-cutting issue of substantiation, Respondent argues that if the Tribunal awards damages on the basis of costs, it needs to stand in the shoes of OSITRAN and assess these costs. The Tribunal understands from Respondent's submissions that OSITRAN would verify that the claimed costs had been incurred in relation to the Project and were reasonable.<sup>1157</sup> While the Tribunal does not consider that it is its role to stand in the shoes of OSITRAN, a Peruvian government agency, the above principles equally apply to the appropriate decision-making standard for the Tribunal regarding the claimed damages.
924. The Tribunal also considers that the financial statements of Kuntur Wasi establish a *prima facie* verification of the amounts and character of expenses incurred. In taking this view, the Tribunal considers it relevant that the financial statements for all the years in question have been subject to independent audits by Ernst & Young.<sup>1158</sup> Below the Tribunal addresses additional issues that are presented with respect to the asserted items of cost below.
925. With respect to the EDI (item (i) above), the fact that only a portion has been paid out to date does not make the cost any less of an obligation, in the view of the Tribunal. Although PyC is a related entity, there has not been any showing that the costs have been in any way inflated. Respondent has admitted use of the EDI and there is no question it was prepared and delivered. Thus, the Tribunal considers that this cost is fully recoverable by Kuntur Wasi based on the invoiced amounts.
926. With respect to the construction delay cost of US\$4.9 million (item (iii) above), which Claimants indicate is owed to PyC, and which Respondent says should be excluded given that Peru did not cause any construction delays and Claimants have not justified why these

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<sup>1156</sup> **Exhibit RER-1**, First Kaczmarek Report, para. 151.

<sup>1157</sup> See **Exhibit RD-1**, Respondent's Opening Statement Presentation, p. 86.

<sup>1158</sup> See **Exhibit CLEX-029**, Kuntur Wasi Financial Statements, 2017, a-d, and f.

costs were incurred,<sup>1159</sup> the Tribunal does not consider that these particular costs have been sufficiently established by Claimants. While this expense may appear in the audited financial statements of Kuntur Wasi,<sup>1160</sup> it presents additional issues that have not been sufficiently addressed. The Tribunal has been provided with no information by Claimants, who bear the burden of proof on damages, as to the basis for this delay charge, which, as a charge between related entities, requires careful scrutiny. Moreover, Respondent has pointed out that in the document suspending the Project signed by the Parties on March 2, 2017, it was expressly agreed that the suspension would not give rise to any additional costs to the MTC.<sup>1161</sup> Thus, to the extent the delay charge is attributable to the period during which the Project was suspended—which cannot be discerned from the evidence before the Tribunal—there is no basis for assessing damages against Respondent. To the extent it arises from pre-suspension delays, the Tribunal considers that such delays were the result of the absence of finalized construction financing and the EGP approval process, and were not therefore the result of any breach by Respondent. Accordingly, this element of asserted cost is non-recoverable in these proceedings.

927. As to the other claimed costs (items (ii) (bidding and structuring costs) and (iv) (financial structuring costs) above), the Tribunal notes that Clause 15.4.3 of the Concession Contract is written in very general terms, providing for compensation for “the general expenses incurred up to the date of the effective termination of the Contract...” It does not appear on its face to exclude any costs that are related to the Project. In particular, even if the bidding and structuring costs could not be recovered via the FPAO scheme, that would not necessarily mean they were excluded from recovery under this provision. Clause 4.5 of the bidding terms is written in broad terms,<sup>1162</sup> but given that the Bases are not to be interpreted

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<sup>1159</sup> **Exhibit RER-1**, Kaczmarek, First Report, para. 150, table 3; Respondent’s Rejoinder, paras. 576-77.

<sup>1160</sup> **Exhibit CER-4**, Second Compass Lexecon Report, para. 119; **Exhibit RER-1**, First Kaczmarek Report, paras. 147-148.

<sup>1161</sup> Respondent’s Rejoinder, para. 576, note 1239, citing to **Exhibit C-31**, *Acta de Acuerdo, Suspension Temporal de Obligaciones Contractuales*, 2 March 2017.

<sup>1162</sup> This Clause states in part that “[U]nder no circumstances, shall the State or any agency, body or official thereof, or PROINVERSION, the Committee, or its advisors, be liable for any such costs regardless of the form of the bidding process or the outcome thereof.” **Exhibit C-18**, Final Bidding Terms, Cl. 4.5. [Tribunal’s translation] The original Spanish reads: “El Estado o cualquier dependencia, organismo o funcionario de este, or PROINVERSION, el Comité, o sus asesores, no serán responsables en ningún caso por dichos costos cualquiera sea la forma en que se realice el concurso o su resultado.”

on an equal basis with the terms of the Contract,<sup>1163</sup> the Tribunal considers that they do not have the effect of creating an implied exclusion from the concept of damages in the Contract's termination provisions.

