

BEFORE THE  
INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES

**Lidercón, S.L.**

*Claimant,*

v.

**Republic of Peru**

*Respondent*

Case No. ARB/17/9

**Award**

Date of Dispatch: 6 March 2020

Tribunal:

Francisco González de Cossío  
Hugo Perezcano  
Jan Paulsson

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## ABBREVIATIONS

Bullet Point 13	The last of 13 unnumbered bullet points of Clause 1.3.20 of the Concession Contract, extending the definition of “Applicable Laws” to “norms that modify, derogate from, complement, replace or interpret those previously identified.”
Concession Contract or <i>Contrato de Concesión</i>	The <i>Contrato de Concesión</i> entered into by MML, Lidercón Perú, and Ivesur on 20 September 2004.
Entidades revisoras	Entities authorized to operate technical vehicle inspections.
INDECOPI	<i>Instituto de Defensa de la Competencia y de la Propiedad Intelectual</i> (National Institute for the Defense of Free Competition and the Protection of Intellectual Property), the Peruvian competition authority.
INDECOPI Commission	INDECOPI’s <i>Comisión de Eliminación de Barreras Burocráticas</i> .
ITV	<i>Inspecciones Técnicas Vehiculares</i> (referred to as “ <i>Revisiones</i> ” prior to the enactment of the 2008 ITV Law).
Ivesur	Ivesur S.A., a Spanish entity which was Lidercón’s consortium partner and owned 30% of Lidercón Perú.

Lidercón.	Lidercón, S.L., the Claimant, a Spanish entity and the 70% owner of Lidercón Perú
Lidercón Perú	Lidercón Perú S.A.C., the Concessionaire, a Peruvian entity.
Lidercón	<i>Either Lidercón, S.L. or Lidercón Perú, depending on the context</i>
MML	Municipalidad Metropolitana de Lima.
MTC or Ministry	<i>Ministerio de Transportes y Comunicaciones.</i>
Municipalities Law	<i>Ley Orgánica de Municipalidades (2003), repealed in part by the 2008 Ley ITV.</i>
Ordinance No. 506	MML <i>Ordenanza</i> of 15 May 2003, requiring all vehicles circulating in the Province of Lima to have certificates of inspection (repealed as a result of the Third Final Provision of the <i>Ley ITV</i> ).
Ordinance No. 694	MML <i>Ordenanza</i> of 16 September 2004, requiring vehicles to be inspected by the <i>Entidad Revisora</i> under the <i>Contrato de Concesión</i> (repealed as a result the Third Final Provision of the <i>Ley ITV</i> ).
SUTRAN	<i>Superintendencia de Transporte Terrestre de Personas, Carga y Mercancías</i> , an “autonomous” department of MTC.

Treaty	<i>Acuerdo para la Promoción y la Protección Recíproca de Inversiones entre el Reino de España y la República de Peru</i> , the Bilateral Investment Treaty between Spain and Perú, done in Madrid on 17 November 1994.
1999 Law	<i>Ley General de Transporte y Tránsito Terrestre</i> of 7 October 1999.
2001 Regulation	<i>Reglamento Nacional de Vehículos</i> of 25 July 2001.
2003 Regulation	<i>Reglamento Nacional de Vehículos</i> of 7 October 2003.
2008 <i>Ley ITV</i>	<i>Ley Nacional de Inspecciones Técnicas Vehiculares</i> of 28 May 2008.
2008 Regulation	<i>Reglamento Nacional de Inspecciones Técnicas Vehiculares</i> of 24 August 2008.
2011 Award	The Award rendered on 4 November 2011 after the consolidation of four proceedings initiated by Lidercón Perú against MML under the Concession Contract.

## **THE PARTIES**

1. The Claimant Lidercón, S.L., Calle Condado de Treviño no. 65, Poligono Industrial de Villalonguejar, Burgos, Spain, is a Spanish corporate entity represented in these proceedings by Mr. Lucas Osorio, Mr. José Luis Huerta, Ms. Silvia Martínez, Ms. Alba Briones, Ms. María E. Ramirez, Ms. Andrea Barracchini, Ms. Juliana de Valdenebro and Mr. Richard C. Lorenzo from the law firms Hogan Lovells US LLP and Hogan Lovells Int'l LLP.

2. The Respondent Republic of Peru is represented in these proceedings by Mr. Ricardo Manuel Ampuero Llerena, President of the Special Commission of the Republic of Peru; Ms. Mónica del Pilar Guerrero Acevedo of the Special Commission; Ms. Marinn Carlson, Ms. Jennifer Haworth McCandless, Mr. Patrick T. Childress, Ms. Courtney Hikawa, Mr. Michael Krantz, Ms. Maria Carolina Durán, Ms. Veronica Restrepo from the law firm Sidley Austin (DC) LLP, and Mr. Stanimir A. Alexandrov from the law firm Stanimir A. Alexandrov PLLC.

## INTRODUCTION

3. In 2004, Liderc3n, S.L entered into a concession contract with the Metropolitan Municipality of Lima (“MML”) to build and operate motor vehicle inspection centers under the MML’s authority within its territory, which is inhabited by between one-fourth and one-third of the population of Peru. The Contract is still in force, but Liderc3n complains of a failure on the part of Peruvian public authorities to respect the condition of exclusivity to which it believes it is contractually entitled, and contends that it is also entitled by contract to be subject to supervision by MML instead of by the Ministry. While foreign investors in various countries have complained about suffering from discrimination, this is an unusual instance of a complaint about being deprived of the *benefits of excluding competitors*, local or foreign. (Liderc3n also complains of discrimination, but of other kinds.) Liderc3n contends the elimination of its claimed rights of exclusivity has been affected by Peruvian state instrumentalities in breach of the Spain/Peru Bilateral Investment Treaty.

4. In this arbitration, Liderc3n alleges that the value of its investment has diminished to an extent which its Memorial evaluated as being in excess of US\$95 million by reason of a number of adverse events, notably (A) a 2008 Law (the *Ley ITV*) setting out rules for operating a national system of vehicle inspection administered by the Ministry of Transportation and Communications (“MTC” or “the Ministry”) which interfered with the rights Liderc3n contends it was granted by MML, (B) the judicial declaration that a 2011 arbitral award favourable to Liderc3n was partially unenforceable, and (C) a decision in September 2007 by INDECOPI, subsequently judicially confirmed, to the effect that MML Ordinance No. 694, which in effect authorized the grant of exclusive rights under the Concession Contract, was an illegal bureaucratic barrier. As a result, Liderc3n has for years been exposed to restrictions, and to competition from its business rivals, in ways that infringe its concession, and alleges that these adverse developments have constituted breaches of the Treaty attributable to the State of Peru. Liderc3n also complains of subsequent grave and improper interference with the operation of its inspection centers, which it says continued notwithstanding the pendency of the present



arbitration and culminated in the closure of its centers by the authorities shortly after the September 2019 hearings.