## **(2) Damages Arising from the Guarantee Agreement**

928. The Tribunal now turns to consideration of the effects, if any, of the Guarantee Agreement has on the scope of Respondent's damages liability as a matter of Peruvian law. Through the Guarantee, the State guaranteed performance of the Contract by the MTC.<sup>1164</sup> The Guarantee does not contain any damage provisions of its own, but simply backs up the Contract obligations.<sup>1165</sup> Nonetheless, the Guarantee operated to oblige the State to ensure that any termination by the MTC was carried out in accordance with the Contract's terms, something that the Tribunal has found did not occur. The Tribunal in its analysis of liability considered this breach to constitute a sovereign act, albeit one that, for the reasons set forth earlier,<sup>1166</sup> provides no basis as a matter of Peruvian law for the award of any additional damages as a consequence of this breach. The Tribunal will consider this point further in connection with its consideration of damages as a matter of international law.
929. To summarize, the damages that can be claimed for breach of the Concession Contract are those provided under Section 15.5 of that Contract, the *gastos incurridos* claimed by Claimants (other than the US\$4.9 million delay charge), *i.e.*, US\$42.5 million, plus the value of the performance bond, *i.e.*, US\$8,687,826 million, for a total of US\$51,187,826 million, together with interest as discussed *infra* at paragraph 985 from the date of termination to the date of the award.

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<sup>1163</sup> The Bases do not control the interpretation of the Contract; however, rather in any interpretive dispute, it is the Contract terms that rank in priority, followed by the circulars referenced in the Bases, with the Bases occupying the final rank. **Exhibit C-4**, Concession Contract, Cl. 16.3.1.

<sup>1164</sup> **Exhibit CL-35**, *Decreto Supremo No. 185-2014-EF*, 27 June 2014, art. 1.

<sup>1165</sup> **Exhibit CL-35**, *Decreto Supremo No. 185-2014-EF*, 27 June 2014, art. 2.

<sup>1166</sup> See para. 929 *supra*.

### (3) Treaty Claims

#### *a. Income Versus Cost Approach*

930. The Parties do not dispute that the Treaty does not provide the standard of compensation for any BIT breaches other than expropriation. Accordingly, with respect to the violations of Article 2(3) of the BIT that the Tribunal has determined have taken place, the Parties are in agreement that the *Chorzow Factory* standard should be applied. It is the application of that standard to this case that they dispute, for although *Chorzow Factory* dictates a full reparation standard,<sup>1167</sup> tribunals over the years have found multiple approaches to the calculation of damages to be consistent with that standard.
931. The contesting approaches in this case are an income-based approach, relying on a DCF calculation based on the parameters of a “but-for” scenario, and a cost approach, which is based on a concept of costs incurred to the date of termination plus a reasonable entrepreneurial profit. The income approach assumes that the Airport would have been built by Kuntur Wasi, and that the Project would have become operational and remained so for the term of the Concession.
932. The Tribunal, after extensive deliberation, has concluded that the cost approach is the more suitable one in this case. Although Corporación America undeniably has significant experience with the construction and operation of airports in Latin America, the state of the Project and unresolved questions regarding fundamental terms of the Concession Contract at the time of termination, as well as uncertainties regarding key assumptions in the Claimants’ “but for” scenario, make the income approach too speculative, in the Tribunal’s judgement, to provide reasonable certainty as to the amounts that calculation yields.
933. In terms of the status of the Project at the time of Peru’s termination of the Contract, not only was the Airport not built, but the construction phase had not even begun. Substantial site preparation work had been done, primarily involving earthworks, but financing for the construction phase had not been approved, and the financing scheme for this phase was in

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<sup>1167</sup> The Tribunal notes that Claimants has not sought restitution, presumably because it is materially impossible.

doubt at the time of termination. This was due to MTC's rejection of Kuntur Wasi's EGP proposal, and the issues raised with respect to Addendum No. 1, the new financing plan for that phase, which had caused the MTC to declare shortly before termination that Addendum No. 1 was "not effective" ("*sin efecto*"). While Addendum No. 1 had greatly simplified the scheme for construction financing over the original PAO/FPAO scheme, it was in the Tribunal's view unclear at the time of termination what the construction financing scheme would ultimately be. Not only did that scheme need to be determined, but then financing for the construction phase needed to be secured based on the subsidy scheme ultimately adopted, and construction had to be completed before the Airport would become operational. Only once all of those steps occurred would there be an income stream from the Project to take into account. Thus, notwithstanding Corporación America's experience in building and operating airports in Latin America, at the time of the breach, there was significant uncertainty as to not only the timing of, but also the prospects for, Project completion.

934. Moreover, at the time of MTC's attempted unilateral termination, in July 2017, substantial uncertainty surrounded other key terms of the Contract going forward as well. The June 1 *Hoja de Ruta*, a document agreed to by Kuntur Wasi, indicated that the concession might be shortened from 40 to 25 years, a significant reduction of the period during which the Concessionaire would realize income from the Project. Addendum No. 1 changed the financing scheme, simplifying it substantially, but its viability was thrown in doubt by the report of the *Contraloría*. A "but for" calculation on an income basis is based on projected cash flows over the life of the investment. But with a key variable, the term of the Concession, in play at the time of the breach, it can no longer reasonably be assumed in the Tribunal's view that the Concession term would have been 40 years. Twenty-five years, a significantly shorter term, was on the table, but the Tribunal considers that it was by no means certain that 25 years would ultimately have been agreed to, either. Whether the appropriate "but for" assumption would be a term of 25 or 40 years or something in between consequently becomes a matter of speculation. Yet that term alone could have material implications for the damages calculation.

935. Other assumptions that are important to the DCF calculation invite speculation as well. In the following paragraphs the Tribunal discusses three such assumptions disputed by the Parties that have a material effect on the calculation:

(i) NPV and rate of return;

(ii) Aeronautical revenue key assumptions (number of visitors and number of international flights); and

(iii) Operating costs and net margins.

**(i) NPV and IRR**

936. The Parties have argued extensively over what the NPV of the Project at the time of the Concession should be. The issue of the NPV is distinct from, but also connected to, the Project's anticipated internal rate of return (IRR) over the life of the Concession, and is significant in the "but for" calculation of the value of the Project.

937. The Respondent's expert, Mr. Kaczmarek, has argued that the NPV at the time of the bid should be zero or close to zero because of the state subsidies being provided. He has contended, with some force of logic and support in the evidence, that without such subsidies the Project had a negative NPV. Although the subsidies were designed to eliminate the negative NPV, thereby attracting bidders, that State would not have wanted to provide subsidies in excess of what was necessary to do so.<sup>1168</sup> In response to the Claimants' arguments about the PROINVERSIÓN assumptions on these matters, Respondent and its expert have indicated that the Claimants have relied on the wrong study for their position.<sup>1169</sup> They have also asserted that the IRR calculated by the Claimant's experts is 20.4%, which they consider to be excessive.<sup>1170</sup>

938. The Claimants in response have made several arguments: They have indicated that the NPV at the time of bid acceptance has to be above zero because the IRR has to be greater

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<sup>1168</sup> **Exhibit RER-1**, First Kaczmarek Report, para. 165; **Exhibit RER-5**, Second Kaczmarek Report, paras. 37, 38.

<sup>1169</sup> Respondent's Rejoinder, para. 596; **Exhibit RER-5**, Second Kaczmarek Report, paras. 43-50.

<sup>1170</sup> **Exhibit RER-1**, First Kaczmarek Report, para. 163; Respondent's Rejoinder, para. 594; Transcript, Day 1 (English), 244:2-8.

than the cost of capital to a bidding firm, to enable it to cover its bidding costs. They have also argued that market changes in the 2013-2017 period increased the Project's value in several ways, particularly by decreasing costs due to the depreciation of the Peruvian *Sol* and increasing traffic. They have further submitted that the IRR expected from an airport project is necessarily greater than the financing costs, as PROINVERSIÓN recognizes,<sup>1171</sup> and that the mere fact of having won the tender creates value. Finally, they have disagreed that the IRR calculated by their experts is 20.4%, submitting instead that it is 12.45% when all relevant years are included.<sup>1172</sup>

939. The Tribunal accepts the proposition that a State would not want to subsidize a project in excess of what was needed to attract bidders. That conclusion strongly argues for an NPV being zero or close to zero at the time of bid acceptance. At the same time, in constructing a “but for” scenario, it would seem appropriate and, indeed, less speculative, to take into account market conditions post-bid in calculating the likely rate of return. The Tribunal also considers that the Contract itself is a valuable asset and that, if bidding costs are excluded from subsidies, a bidder would want a rate of return that would cover those costs.
940. On balance, therefore, the Tribunal considers that while the NPV at the time of the bid's acceptance may have been zero or close to zero, the Contract, once entered into, would have value. Even so, it is difficult to imagine that the signing of a Contract and the subsequent events that Claimants have put forward would result in an increase in the NPV at the time of bid acceptance to the extent Claimants' model posits, given that the Airport still had to be financed, constructed, and enter into operation.
941. Turning to the question what is a reasonable rate of return for the Project in the “but for” scenario, the Tribunal agrees with Respondent that a rate greater than 20% would appear to be excessive; however, if Claimants are correct, this is not what the “but for” model proposes; rather, Claimants have indicated the IRR is 12.45% when all relevant years are taken into account. The Tribunal notes that PROINVERSIÓN, in its report of 1 December 2013, indicated that “[p]revious concessions of airports in Peru accounted between 12%

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<sup>1171</sup> **Exhibit CD-1**, Claimants' Opening Statement Presentation, p. 195. *See also* Claimants' Reply para. 923.

<sup>1172</sup> **CD-1**, Compass Lexecon Presentation, P. 15.

and 14% IRR.”<sup>1173</sup> The Tribunal considers this evidence highly probative on what a reasonable IRR would be. It also considers that if bid costs are not recoverable from the State, bidders would want to recover those costs through the returns earned on the Project. This leads to the conclusion that the IRR should logically be greater than a bidder’s cost of capital.

942. The Tribunal further observes that the second expert report of Mr. Kaczmarek, after criticizing the Claimants’ experts’ reliance on the overall project-level scenario in the December 2013 PROINVERSIÓN study, points to the second cash flow analysis of that study, which focused on cash flows to the equity investor, which apparently found an IRR of 12.35%.<sup>1174</sup> This rate is very close to the 12.45% IRR that Claimants indicate to be the true IRR in their calculation and also falls within the range cited by PROINVERSIÓN in the December 2013 report.
943. Given the public interest in building the new Airport, it seems clear to the Tribunal that Peru would have wanted to offer a sufficiently robust rate of return to attract strong bidders. The evidence of PROINVERSIÓN’s views on what was an appropriate rate of return are, in the Tribunal’s view, the most relevant in terms of any expectations the Claimants might have had regarding the appropriate IRR for the Project, not the bidders’ internal calculations.
944. But what is a reasonable assumption regarding the life of the Project? This question harks back to the issue of what the duration of the Concession would have been had the Project gone forward instead of being terminated. A material shortening of the term of the Concession would presumably affect the rate of return that would be needed to attract investors. However, the cited PROINVERSIÓN IRR figures appear to assume a 40-year concession.<sup>1175</sup> The PROINVERSIÓN calculations are therefore ultimately not probative

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<sup>1173</sup> **Exhibit R-31**, ALG Report, Deliverable 4-B: Financial Economic Model, December 2013, p. 163.