5. In Peru, a national system of mandatory vehicle inspections began to emerge at the turn of the century. The 1999 *Ley General de Transporte y Tránsito Terrestre* (“1999 Law”) established in Article 16 that the regulation and management of this system would form part of the “*competencias y funciones*” (jurisdiction and powers) of the Ministry, which in 2001 issued a *Reglamento Nacional de Vehículos* (“2001 Regulation”) containing a chapter on motor vehicles which notably provided in Article 52(E) that the Ministry had the authority to regulate and supervise vehicle inspections in the country; in Article 52 (G) that vehicle owners were free to choose where they would obtain inspection certificates; and in Article 54(A) that the Ministry could delegate some of its functions to other entities.

6. The situation of the municipality of Lima was something of an anomaly. A few months before the issuance of the 2001 Regulation, the Ministry had agreed, in a *Convenio de Gestión de Revisiones Técnicas de Vehículos en Lima Metropolitana* (Management Agreement for the Technical Inspection of Vehicles in Metropolitan Lima) with MML, that the latter would supervise motor vehicle inspections in the capital. Nevertheless, so Peru contends, the delegation was never implemented according to its terms carried out with the result that the *Convenio* was never given effect.

7. In any event, the consortium comprised of the Claimant and Ivesur won the bid in 2004 for a concession from MML to build and operate motor vehicle inspection centers. As a result, Lidercón and Ivesur incorporated a Peruvian company, Lidercón Perú, S.A.C. (70% owned by Lidercón and 30% by Ivesur) that would operate the concession, as required by the *Bases de licitación* (Bidding Rules) and subsequently by the Concession Contract.

8. The Concession Contract was entered into by MML, Lidercón Perú and Ivesur on 20 September 2004. Contractual relations soon turned out to be difficult. By early 2008, Lidercón had initiated six separate arbitrations against MML under the Contract. Part of the

difficulty, as will be explained below, resulted from the tension of different conceptions of the attribution of authority to regulate vehicle inspections as between the Ministry (nation-wide powers) and MML (regional powers in the dominant, densely populated region of the capital, where the problems of congestion and pollution are uniquely acute), as well as of the compatibility of a sole-provider as *entidad revisora* (inspection entity) with the public policy against monopolies.

9. The original texts of the documents examined by the Arbitral Tribunal and quoted in this Award are in the Spanish language, and all participants in these proceedings understand them in the original. Nevertheless, the proceedings have been bilingual, and the oral arguments by both sides were presented in English. For that reason, some passages of documents quoted below are rendered in translation to be consistent with the English words actually used in the hearings.

## PROCEDURAL HISTORY

10. On 21 December 2016, ICSID received a Request for Arbitration of the same date from Lidercón, S.L. and Lidercón Perú, S.A.C. against the Republic of Peru (the “Request”). On 24 March 2017, representatives of Lidercón, S.L. and Lidercón Perú, S.A.C. submitted a letter to ICSID withdrawing Lidercón Perú, S.A.C. as requesting party. On 3 April 2017, Lidercón, S.L. submitted a revised version of its Request to ICSID.

11. On 5 April 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36 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 Articles 37 and 40 of the ICSID Convention.

12. The Parties agreed to do so in accordance with Article 37(2)(a) of the ICSID Convention. The Tribunal is composed by Professor Jan Paulsson (French/Swedish), President, appointed by agreement of the parties; Dr. Francisco González de Cossío (Mexican), appointed by the Claimant; and Professor Hugo Perezcano (Mexican), appointed by the Respondent.

13. On 2 August 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), 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. Ms. Mairée Uran Bidegain, ICSID Team Leader/Legal Counsel, was designated to serve as Secretary of the Tribunal.

14. On 25 August 2017, the Centre informed the Tribunal and the Parties that Ms. Catherine Kettlewell, ICSID Counsel, had been appointed as Secretary of the Tribunal in replacement of Ms. Uran Bidegain.

15. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 22 September 2017, by teleconference. On 16 October 2017 the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, the timetable for submissions, and that the place of proceeding would be Washington, D.C.

16. On 6 February 2018, in accordance with the timetable for submissions, the Claimant filed a Memorial on the Merits (“Claimant’s Memorial”) together with Exhibits C-1 through C-152 and Legal Authorities CL-1 through CL-84; Witness Statements by Raúl Barrios Fernández Concha and Alberto Vicario Anuncibay, and an Expert Report by Daniel Flores (Econ One Research, Inc.).

17. On 8 August 2018, in accordance with the timetable for submissions, the Respondent filed a Counter-Memorial on the Merits and a Memorial on Jurisdiction (“Respondent’s Counter-Memorial”) together with Exhibits R-001 through R-254 and Legal Authorities RL-01 through RL-046; Witness Statements by Silvia Hooker, Eduardo García-Godos, Alfieri Lucchetti, Janet Arias, Elloth Tarazona, and Arturo Ruiz; and Expert Reports by Brent C. Kaczmarek and Isabel S. Kunsman (of Navigant Consulting, Inc., together with appendices 4 through 11), Diego Zegarra, Manuel Sánchez, and Francisco Eguiguren.

18. On 28 September 2018, each Party filed a request for the Tribunal to decide on production of documents. On 17 October 2018, the Tribunal issued Procedural Order No. 2 concerning production of documents.

19. On 1 February 2019, in accordance with the timetable for submissions, the Claimant filed a Reply on the Merits and Counter-Memorial on Jurisdiction (“Claimant’s Reply”) together with Exhibits C-153 through C-284 and Legal Authorities CL-85 through CL-128; Second Witness Statements by Raúl Barrios Fernández Concha and

Alberto Vicario Anuncibay, a Second Expert Report by Daniel Flores (Econ One Research, Inc.), and Expert Reports by Fernando Cantuarias and María Teresa Quiñones Alayza.

20. On 22 April 2019, the Claimant filed a request for provisional measures, together with Exhibits C-284 through C-336,<sup>1</sup> and Legal Authorities CL-129 through CL-133; a Third Witness Statement by Raúl Barrios Fernández Concha; and an Update on Economic Damages by Daniel Flores (Quadrant Economics LLC). On 9 May 2019, the Claimant filed further information on the request for provisional measures.

21. On 14 May 2019, the Respondent filed observations on the Claimant's request for provisional measures, together with Exhibits R-255 through R-311 and Legal Authorities RL-047 through RL-063; and a Witness Statement by Daniella Canales.

22. On 21 May 2019, the Claimant filed a response to Respondent's observations of 14 May 2019.

23. On 28 May 2019, the Respondent filed further observations on the Claimant's response of 21 May 2019, together with Exhibits R-312 through R-315.

24. On 31 May 2019, the Tribunal decided on Claimant's request for provisional measures as follows:

The arbitrators find it difficult to order national authorities to suspend the enforcement of regulations before they have found it to be wrongful. They are moreover disinclined to do so even on a prima facie basis,

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<sup>1</sup> The Claimant has submitted two different exhibits identified as Exhibit C-284. The first was included in the Claimant's Reply (Sentencia de la Corte Superior de Justicia de Lima, Primera Sala Permanente Contenciosa Administrativa, resolución N° 03 de 28 de septiembre de 2018, expediente N° 18103-2016-30, dated 28 September 2018), and the second was included in the Claimant's Request for Provisional Measures (Acta de Verificación 2901000915 para la Planta Materiales, dated 22 February 2019).

and will therefore at this time not order the provisional measures sought by the Claimant.