<sup>1174</sup> **Exhibit RER-5**, Second Kaczmarek Report, paras. 56-59, discussing **Exhibit R-31**, ALG Report, Deliverable 4-B: Financial Economic Model, December 2013.

<sup>1175</sup> **Exhibit R-31**, ALG Report, Deliverable 4-B: Financial Economic Model, December 2013, p. 22.



on what the IRR should be under a scenario in which the Concession has a materially shorter term.

945. This analysis underscores the challenges of constructing a “but for” scenario that is not speculative. But these are not the only key assumptions that materially affect valuation of the Project using an income model.

**(ii) Number of Visitors and Flights**

946. The assumptions regarding the number of visitors and flights, especially international flights, once the Airport becomes operational, also have a significant impact on revenues from aeronautical activities in the “but for” income-based scenario. These aeronautical revenues represent more than 80% of estimated revenues from the new Airport, with non-aeronautical revenues (the estimate of which there does not seem to be in dispute) representing the remainder.
947. Respondent contends that aeronautical revenues are vastly overestimated in the “but-for” scenario, increasing damages using the income approach by US\$42.3 million.
948. With respect to visitors, Respondent and its expert, Mr. Ricover, argue that a ceiling on visitors to Macchu Picchu, which would be triggered beginning in 2027, limits the growth potential of the area, which is principally driven by tourism. Claimants in response criticize Mr. Ricover’s reliance on 2013 rather than 2017 data,<sup>1176</sup> and argue that his position ignores both the optimistic version put forward by PROINVERSIÓN as well as real data. They also emphasize the existence of other tourist attractions in the Sacred Valley besides Macchu Picchu that in their view would bring in visitors.
949. In the Tribunal’s view, it would be illogical for Peru to support building a new airport as strongly as it did if it did not believe that a better facility would result in an increase in the number of visitors, especially tourists. At the same time, the visitor limitation to Macchu Picchu cannot simply be ignored; even though it is of Peru’s making and therefore could be changed; the reasons for that limitation presumably relate to the cultural and historical

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<sup>1176</sup> Claimants’ Reply, para. 930.

significance, environmental sensitivity, and carrying capacity of the Macchu Picchu site that would remain factors to be considered in any objective assessment.<sup>1177</sup> Claimants' highlighting of Choquequeirao and other attractions that are increasingly drawing visitors to the Sacred Valley also has merit, however. In particular, with new sites being developed and attracting an increasing number of tourists, it is reasonable to assume that, while Macchu Picchu would remain an important and even perhaps still the principal attraction to the region, the increasing diversity of attractions would bring in additional visitors.

950. For all these reasons, the Tribunal is of the view that the projections of Mr. Ricover, Respondent's aviation expert, are too conservative. They are not consistent with the Respondent's own projections at the time. While reliance on the most optimistic scenario envisioned by PROINVERSIÓN may not be fully justified, the Tribunal considers that Mott McDonald's expectation of continued growth, based on the expert opinion of Mr. Rossi, represents the more likely scenario. But whether the right number is 6 million, 6.5 million, or some other number again becomes a matter of some degree of speculation on the part of the Tribunal.
951. With respect to flights, the major issue concerns the number of international flights with a new airport. This is because the revenue contribution of international flights is significantly greater than that of domestic flights. Respondent asserts that tourists would continue to travel to the region primarily through Lima, a low-cost airport that functions as a major hub in the region. Its expert Mr. Ricover therefore projects that international flights to Chinchero would not represent more than 10% of the total number of flights and in fact would decline progressively starting in 2022. Claimants consider that the proper percentage would be between 25 and 30% starting around 2030, hovering just above 25% in 2039. Claimants have submitted that there would be sufficient demand to justify nonstop flights from certain international destinations, such as Miami, once the new infrastructure was in place.<sup>1178</sup> It relies not only on its own experts, but studies done by Peru which have projected growth with a new facility.

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<sup>1177</sup> Macchu Picchu is a UNESCO World Heritage site, having been so designated in 1983.

<sup>1178</sup> Claimants' Closing Statement Presentation, pp. 134-136.

952. Again the Tribunal considers that neither party's position is fully justified. It agrees with the Respondent that considerable traffic will continue to be routed through Lima, both for the attractions of Lima itself and because of its hub status and favorable cost structure. It also accepts that new infrastructure does not necessarily mean a growth in international traffic. At the same time, the Tribunal is persuaded that there will be sufficient demand for some new international flights that bypass Lima and go directly to the tourist area. A 10% ceiling therefore seems unrealistic. Although the Claimants' scenario also appears unduly optimistic, an assumption that international flights would grow after the new airport became operational, either due to the addition of some new routes or to the possibility of introducing wide-bodied planes (fleet evolution), and would over a period of several years increase, seems reasonable based on all the evidence.<sup>1179</sup> Again, however, fixing a number becomes a somewhat speculative exercise.