25. In view of the evolution of the case, the Tribunal also decided to adjust the process in the interest of time and costs and to exclusively address non-quantum issues at the hearing foreseen in the timetable. In regards to the bifurcation of the quantum issues, the Tribunal specified:

It seems to the Tribunal that putting quantum issues to the side for now has at least three conceivable advantages: (i) avoiding the cost of full presentations of quantum at this stage, which experience often shows to be a very expensive process; (ii) allowing subsequently more precise debate on quantum in light of the findings in relation to liability; (iii) reducing the complexity and therefore the length of the deliberations and drafting of the Tribunal's more limited decision, and (iv) conceivably creating an impetus for the Parties, in light of the Tribunal's decision on the non-quantum matters, to resolve the dispute directly.

26. On this basis, the Tribunal invited the Parties to consult in this regard. After receiving the comments from the Parties, on 1 July 2019, the Tribunal decided that the hearing would be held from 19 to 27 September 2019.

27. On 14 June 2019, in accordance with the timetable for submissions, the Respondent filed a Rejoinder on the Merits and Reply on Jurisdiction ("Respondent's Rejoinder") together with Exhibits R-213 bis, and R-316 through R-505, and Legal Authorities RL-064 through RL-099; Witness Statement by Carlos Jiménez Rodríguez, Second Witness Statements by Daniella Canales, Janet Arias, Elloth Tarazona, Silvia Hooker, Alfieri Lucchetti and Arturo Ruiz; Expert Report by Mercedes Bravo Osorio, and Second Expert Reports by Brent C. Kaczmarek and Isabel S. Kunsman (of Navigant Consulting, Inc., together with appendices 3 and 12 through 16), Diego Zegarra, Manuel Sánchez, and Francisco Eguiguren.

28. On July 22, 2019, once that the parties had confirmed their availability, the Tribunal confirmed the pre-hearing conference call to be held on 3 September 2019.

29. On 2 August 2019, in accordance with the timetable for submissions, the Claimant filed a Rejoinder on Jurisdiction (“Claimant’s Rejoinder”) together with Exhibits C-337 through C-347,<sup>2</sup> and Legal Authorities CL-134 through CL-137; Third Witness Statement by Alberto Vicario Anuncibay, and Expert Report by Alberto Vaquerizo Alonso.

30. On 21 August 2019, the Tribunal invited the Parties to consult in the arrangements for the hearing. On 28 August 2019 the Parties submitted their agreement on the hearing procedures and their corresponding positions on those matters in which there was no agreement. On 30 August 2019, the Claimant notified the Tribunal of a possible disruption due to inclement weather which would impede the participation of counsel for the Claimant at the pre-hearing conference call. In view of the Claimant’s counsel situation, on 2 September 2019, the Tribunal cancelled the pre-hearing conference call. On 3 September 2019, the Tribunal decided on the procedural matters for the hearing not previously agreed by the Parties. The Tribunal further invited the Parties to consult with each other and then (1) indicate approval, (2) make a joint request for modification(s), or (3) make unilateral application(s) for reconsideration.

31. On 31 August 2019, the Claimant requested leave from the Tribunal to submit new evidence into the record. On 1 September 2019, the Tribunal indicated that a Party did not need permission to make an application invoking exceptional circumstances and provide evidence thereof, but that cannot prejudge its admissibility as to which its opponent is naturally free to comment. On this basis, the parties submitted new evidence on the record. The Claimant submitted Exhibits C-348 to C-351 and the Respondent submitted in response

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<sup>2</sup> On August 23, 2019, the Claimant informed the Tribunal of an inadvertent error in Exhibit C-347 included In Claimant’s Rejoinder. In this communication, the Claimant submitted the correct Exhibit C-347 which was then introduced into the record.

Exhibits R-506 to R-517 on 31 August 2019 and 14 September 2019, respectively.

32. On 1 September 2019, the Respondent informed the Tribunal that Mr. Alfieri Lucchetti was restricted from leaving Peru and would, therefore, not be able to attend the hearing in person. The Respondent offered, alternatively, to have Mr. Lucchetti testify via video conference. On 6 September 2019, the Tribunal requested the Respondent for further information regarding the presence of Mr. Alfieri Lucchetti at the hearing indicating that remote testimony would be undesirable. In view that Mr. Lucchetti's presence at the hearing could not be ensured, on 16 September 2019, the Tribunal provided instructions for the parties to arrange his testimony via video conference.

33. On 10 September 2019, the Tribunal requested further information regarding the request for the Claimant to present the direct examination for Dr. Cantuarias. On 12 September 2019, the Tribunal reconsidered its decision on Dr. Cantuarias' testimony allowing Dr. Cantuarias to respond to Dr. Sanchez's Second Legal Opinion with respect to the three questions related to the 2011 Award.

34. On 16 September 2019, the Tribunal decided the following:

The evidence concerning SUTRAN's actions is admitted from both sides. The Secretary already has all of the exhibits and they can be placed on the record. The Respondent's request to admit certain supervening evidence coming out of the court cases related to the 2011 arbitral award is also admitted; the Secretary can place the documents on the record. If the Claimant wishes to submit responsive evidence it is in principle free to do so but after conferring with the Respondent in case there is any objection as to responsiveness.

On this basis, Claimant submitted Exhibits C-351 to C-356.



35. A hearing on jurisdiction and the merits was held in Washington, DC from 19 to 27 September 2019 (the “Hearing”). The following persons were present at the Hearing:

***Tribunal:***

Prof. Jan Paulsson	President
Dr. Francisco Gonzalez de Cossío	Arbitrator
Prof. Hugo Perezcano Díaz	Arbitrator

***ICSID Secretariat:***

Ms. Catherine Kettlewell	Secretary of the Tribunal
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***For the Claimant:***

Mr. Richard C. Lorenzo	Hogan Lovells US LLP
Ms. Maria E. Ramirez	Hogan Lovells US LLP
Ms. Alba Briones	Hogan Lovells International LLP
Ms. Silvia Martinez	Hogan Lovells International LLP
Ms. Andrea Barracchini	Hogan Lovells International LLP
Ms. Juliana De Valdenebro	Hogan Lovells US LLP
Ms. Marta M. Urrea	Hogan Lovells US LLP
Mr. Jared Schifman	Hogan Lovells US LLP
Ms. Wilzette Louis	Hogan Lovells US LLP
Mr. Alberto Vicario	Lidercón, S.L.

***For the Respondent:***

Mr. Stanimir A. Alexandrov	Stanimir A. Alexandrov PLLC
Ms. Jennifer Haworth McCandless	Sidley Austin LLP
Ms. Marinn Carlson	Sidley Austin LLP
Ms. María Carolina Durán	Sidley Austin LLP
Mr. Michael Krantz	Sidley Austin LLP
Ms. Veronica Restrepo	Sidley Austin LLP
Ms. Courtney Hikawa	Sidley Austin LLP
Ms. María Marulanda-Mürle	Sidley Austin LLP
Mr. Ricardo Puccio Sala	Navarro & Pazos Abogados
Mr. Ricardo Ampuero Llerena	Ministry of Economy and Finance, Republic of Peru

Ms. Mónica del Pilar Guerrero Acevedo	Ministry of Economy and Finance, Republic of Peru
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Ambassador Hugo De Zela	Embassy of Peru
Ms. Giovanna Zanelli	Embassy of Peru
Mr. Alberto Hart	Embassy of Peru

***Court Reporters:***

Ms. Dawn K. Larson	Worldwide Reporting, LLP
Mr. Leandro Iezzi	DR-Esteno

***Interpreters:***

Mr. Daniel Giglio	English-Spanish Interpreter
Ms. Silvia Colla	English-Spanish Interpreter
Mr. Charles Roberts	English-Spanish Interpreter

36. During the Hearing, the following persons were examined:

***The witnesses presented by the Claimant:***

Mr. Alberto Vicario	Lidercón, S.L.
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Mr. Raúl Hernando Barrios Fernández Concha	Lidercón Perú, S.A.C.
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***The experts presented by the Claimant:***

Dr. Fernando Cantuarias Salaverry	Legal Expert - Decano de la Facultad de Derecho de la Universidad del Pacifico
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Dr. Maria Teresa Quiñones Alayza	Legal Expert - Quiñones Alayza Abogados
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***The witnesses presented by the Respondent:***

Mr. Félix Arturo Ruiz Sánchez	Estudio Rubio Leguia Normand (formerly, Asistente Legal de la Gerencia Legal del Comité Especial de Promoción de la Inversión Privada (CEPRI) in the Municipalidad Metropolitana de Lima)
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Mr. Elloth Tarazona	Gerente de Planeamiento y Desarrollo, Asociación Automotriz del Peru (formerly, Asesor Técnico and Asesor Técnico de la Dirección de Regulación y Normatividad de la Dirección General de Transporte Terrestre (DGT) del Ministerio de Transportes y Comunicaciones (MTC))
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Ms. Janet Arias	Directora de Circulación Vial, Ministerio de Transportes y Comunicaciones (MTC)
Mr. Alfieri Bruno Lucchetti Rodríguez	Asesor Legal de la Dirección de Inversiones Descentralizadas de la Agencia de Promoción de la Inversión Privada (Proinversión) (formerly, Asistente Legal Senior de la Secretaría Técnica de la Comisión de Acceso al Mercado del Instituto Nacional de la Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI))
Mr. Eduardo García-Godos	Instituto Peruano de Facilitación del Comercio (formerly Comisionado de la Comisión de Acceso al Mercado, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI))
Ms. Silvia Hooker	Vocal de la Sala Especializada en Defensa, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI) (formerly, Gerencia Legal of INDECOPI)
Ms. Daniella Canales	Independiente (formerly, Gerente de la Gerencia de Supervisión y Fiscalización de la Superintendencia de Transporte Terrestre de Personas, Carga y Mercancías (SUTRAN))
Mr. Carlos Jiménez Rodríguez	Gerencia Legal, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI)

***The experts presented by the Respondent:***

Mr. Francisco José Eguiguren Praeli	Legal Expert - Pontificia Universidad Católica del Peru;
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Comisión Interamericana de  
Derechos Humanos

Mr. Manuel Sanchez

Legal Expert - Judge of the  
Supreme Court of Peru,  
Retired; Independent  
Attorney

Dr. Mercedes Bravo Osorio

Legal Expert - Bufete Barrilero  
y Asociados

37. All witnesses were present in person before the Tribunal, save Mr. Alfieri Bruno Lucchetti Rodríguez who testified via video conference.

38. On 7 November 2019, the Parties submitted their agreed corrections to the English and Spanish transcripts of the hearing. The corrections were recorded by the corresponding court reporters.

39. On the same date, the Claimant submitted a Renewed Request for Interim Relief together with Exhibits C-357 and C-358. The Respondent commented on the Claimant's request on 13 November 2019, as invited by the Tribunal.

40. On 19 November 2019, the Claimant submitted further comments and evidence (Exhibits C-359 and C-360) in support of its request. On 21 November 2019, the Tribunal invited the Respondent to comment, particularly with respect to two issues. On 22 November 2019, the Claimant submitted further evidence (Exhibit C-361). On 27 November 2019, the Claimant submitted further arguments related to its request and Exhibits C-362 through C-367. In light of this information, the Respondent requested an extension to respond. On 4 December 2019, the Respondent submitted its comments together with Exhibits R-518 through R-521.

41. On 11 December 2019, the Tribunal issued its decision on the Claimant's Renewed Request for Interim Relief as follows:

The Arbitral Tribunal has considered the Claimant's objections to the closing of its plants, and its desire for immediate relief. The arbitrators however remain disinclined to order the Peruvian public authorities to undo steps they believe are essential from a regulatory point of view. If the Claimant prevails on the merits and the proceedings therefore move to a quantum phase, it may turn out that the Respondent's actions have exacerbated the prejudice the Claimant says it has suffered, in which case it may secure relief then – but not before.

42. On 10 January 2020, the Parties requested the Tribunal for guidance on the presentation of cost submission. The Parties also inquired whether the Tribunal wished to pose any questions in preparation for the Hearing on Quantum.

43. On 17 January 2020, the Tribunal provided the following instructions to the Parties:

1. Cost submissions. The Tribunal assumes that the Parties now have the information available and could specify their costs claims in 10 days. The Tribunal does not require lengthy explanations, nor full details such as dates when time was recorded, as well as by whom; or receipts of expenditures. The Tribunal will take a view of the reasonableness and proportionality of the claims in light of their collective experience and judgment, as well as the work that has been produced –with which they are well acquainted indeed. Counsel's certification that fees have been paid will be required. Each side will be invited to react to the claims 10 days thereafter. These deadlines will be adjusted if they cause difficulty. The submission of costs claims at this stage would enable the arbitrators to render either an Award or a Decision reserving costs depending on the result of their deliberations.

2. Timing. The considerable volume of materials in this case has affected the progress of deliberations.

Nevertheless, the arbitrators believe that they can reach and communicate their decision some time before the end of February, fully understanding as they do that the sooner they do so the less the inconvenience for the Parties who until then need to be on standby.

44. On 31 January 2020, the Parties simultaneously submitted their cost submissions. On 1 February 2020, the Claimant submitted an updated cost submission to reflect the line on experts with the purpose of showing the same information as filed by Respondent. On 21 February 2020, the Respondent submitted comments on Claimant's cost submission. Claimant objected alleging that the comments were not timely submitted pursuant to the Tribunal's instructions and requested leave to comment on Respondent's submission. In light of the advanced stage of the Tribunal's deliberations, it was unnecessary to pursue this matter as it did not require resolution.