### **(iii) Operating Costs and Margins**

953. Respondent criticizes the level of operating costs assumed in Claimants' DCF model, indicating that at 13.6%, they are too low, and should be 55% of total revenues. Claimants submit that their model takes PROINVERSIÓN's numbers which were specifically tailored to local circumstances, adjusted to make them current. They also say that the 13.6% cost level is consistent with the operating costs of the Lima airport, and criticize Respondent and its expert for picking airport facilities around the world that may not be comparable in fact in terms of regulation, the cost environment, and other relevant factors. Claimants also criticize the calculations for some airports used by Respondent as comparators, *e.g.*, Montevideo, where they say operating costs have been miscalculated.

954. In the view of the Tribunal, PROINVERSIÓN's assumptions at the time of the bid regarding the level of likely operating expenses are highly probative. Not only were they prepared by a government agency in relation to this bid, but they are based on information about the cost structure of airport operations in Peru and draw on the numbers from the

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<sup>1179</sup> It appears PROINVERSIÓN also considered in its studies that with the new airport, there would also come new direct international routes. See **Exhibit CD-2**, Mott MacDonald Presentation, p. 11.

existing Cuzco airport. They therefore provide the best evidence of reasonable expectations regarding the level of relevant operating costs at least at the time of the bid.

955. With respect to the issue of operating margin, the Tribunal agrees with Mr. Ricover that operating margin is the proper benchmark to use when comparing projections for Chinchero to other airports, rather than EBIDTA which brings in non-comparable local factors such as regulatory charges. In terms of which airports should be compared to Chinchero to assess the reasonableness of the operating margin projected for Chinchero, the Tribunal agrees that comparability is key. It doubts whether an airport such as Lima, which is a major international as well as domestic hub, is a reasonable comparator. Rather, other regional airports in Latin America, recognizing that there may need to be adjustments for relevant factors, and especially those operated by Corporación América, would appear to the Tribunal to be the best comparators.
956. While the Parties' disagreement with respect to the cost side of the DCF projection thus appears to the Tribunal to be more susceptible to being resolved with reasonable certainty than the other factors discussed above, it is subject to the overall uncertainty discussed earlier regarding the term of the Concession, the rate of return, and revenues.
957. In sum, a detailed consideration of the key assumptions underlying the Claimants' DCF model have convinced the Tribunal that given the number of key variables in play, a DCF model is simply too speculative given the state of the Project and the unresolved questions concerning its future at the time of termination that make the construction of a "but for" scenario particularly fraught.
958. In addition to the terms of the Contract, Claimants have relied upon the *Stati v. Kazakhstan* decision for the proposition that when there is an existing facility with established and predictable traffic and binding contractual revenue obligations, an income approach is appropriate.<sup>1180</sup> Notably, however, the tribunal in the *Stati* case found that the claimants

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<sup>1180</sup> **Exhibit CL-246**, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V 116/2010 1688, Award, 19 December 2013 (hereinafter *Antolie Stati et al v. Kazakhstan*), para. 1688; see Claimants' Reply para. 910; **Exhibit CD-1**, Claimants' Opening Statement Presentation, p. 192.

had not met their burden of proof and that “a high level of sufficient probability must be applied to a claim for lost opportunity.”<sup>1181</sup>

959. Two other cases on which the Claimants have relied, involving airport contracts or concessions where the DCF method was applied to calculate damages following a finding of unlawful expropriation, *ADC v. Hungary* and *Flughafen Zürich v. Venezuela*,<sup>1182</sup> both involved airports that were operational. They therefore did not present the issues that the circumstances of the Project at the time of termination present to this Tribunal.
960. While it is true that the Contract provides a solid basis for making assumptions about certain key variables in a but-for analysis, ultimately the Tribunal must be convinced that damages based on an income approach have been sufficiently proven, have been caused by the breach, are reasonable in amount, and are not too speculative or remote. The Tribunal considers that the Claimant has not met its burden of persuasion when all of these factors are taken into account in relation to the proposed DCF model. It therefore agrees with the expert of the Respondent that the cost rather than the income approach is the most appropriate approach for calculating damages for the breaches of Article 2(3) of the BIT on the facts and circumstances of this case.

***b. Cost approach***

961. As noted earlier (*supra*, paras. 827 through 829), the Claimants have not submitted calculations of damages for a violation of international law using the cost approach. They have responded to the calculation of damages based on a cost approach prepared by the Respondent’s quantum expert. It is to that approach, which seeks to establish a market value for the Project at the time of termination based on costs incurred plus an entrepreneurial profit, to which the Tribunal will now turn.
962. According to the Claimants’ experts, based on Kuntur Wasi’s audited financial statements, the Claimants’ investment in the Project totaled approximately US\$47.4 million.<sup>1183</sup> The Tribunal in its analysis of contractual damages considered each of the components of this

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<sup>1181</sup> **Exhibit CL-246**, *Antolie Stati et al v. Kazakhstan*, para. 1689.

<sup>1182</sup> **Exhibit CL-107**, *ADC v. Hungary*; **Exhibit CL-128**, *Flughafen Zürich v. Venezuela*.

<sup>1183</sup> **Exhibit CER-1**, First Compass Lexcon Report, paras. 63-65.

amount. It concluded that the Claimants had not met their burden of persuasion as to the construction delay costs of US\$4.9 million, but found that the other expenses were appropriate and sufficiently justified. Accordingly, the total amount of out-of-pocket expenditures found to have been validly incurred was US\$42.5 million.

963. The Respondent's quantum expert maintains that a market value approach to costs would not result in US\$2.0 million of these expenses, for financial structuring, being compensable.<sup>1184</sup> In the Tribunal's view, however, it is reasonable to assume that any party in the position of the Claimants would seek to recover their full investment, which would include these costs. The Tribunal therefore considers that US\$42.5 million is the appropriate number for purposes of the BIT's damages calculation under the cost approach. This is the amount, in the Tribunal's view, on which the entrepreneurial profit needs to be calculated.
964. The Respondent's expert did not set forth any calculation of entrepreneurial profit in his initial report, but addressed this in his second report.<sup>1185</sup> As a result of the Tribunal's conclusions that the market value of the Concession at the time of the breach was US\$42.5 million, rather than US\$34.4 million, however, a new calculation of entrepreneurial profit needs to be made. The Tribunal therefore instructs the parties to prepare a new calculation based on this decision.
965. The *Chorzow Factory* standard also requires the inclusion of any consequential damages in order to achieve full reparation. Had there not been the unlawful termination, Kuntur Wasi's performance bond would not have been forfeit. Accordingly, the value of that bond, US\$8,687,826, should be treated as consequential damages.

***c. Moral Damages***

966. The Claimants seek moral damages based on both Peruvian and international law of 20% of the compensatory damages arising from alleged damage to the image, honour and good

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<sup>1184</sup> See, e.g., **Exhibit RER-1**, First Kazcmarek Report, para. 149.

<sup>1185</sup> **Exhibit RER-5**, Second Kazcmarek Report, paras. 141-148.

reputation of Kuntur Wasi and its shareholders from the Respondent's wrongful termination of the Concession Contract.

967. They admit that moral damages under Peruvian law requires the establishment of financial prejudice.<sup>1186</sup> Given that the Tribunal has determined that the Claimants have not sustained their burden of demonstrating this claim (*supra*, paras. 184 *et seq.*), there is no moral harm and, therefore, no basis for an award of damages in relation to this claim under Peruvian law.

968. That leaves the question of whether they are justified under international law. Both parties rely on the standard articulated in *Lemire v. Ukraine*, which has three prongs:

- the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
- the State's actions cause a deterioration in health, stress, anxiety, or other mental suffering such as humiliation, shame and denigration, or loss of reputation, or social position; and
- both cause and effect are grave and substantial.<sup>1187</sup>

969. This is a high standard, which the Tribunal does not consider has been met on the facts and circumstances put forward by the Claimants in this case. The Claimants rely on two sets of facts and circumstances: first, the criminal measures taken by the State against certain Kuntur Wasi personnel detailed earlier; and second, the effects of termination on future procurement opportunities of Corporación America based on a tendering requirement to disclose instances of contract termination.<sup>1188</sup>

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<sup>1186</sup> See, para. 595 *supra*.

<sup>1187</sup> **Exhibit RL-70**, *Lemire v. Ukraine*, para. 333. [Referenced in **Exhibit RD-1**, Respondent's Opening Statement Presentation, p. 94].

<sup>1188</sup> See para. 580 *supra*.

970. As to the first, it does not, in the Tribunal's view, provide a basis for moral damages. The criminal measures were not taken against a Claimant, but against individual personnel. It is not clear to the Tribunal whether there could have been criminal action taken against Kuntur Wasi as a corporate entity, as the Tribunal does not have evidence on the record as to whether Peru recognizes corporate criminal liability. But in any event, while the Tribunal appreciates the seriousness of the criminal measures taken against Kuntur Wasi personnel, Peru's actions, even if taken against the individuals as proxies for the company, did not satisfy the first element of the *Lemire* test.
971. The Tribunal has not been provided with evidence that demonstrates that the measures were taken in bad faith. The Tribunal takes judicial notice of the fact that during this period, Peru faced numerous accusations of significant corruption in public procurement, including in the construction sector. While corruption allegations can be misused, and it is particularly troubling that allegations similar to those made against Minister Vizcarra and arising from the same events were archived one month before he assumed the Presidency of Peru, while those against Kuntur Wasi's personnel were not, there is nonetheless insufficient evidence of abuse of the State's investigative and penal machinery for this element to be met. The fact that an investigation did not ultimately lead to charges having been made does not mean there was no basis for the inquiry and therefore cannot be the test. If there was a reasonable basis for concern regarding potential criminal conduct, Peru was entitled —perhaps even internationally obligated- to investigate. It has not been shown to have been acting contrary to the norms according to which civilized nations are expected to act. But those same norms also compel Peru to act with dispatch and non-arbitrariness; the Tribunal can well appreciate that the prolonged nature of these investigations would be extremely troubling to the individuals involved.
972. As to the second, the Tribunal recognizes that tenders for other airport projects pursued by Corporación América may require disclosure of Peru's termination of the Chinchero Airport contract and the potential for reputational harm arising from the termination. The fact that this act was disputed and this Tribunal has found that the termination was wrongful and gives rise to damages should, however, allow Corporacion America to mitigate any effects of this disclosure in future tenders and to its reputation more generally. Moreover,



the Claimants have not demonstrated that the effects of disclosure or the reputational damages up to this point are “grave and substantial” as the *Lemire* test requires. They have not provided any examples of bids that were rejected on this basis, or other deleterious effects of a specific nature, but have only made a general allegation of harm.