45. The proceeding was closed on 6 March 2020.

## ANTECEDENTS OF THE CONCESSION CONTRACT

46. Pre-contractual events are of particular interest in the present case in light of the Claimant's alleged expectations with respect to the rights it says were generated by the Concession Contract.

47. In May 2001, the Ministry and MML concluded a *Convenio de Gestión*, or management agreement, by which these two governmental departments agreed that MML would be charged with the task of conducting vehicle inspections “*en la provincia de Lima*,” (in the province of Lima) and that MML would be able to do so by granting concessions “within the scope of its territorial authority”. The same document contained a clause (*tercera*) (third) which mentioned that a National Regulation of Technical Inspections was to be established, and that it would include, “*de manera explícita, el régimen especial de gestión para la Municipalidad*” (in an express manner, the special regime for administration by the Municipality). The following clause, moreover, provided that the “special regime” of administration by MML would “form a part of” an anticipated national Regulation, and would be drafted, with the participation of MML, within not more than 45 days of the signature of the *Convenio de Gestión*.

48. This never happened. So testified Mr. Elloth Tarazona, a Technical Advisor at the Ministry involved in the preparation of its regulations from 2003 to 2008. To the contrary, as his first witness statement puts it in Paragraph 9, the Regulation issued on 25 July 2001, implementing the 2001 Law, although it permitted in principle the delegation of this function, identified the Ministry alone as the *entidad autorizada* (authorized entity) to confer concessions with respect to vehicle inspections, and did not envisage a special regime for MML.

49. Mr. Tarazona's evidence illuminates the tension between the concept of national vs. regional regulatory authority in other respects as well. He refers to the absence of vehicle inspections prior to 2001, when the Regulation of that year first mentioned an obligation for vehicle owners to submit to inspections (Paragraph 7), and insists repeatedly on the need for a “*sistema nacional de inspecciones*”

(national inspection system). He expresses the view that in the wake of the “turbulence” of the Fujimori regime, the Peruvian government underwent a comprehensive restructuring which explains why the Regulation designed to implement the 1999 Law was not issued until 2001 (Paragraph 6).

50. On 15 May 2003, MML issued municipal *Ordenanza* No. 506 regulating vehicle inspections in Lima. The Ordinance took as its premise that MML’s “*competencias y funciones*” included the inspection of motor vehicles and affirmed that it was obligatory for every vehicle circulating in Lima. It also set out vehicle inspection schedules and sanctions for car owners who had not passed required vehicle inspections, conducted by public or private entities to be approved in accordance with the applicable law.

51. On 26 May 2003, the Peruvian Congress enacted the *Ley Orgánica de Municipalidades*. This was an omnibus piece of legislation, which in some 60 pages set out a great number of directives concerning the function and attributes of municipal entities. It contained a full section comprising 14 Articles devoted to MML. Article 161 laid out MML’s *competencias y funciones*. Among them was a succinct indication, in paragraph (7.6), of its authority to “verify and control the performance of vehicles through periodic technical inspections.” According to Paragraph 25 of Peru’s Counter-Memorial, MML interpreted this provision to mean that it had the power to authorize and regulate vehicle inspection centers within its jurisdiction, but other officials disagreed, believing that MML had the competence only to ensure that cars circulating in Lima had passed vehicle inspections regulated by the latter and could not issue certificates that were valid nation-wide.

52. On 7 October 2003, MTC issued the 2003 National Vehicle Regulation. A number of its provisions, such as the rule in Article 102 that inspections could only be carried out in *plantas autorizadas* (authorized centers), did not indicate which public entity might be ensuring the implementation of the Regulation. But Article 106 cast doubt on the prospect of the grant of exclusive rights to inspect, making clear that owners could go to the inspection center of their choice. Moreover, Article 119 defined MTC as the *autoridad competente* for



the grant of concessions with respect to vehicle inspection. In contrast with the 2001 Regulation, which it supplanted, the 2003 Regulation did not provide that MTC could delegate its authority to a different government entity.

53. Mr. Tarazona notes that notwithstanding the 2003 Regulation, MML relied on the *Ley Orgánica de Municipalidades* issued earlier that year as authorizing it to grant concessions for inspection centers within its jurisdiction. He finds this to be incoherent with the fact that the Ministry under the 2003 Regulation was to apply a national set of criteria for those seeking to operate inspection centers, and to issue certificates valid nation-wide. In any event, Article 5 of the 2008 Law (or “*Ley ITV*”) prohibited the exclusive grant of concessions, thereby in his view securing the public benefits of competition both in respect of quality of services and cost. At the same time, however, this posed a troublesome question of the Concession Contract’s compatibility with the *Ley ITV*.

54. Lidercón for its part argues that its entitlement to rely on MML’s authority was confirmed in a single-page letter from the Minister of MTC dated 14 October 2003 to the Mayor of Lima, following up a telephone conversation, observing that although his Ministry would establish a system of vehicle inspections at the national level the Municipality of Lima should put in place its own inspections. Therefore, the Minister went on to suggest that MML might also implement a bidding process “*dentro de su jurisdicción, de modo que sea posible uniformizar el procedimiento a nivel nacional*” (within its jurisdiction, so as to bring about a uniform national process).

55. Mr. Tarazona states in his first witness statement in Paragraph 14 that although “I am ignorant of the Minister’s motives in having sent that letter”, he expresses disbelief that it could at the time have been taken as proof that Lidercón enjoyed exclusive rights since the Minister referred in the plural to *Entidades Revisoras*. He nevertheless accepts (in the following Paragraph) that MML’s *Ordenanza* 694 had the explicit purported effect of subordinating the process of inspections in the Province of Lima to the provisions of the *Contrato de Concesión* signed with the “*Entidad Revisora*”, thus purporting to give Lidercón 16 years of exclusivity.

56. Peru's Counter-Memorial asserts as follows:

27. According to the 2003 National Vehicle Regulation: (i) vehicle inspections can only be carried out as Plantas de Revisiones Técnicas that are authorized and supervised by the MTC; (ii) Entidades Revisoras are companies that operate the Plantas de Revisiones Técnicas and that may render vehicle inspection services in accordance with a concession obtained from the government; and (iii) users may choose freely where to obtain vehicle inspections for their vehicle, among other provisions. Even though the MTC issued this new Regulation indicating that the MTC had authority to govern vehicle inspection centers, the MML continues to believe that it had authority to act regarding vehicle inspection centers within the Municipality of Lima.

28. Thus, there was tension between the MTC and the MML regarding who had the competence to approve vehicle inspection centers in Lima. Under Peruvian law, where there is a disagreement between two government entities on the scope of their competence, it may be resolved via a constitutional proceeding (*proceso competencial*) before the Constitutional Tribunal, where the Tribunal interprets the applicable laws and decides which is the competent entity. However, the Constitutional Tribunal has clarified that Congress may also issue laws granting competences to the national government (such as the MTC) to maintain the "unity" of the State. In those cases, via legislation, Congress clarifies which national-level entity has the competence to act.