973. Accordingly, the Tribunal finds no basis for the award of moral damages.

**d. Contingent PYC Claim**

974. Kuntur Wasi and Proyecta & Construye, S.A. (“PyC”) entered into an EPC contract for the Project (*Contrato de Ingenieria, Aprovevisionamiento y Construcccion (EPC) a Suma Alzada*) (the “EPC” Contract”) on 26 June 2014.<sup>1189</sup> By its terms, the EPC Contract would terminate automatically upon the termination of the Concession.<sup>1190</sup> If construction had begun, then PyC would have the right to be compensated for the work performed as well as its duly verified expenses and costs up to the termination. This same clause goes on to provide that:

*Nonetheless, in the event that KUNTUR WASI prevails over the Grantor and is paid compensation by the latter as a result of having challenged the termination of the Concession, KUNTUR WASI undertakes to recognize in favour of THE CONTRACTOR, as loss of profits, any profit lost by the latter for the unfinished WORK, provided that such item is expressly included in the compensation granted to KUNTUR WASI.*<sup>1191</sup>

975. This provision thus appears to establish a contingent liability of Kuntur Wasi to PyC for lost profits from the EPC Contract, provided that this element is specifically provided for in any award to Kuntur Wasi.<sup>1192</sup>

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<sup>1189</sup> **Exhibit C-104**, EPC Contract, 26 June 2014.

<sup>1190</sup> **Exhibit C-104**, EPC Contract, 26 June 2014, Cl.18.4.

<sup>1191</sup> Id. [Tribunal’s translation] The original Spanish reads: “*No obstante, en caso que KUNTUR WASI logre percibir por parte del Concedente una indemnizacion a su favor como consecuencia de haber cuestionado la caducidad de la Concesion, KUNTUR WASI se compromete a reconocer a favor de EL CONTRATISTA, a titulo de lucro cesante, la utilidad dejada de percibir por este ultimo respecto de LA OBRA inconclusa, siempre que dicho concepto este especificamente comprendido en la indemnizacion que se otorgue a KUNTUR WASI.*”

<sup>1192</sup> It is not entirely clear to the Tribunal whether this liability would arise by virtue of an award of lost profits generally, or whether it requires that there be an award the specifically provides for lost profits under this contract. Claimants have identified this as a separate head of damages, so the Tribunal assumes they understand it to be the latter.

976. The Claimants argue that this obligation, quantified at US\$48.5 million, would not have arisen without Peru's unlawful conduct, and that this contingent liability needs to be part of an award in order to put the Claimants in the same position they would have been in absent the violation.<sup>1193</sup> The Respondent disputes the validity of this claim, highlighting the sister relationship between Kuntur Wasi and PyC.<sup>1194</sup>
977. The Tribunal finds this claim puzzling. It observes that, had the Concession not been terminated and the EPC Contract been performed, Kuntur Wasi would presumably have paid PyC for its work under the Contract, and any profit earned by PyC from the Contract would have been derived from the payments received from Kuntur Wasi. Thus, in the Tribunal's view, in the "but for" scenario, taking an income approach, the EPC contract would have been performed and the cost of that Contract should therefore be an expense of Kuntur Wasi, without there being a separate obligation to compensate PyC for its profits. The Tribunal understands that Claimants' experts have included this item in its real scenario. Although the real scenario assumes termination, the flaw in this approach is that as a contingent liability, it only qualifies as an element of out-of-pocket loss to Kuntur Wasi if the contingency is satisfied. Based on the terms of the EPC Contract, this would only occur if the Tribunal specifically recognizes this amount as a component of a damages award.
978. The Tribunal does not consider it appropriate to include this contingent liability in its damages award and specifically declines to do so. It is one thing to include in damages an unpaid liability for work that has been demonstrated to have been performed, such as the balance of the invoice relating to the EDI. It is quite another to saddle the Respondent, which was not a party to the EPC Contract and has not been shown to have been aware of or consented to its provisions, with a potential significant contingent liability of Kuntur Wasi to a third party, especially one that is related. Accordingly, this claim shall be excluded from any further damages calculations.

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<sup>1193</sup> Claimants' Memorial, para. 639.

<sup>1194</sup> Respondent's Rejoinder, paras. 617-619.

*e. Interest*

979. As noted earlier, Claimants' damages calculation includes interest from 13 July 2017 until the date of payment of any award, compounded annually.<sup>1195</sup> They submit that interest is an integral part of providing full reparation and that the interest rate in this case should be its weighted average cost of capital (WACC) of 7.18%. Respondent did not address these submissions in its Counter-Memorial, although its quantum expert, Mr. Kaczmarek, proposed that the Tribunal consider two alternative rates, LIBOR plus 4% and the US Prime Rate of Interest plus 2%.<sup>1196</sup> Mr. Kaczmarek also suggested that interest should not run on any period which is attributable to delay by Kuntur Wasi in proving its expenses.<sup>1197</sup>
980. In Reply, Claimants reiterated the position that interest should be based on the WACC and submitted that Respondent's alternatives were "within range" of 7.18%.<sup>1198</sup> Respondent continued to maintain in its Rejoinder that the WACC is not appropriate and put forward two additional alternatives to the two put forward in its Counter-Memorial: 1) a ten-year US government bond yield; 2) the average US dollar lending rate in Peru.<sup>1199</sup> The latter, Respondent submitted, was endorsed by Claimants' damages experts.<sup>1200</sup> Respondent does not appear to contest the requested annual compounding.
981. The Tribunal agrees with Claimants that interest from the date of breach to the date of payment of the award is appropriate to provide full compensation. The Tribunal found no delays attributable to Kuntur Wasi after that date (*i.e.*, 13 July 2017).
982. With respect to the question of what the appropriate interest rate would be, the Respondent's objection to the WACC appears to be that it considers the WACC to be a long-term interest rate, which is not appropriate on the facts of this case. Since there appears to be agreement between the Parties' experts that the average US dollar lending

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<sup>1195</sup> Claimants' Memorial paras. 666 *et seq.*

<sup>1196</sup> **Exhibit RER-1**, First Kaczmarek Report, paras. 200, 201. Since then, of course, LIBOR has ceased to exist.