57. The choice ultimately made by the Peruvian national authorities, as indeed Mr. Tarazona confirms, was to clarify the matter of competence by legislative enactment. This finally had the effect of congressional abrogation of the conflicting provision of the *Ley de Municipalidades*. But that result was reached five years after MML had charged its Special Committee for the Promotion of Private Investment, commonly referred to by its Spanish acronym, "CEPRI", to conduct and conclude a tender process, open to both Peruvian and

foreign candidates. The invitation to tender was published between 21 March and 9 April 2004 in *El Peruano*, the official gazette, as well as in several newspapers with broad national and international circulation. The *Bases de Licitación*, which served as terms of reference, were made available to prospective bidders. The latter were required to go through a phase of prequalification. A draft of the Concession Contract was provided to interested parties on 17 May 2004. Revised *Bases de Licitación* were finalized on 24 June 2004 after consultations with participants. They notably introduced a new exclusivity clause for the provision of inspection services in “Lima Metropolitana”.

58. Five companies sought prequalification. Of those, only two were deemed to be compliant with the specified qualifications. One of them was Ivesur, Lidercón’s consortium partner. Lidercón itself did not satisfy the prequalification criteria; the *Bases de Licitación* required bidders to have specific experience and practical expertise in the operation of vehicle inspection facilities, which Lidercón lacked – not having operated such facilities in Spain or elsewhere.

59. A third draft of the Contract was issued to the prequalified bidders on 21 July, and in the absence of comments from the bidders a final version on 26 July. On August 3, the Lidercón consortium provided a copy of the final Contract signed by Ivesur S.A. as the “prequalified operator”, together with a performance bond, a signature copy of the Consortium Agreement, and an economic proposal. On 19 August, CEPRI announced that the Lidercón’s consortium had prevailed by proposing the lowest inspection fee. On 20 September, Lidercón, Ivesur, and MML formally signed the *Contrato de Concesión*.

60. Four days before that, MML had enacted *Ordenanza* 694. Mr. Arturo Ruiz, who served on CEPRI from 2004 to 2010 and “directly participated in the preparation of *Ordenanza* 694”, writes in Paragraph 12 of his first witness statement that this text was a necessary complement to *Ordenanza* 506 in order to make clear, in Article 5, that the obligation to undergo inspections in Lima applied to “all vehicles registered in the *Oficina Registral* de Lima and Callao whose owners are domiciled in the province of Lima.”

61. Meanwhile, it is safe to say that trouble was brewing. Mr. Tarazona testified before the present Tribunal that notwithstanding the Minister's letter of 14 October 2003 his team was "fully certain" that MML did not have the authority to regulate and administer vehicle inspections. This divergence was the reason for consulting a leading Peruvian law firm, the Estudio Jorge Avendaño. Its opinion of 15 July 2004 confirmed the view of the Ministry's internal lawyers that MML "*no tiene competencia para otorgar en concesión el servicio técnico de los vehículos automotores que circulan dentro de su jurisdicción*" (does not have authority to grant a concession for the technical service of vehicles that circulate in its jurisdiction). In Mr. Tarazona's understanding, the Municipalities Law did no more than to authorise MML to verify that motor vehicles circulating within its jurisdiction has passed the inspection. (T 757:14-17.) For its part, MML solicited a number of opinions which expressed a contrary view (as will be seen below), but none of them was communicated to the Ministry as far as Mr. Tarazona knew; he said he was seeing them for the first time on the witness stand.

62. Another issue was being raised, initially by a written questions from a member of the Peruvian Congress with respect to the fees to be charged for the vehicle inspection services and the conformity of the planned Concession with the constitutional prohibition of anti-competitive agreements. The question was addressed to INDECOPI, which has the authority to prevent governmental entities from creating "barriers" to competition. INDECOPI thus examines the acts of public entities and where it deems it appropriate takes action against them, which may of course indirectly affect private parties who are advantaged by the barriers. The question was received on 20 August 2004. The *Comisión de Acceso al Mercado* (Market Access Commission) (as it then was called) instructed its Technical Secretary to determine whether the conditions were met for the Commission to open an investigation. In the report he produced ten days later, he explained that no fees had yet been imposed and the matter was not ripe for investigation by the Commission. He also concluded that the concession was not a legal monopoly that affected free competition rules. The documents he reviewed included neither the Concession Contract (yet to be signed) nor MML's *Ordenanza* 694 (which had not yet been issued). He did review *Ordenanza* 506, but noted that the inspection proceedings "will be regulated" by MML and the

corresponding fees established by means of an *ordenanza*, and made clear that such implementation could be subject to investigation by the Commission. As will be seen, the subsequent, substantive INDECOPI investigation in 2007 was rather triggered by and focused on *Ordenanza 694*.

## SALIENT CONTRACTUAL TERMS

63. Although the Claimant seeks to establish breaches of the Treaty, the alleged deprivation of which it complains is the wrongful impairment of its rights under the *Contrato de Concesión*. It is therefore necessary to be acquainted with its essential provisions.

64. The *Contrato* was signed by Lidercón Perú as the *Sociedad Concesionaria*, by Ivesur S.A as *Operador Precalificado* (Prequalified Operator), and by MML as *El Concedente*.

65. Clause 1.3 contains the following definitions:

*1.3.4. "Bases". Es el documento denominado "Bases de la Licitación Pública Especial Internacional" N° 001-2004-MML/CEPRI-LIMA para otorgar la Concesión de la Ejecución de la Infraestructura de las Plantas de Revisiones Técnicas y la Explotación del Servicio de Revisiones Técnicas Vehiculares para Lima Metropolitana, incluyendo cualquier formulario, anexo y todas las modificaciones que se hubieran introducido en el curso de la Licitación, así como las circulares emitidas por el CEPRI LIMA de acuerdo con sus facultades para establecer los términos de la adjudicación de la Concesión.*

....

*1.3.7. "Concesión". Es el acto administrativo plasmado en el presente Contrato, mediante el cual se establece una relación de Derecho Público, en cuya virtud EL CONCEDENTE otorga a la SOCIEDAD*

*CONCESIONARIA el derecho a explotar los Bienes de la Concesión y prestar el Servicio de Revisiones Técnicas Vehiculares, de acuerdo con las condiciones establecidas en el presente Contrato y a las Leyes Aplicables.*

*1.3.8. “Contrato de Concesión o Contrato”. Es el presente documento y sus anexos celebrado entre EL CONCEDENTE y la SOCIEDAD CONCESIONARIA, con la intervención del Operador Precalificado, el mismo que define derechos y obligaciones de las Partes y regula la Concesión otorgada a la SOCIEDAD CONCESIONARIA. Forman parte integrante del presente Contrato las Bases, Circulares y sus Formularios.*

English translation:

1.3.4. “Bidding Rules”. It is the document called “Special International Public Bidding Rules” No. 001-2004-MML/CEPRI-LIMA to grant the Concession for the Execution of the Infrastructure of the Technical Inspection Plants and the Operation of the Technical Vehicle Inspection Plants Service for Metropolitan Lima, including any form, annex and all the modifications that would have been introduced in the course of the bidding process, as well as the letters issued by CEPRI LIMA in accordance with its powers to establish the terms of the adjudication of the Concession.

....

1.3.7. “Concession”. It is the administrative act embodied in this Contract through which a Public Law relationship is established, in which virtue THE GRANTOR grants the CONCESSIONAIRE COMPANY the right to exploit the Concession Assets and provide the Technical Vehicle Inspection Services, in accordance with the conditions established in this Contract and the Applicable Laws.

1.3.8. “Concession Contract or Contract”. It is this document and its annexes concluded between THE GRANTOR and the CONCESSIONAIRE COMPANY, with

the intervention of the Prequalified Operator, which defines rights and obligations of the Parties and regulates the Concession granted to the CONCESSIONAIRE COMPANY. The Bidding Rules, Letters and their Forms are an integral part of this Contract.

66. Clause 2.1 stipulates that the *Contrato* and MML's *atribuciones* (powers) are delimited by the terms of the document and by the "*Leyes Aplicables*" (Applicable Laws) as follows:

*Por el presente Contrato, EL CONCEDENTE otorga a la SOCIEDAD CONCESIONARIA la Concesión. Este Contrato es de naturaleza administrativa y en él se establecen los derechos y obligaciones de las Partes con relación a la Concesión. En el marco de la ejecución de la Concesión, las atribuciones de EL CONCEDENTE están delimitadas por el presente Contrato y las Leyes Aplicables.*

English translation:

By this Contract, THE GRANTOR grants the CONCESSIONAIRE COMPANY the Concession. This Contract is administrative in nature and it establishes the rights and obligations of the Parties in relation to the Concession. Within the framework of the execution of the Concession, the powers of THE GRANTOR are delineated by this Contract and the Applicable Laws.

67. The expression *Leyes Aplicables* (Applicable Laws) is defined in Clause 1.3.20 as those cited in Clause 1.1 of the Contract which, in turn, identifies the "*Base Normativa*" (Legal Framework) of the Contract as including not only all the existing legal texts that are applicable to the Contract, such as the Constitution, the Organic Law on Municipalities, the 2003 National Vehicle Regulation, and Ordinance No. 506, but also, in the last two of thirteen unnumbered bullet points:

-- *Las Bases de la Licitación Pública Especial Internacional N° 001-2004-MML/CEPRI-LIMA, incluyendo las Circulares emitidas por CEPRI LIMA en el procedimiento de Licitación Pública.*

-- *Las normas modificatorias, derogatorias, complementarias, sustitutorias o interpretativas de las anteriormente citadas.*

English translation:

-- The Special International Public Bidding Rules No. 001-2004-MML/CEPRI-LIMA, including the Letters issued by CEPRI LIMA in the Public Bidding process.

-- The rules modifying, repealing, adding, substituting or interpreting the aforementioned.

68. Clause 2.3 provides that the Concession is granted within the “*ámbito geográfico de Lima Metropolitana*” (Metropolitan Lima geographic area)

69. Clause 2.4, entitled “Exclusividad” (Exclusivity), provides:

*La SOCIEDAD CONCESIONARIA tendrá exclusividad en la prestación del Servicio en Lima Metropolitana durante el plazo de vigencia de la Concesión.*

*La SOCIEDAD CONCESIONARIA no está impedida de prestar el mismo servicio en otras ciudades, provincias o regiones.*

English translation:

The CONCESSIONAIRE COMPANY shall have exclusivity to provide the Service in Metropolitan Lima during the term of the Concession.



The CONCESSIONAIRE COMPANY is not prevented from providing the same service in other cities, provinces or regions.

70. Clause 4 defines the basic term of the concession as 16 years, and defines the circumstances of its possible extension without the requirement of a bidding process.

71. Clause 17 contains an arbitration clause calling for the resolution of all disputes under the Rules of the National and International Centre of the Chamber of Commerce of Lima, and the acknowledgement that any award rendered thereunder shall be *definitivo e inapelable* (final and not subject to appeal).

72. Clause 19.4 provides that the *Contrato* may be terminated by the Concessionaire where the adoption and application of “a law,” or an “act, fact or omission” by MML results in the impossibility of performance or a grave non-observance of MML’s undertakings. It reads as follows:

*La SOCIEDAD CONCESIONARIA, podrá resolver el presente Contrato por culpa de EL CONCEDENTE cuando, como resultado de la aprobación y aplicación de una Ley o un acto, hecho u omisión de EL CONCEDENTE, resulte: i) Un incumplimiento [sic] parcial, tardío o defectuoso de las obligaciones contractuales si ello determina la imposibilidad de la ejecución del Contrato, ii) Un incumplimiento grave de las obligaciones asumidas por EL CONCEDENTE en el presente Contrato. Se exige, además, que dichos incumplimientos tengan un efecto sustancialmente adverso en el patrimonio de la SOCIEDAD CONCESIONARIA y que no pueda ser considerado como una Suspensión.*

*Para efectos del ejercicio de la facultad de resolución del Contrato, la SOCIEDAD CONCESIONARIA remitirá a EL CONCEDENTE para que lo subsane dentro de los sesenta (60) días siguientes a la fecha de notificación de dicho*

*requerimiento. De no subsanarse tal incumplimiento dentro del plazo antes indicado, el Contrato quedará resuelto de pleno derecho.*

English translation:

The CONCESSIONAIRE COMPANY, may terminate this Contract by fault of THE GRANTOR when, as a result of the passage and application of a law, or an act, a fact or omission of THE GRANTOR, which results in: i) A partial, late or defective breach [sic] of the contractual obligations resulting in the impossibility of performance of the Contract, ii) A grave non-observance of the obligations assumed by THE GRANTOR in this Contract. It is also required that such breaches have a substantially adverse effect on the assets of the CONCESSIONAIRE COMPANY and cannot be considered as a Suspension.

For the purposes of exercising the power to terminate the Contract, the CONCESSIONAIRE COMPANY shall refer to THE GRANTOR to remedy such breach within sixty (60) days after the date of the notification of said request. If such breach is not remedied within the aforementioned period, the Contract shall be terminated in full.