<sup>1197</sup> **Exhibit RER-1**, First Kaczmarek Report, para. 198.

<sup>1198</sup> Claimants' Reply, para. 971.

<sup>1199</sup> Respondent's Rejoinder, para. 622.

<sup>1200</sup> *Id.*, citing to **Exhibit CER-4**, Second Compass Lexecon Report, paras. 111.

rate in Peru is an appropriate alternative rate, the Tribunal requests that the parties prepare a calculation based on that rate for the Tribunal's consideration.

983. As there appears to be no disagreement on the appropriateness of annual compounding, the calculation should proceed on this basis.
984. Given that the Tribunal has determined that it has jurisdiction over Kuntur Wasi, the question arises as to whether damages for a treaty breach should be made payable to Corporación América or Kuntur Wasi. The Tribunal invites submissions of the Parties on this question. It also invites submissions on the taxability of the award in Peru under the two alternatives.

#### **(4) Summary of Decisions and Further Instructions**

985. With respect to the issues of quantum in this case, the Tribunal has decided as follows:
- (i) Damages for contractual breaches will be governed by the terms of the Concession Contract and/or Peruvian law, as appropriate, while damages for treaty breaches shall be governed by the terms of the BIT or international law, as appropriate;
  - (ii) The damages that can be claimed for breach of the Concession Contract are those provided under Section 15.5 of that Contract, the *gastos incurridos*, i.e., US\$42.4 million, plus the value of the performance bond, US\$8,687,826, with interest from the date of valuation, i.e., 13 July 2017.
  - (iii) The Guarantee Agreement does not augment the damages that are payable as a matter of contract or Peruvian law.
  - (iv) For the FET breach, the *Chorzow Factory* standard of full reparation shall be applied, using the cost approach of calculating damages, which will value the Claimant's investment in the Project plus an entrepreneurial profit, plus any consequential damages that are not taken into account in the investment figure
  - (v) in relation to the claimed costs:

- a. no damages shall be paid in relation to the construction delay claim of US\$4.9 million;
  - b. the claims for the EDI of \$27.6 million, bidding and structuring costs of US\$6.1 million, financial structuring costs of US\$2.0 million; supervisory costs of US\$1.1 million payable to OSITRAN; taxes of US\$1.3 million not associated with EDI, and operating expenses of US\$4.4 million, shall be recoverable by Kuntur Wasi, for a total of US\$42.5 million.
  - c. entrepreneurial profit shall be calculated on the above damages by use of the same methodology as is described in paragraphs 892, 893 above (*i.e.*, the average of the two calculations described in paras. 892 and 893).
  - d. The performance bond of US\$8,687,826 million shall be treated as consequential damages.
  - e. no damages shall be paid in relation to the PyC contingent claim of US\$48.5 million for lost profits.
- (vi) no moral damages shall be due and owing.
  - (vii) interest calculations on damages (including consequential damages as well as damages calculated under the costs approach) from the date of valuation shall be based on the average US dollar lending rate in Peru, compounded annually.

986. The Parties are instructed to make further submissions on the following questions:

- (i) First, as set forth in paragraph 964, a new calculation of damages under the cost approach, taking into account the items of cost this Decision has found to be admissible and no others, and applying the interest rate set forth in this Decision, needs to be performed.
- (ii) Second, as set forth in paragraph 982, the Tribunal requests that the parties provide a submission as to the average US dollar lending rate in Peru for the relevant period to date for the Tribunal's consideration.

- (iii) Third and finally, as set forth in paragraph 984, the Tribunal instructs the Parties to make submissions of the Parties on whether damages should be awarded to Kuntur Wasi, Corporación América, or some combination of the two. It also instructs the Parties to make submissions on the taxability of the award in Peru under the two alternatives.

987. The additional submissions requested by the Tribunal should be made within thirty (30) days of the date this Decision is dispatched to the Parties. To the extent possible, the submissions should be made on a joint basis; the Parties are asked to use every reasonable effort to reach agreement. If, however, agreement cannot be reached between the Parties, the Parties may make separate submissions on the date specified, explaining any reasons for disagreement. The Tribunal will determine whether any follow-up submissions are required.

988. The Tribunal also instructs the Parties to make submissions on costs within fifteen (15) days of the submission(s) made pursuant to the preceding paragraph. A decision on costs will be reserved for the final Award.

[Signed]

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Enrique Barros Bourie  
Arbitrator

Date: 11 August 2023

[Signed]

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José Emilio Nunes Pinto  
Arbitrator

Date: 11 August 2023

[Signed]

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Lucinda Low  
President of the Tribunal

Date: 11 August 2023