73. Clause 23.2, which Peru invokes in support of “the understanding that the Contract was an agreement subject to future changes” and refers to as “the equilibrium clause”, provides that either party could submit a proposal to reestablish the contractual equilibrium whenever it considered that the equilibrium had been affected by variations exceeding 10% of Net Revenues as a result of changes in the *Leyes Aplicables* (Applicable Laws), or their interpretation or application – and if necessary submit any controversy in that respect to arbitration:

*cuando cualquiera de las Partes que considere que el equilibrio económico del Contrato se ha visto afectado por variaciones mayores al 10% (diez por ciento) de los Ingresos Netos, como producto de cambios en las Leyes Aplicables, en la interpretación o en la aplicación de las*

*mismas, en relación a aspectos económico-financieros vinculados a (a) la inversión, propiedad u operación de las Plantas de Revisiones Técnicas Vehiculares, o (b) la ejecución del Contrato de Concesión, podrá proponer por escrito y con la necesaria sustentación las soluciones y procedimientos a seguir para restablecer el equilibrio económico en la magnitud que tenía en la Fecha de Cierre.... Si las Partes no se pusieran de acuerdo dentro del plazo de treinta (30) Días mencionado, entonces cualquiera de ellas podrá considerar que se ha producido una controversia y queda facultada a someterla a los mecanismos de solución de controversias establecidos en la Cláusula Décimo Sétima.*

English translation:

when any of the Parties that considers that the economic equilibrium of the Contract has been affected by variations of more than 10% (ten percent) of the Net Revenues, as result of changes in the Applicable Laws, in the interpretation or in the application thereof, in relation to economic-financial matters related to: (a) the investment, property or operation of the Technical Vehicle Inspection Plants, or (b) the execution of the Concession Contract, may propose in writing and with the necessary support the solutions and procedures to be followed to reestablish the economic equilibrium to the magnitude it had as of the Closing Date.... If the Parties fail to agree within thirty (30) days, either may consider that a dispute has arisen and is entitled to submit it to the dispute resolution mechanisms established in Clause 17.

## **POST-SIGNATURE DEVELOPMENTS**

74. This case involves considerable controversy about events and their causes, and about a multitude of actors and their motivation. To

understand and appraise the substantive claims and defenses, it is helpful to be clear about the chronology. This Section seeks to set out the broad sequence of relevant events without yet intending to make any judgments about them.

75. This necessarily abbreviated narrative gives particular attention to a central issue in this case, which is that of exclusivity. Three types of exclusivity are at play: (A) an entitlement to be the sole operator of inspection centers within MML's jurisdiction, (B) the imposition of an obligation on all residents and operators of transportation services within MML's jurisdiction to use only centers operated by Lidercón, and (C) the imposition of the same obligation on all vehicles habitually using roadways within MML's jurisdiction. Three questions recur in the case of each of these putative entitlements: (i) did MML in fact grant it; if so, (ii) did MML have the authority to grant it; and, in any event, (iii) did Peru commit a breach of the Treaty in curtailing it as part of its reform of the national vehicle inspection regime?

76. On 1<sup>st</sup> September 2004, that is to say 20 days before the Contract was concluded, the Technical Secretary of one of the Commissions within the Peruvian competition authority, INDECOPI, as already mentioned (see Paragraph 62 above) prepared a report responding to questions submitted by a member of the Peruvian Congress and concluding that no fees had yet been established for INDECOPI to conduct an investigation. In Paragraph 15, however, he wrote that the grant of concessions to conduct technical inspections:

*...no puede catalogarse como la creación de un monopolio legal que afecte las normas de libre competencia, toda vez que lo que se está concesionando no es una actividad económica de iniciativa privada sino una actividad pública o función pública que va ser realizada con la participación del sector privado, lo que de por sí constituye una actividad exclusiva de la administración pública.*

English translation:

...cannot be categorized as the creation of a legal monopoly affecting norms of free competition, because the subject of the concession is not a private initiative economic activity but rather a public activity or public function to be carried out with private sector participation, which itself constitutes an exclusive activity of the public administration.

77. On 16 September 2004, that is to say four days before the Concession Contract was signed, MML enacted Ordinance No. 694 (see Paragraph 60 above). In Article 3, it provided in effect exclusive rights; inspection services would be provided in accordance with the Contract with the “*Entidad Revisora*”, i.e. Lidercón Perú. The Ordinance moreover expanded the contractual exclusivity by providing that all residents of the Province of Lima whose vehicles were registered in either Lima or Callao, and any vehicles that drove within the Province, were also required to obtain their certificates from the concessionaire’s facilities, unless they had a certificate issued by an *entidad revisora* authorised by the Ministry, or a temporary certificate issued by MML allowing them to drive within the Province for up to 30 days within the same calendar year.

78. Ordinance 694 was to trigger a review carried out in 2007 by INDECOPI to determine whether it had created “illegal and unreasonable bureaucratic barriers” to competition. This led to the developments described in Paragraphs 101-113 below.

#### *Relations between Lidercón and Ivesur*

79. The Lidercón venture in Peru, it seems, was fraught with recurrent disputation from the very beginning. Most of it involved various public entities, but the first post-signature clouds on the horizon concerned the relations between the two Spanish co-venturers.

80. The *Bases de Licitación* required that bidders must have operated more than five vehicle inspection centers in the last eight years, of which more than three consecutive years as the primary operator and with a flow of at least 500,000 vehicles per year. Ivesur provided evidence of compliance with these conditions to CEPRI, which informed Ivesur on 24 July 2004 that it had prequalified in the tendering process.

81. The Lidercón and Ivesur consortium won the bid and thereafter incorporated Lidercón Perú on 9 September. Lidercón became the majority shareholder with a 70% stake in the Peruvian company. While Ivesur took only a 30% stake, it was agreed that Ivesur's representative would preside Lidercón Perú's board of directors.

82. Lidercón Perú, MML, and Ivesur (as the "Prequalified Operator"), entered into the Concession Contract on 20 September, but the ink had hardly dried on the Contract when the partners were at logger-heads, leading to a series of arbitrations initiated by Ivesur, which claimed that it was being ousted from the project even at the pre-operational stage.

83. The first of these conflicts began to emerge little over one month into the life of the Concession Contract. On 10 November 2004 Lidercón Perú held a shareholders meeting in Málaga, Spain, where it removed Ivesur's representative, Mr. Espinosa Vallés, as Chairman of the Board, and appointed Mr. Vicario in his stead. Lidercón Perú kept Mr. Espinosa Vallés as Vice-Chair. The appointments, however, did not take effect because Lidercón Perú was unable to register them in the Lima Public Registry of Corporations. Thus, Mr. Espinosa Vallés continued to carry out his duties and exercise his powers as Chairman of the Board, which apparently did not sit well with Mr. Vicario who on 31 January 2005 held another shareholder's meeting of Lidercón Perú without informing Ivesur, and ousted Ivesur from the Board completely. Mr. Vicario appointed himself as Chairman of the Board and Mr. Raúl Barrios as Vice-Chair, Ivesur therefore initiated arbitration against Lidercón Perú. On 17 March 2006 the arbitral tribunal found in favor of Ivesur and annulled the appointments made in January 2005. Undeterred, on 31 March 2006 Mr. Vicario reappointed himself and Mr. Barrios as Chair and Vice-Chair,

respectively, but included Mr. Espinosa Vallés as the third member of the board.

84. In August 2005, Ivesur initiated a second arbitration against both Lidercón Peru and MML. It requested the termination of the Concession Contract, notably on the grounds that it insisted on being liberated from a contract where its partner had usurped operational functions which it was not capable of performing. Ivesur published a full page advertisement in the Peruvian press where it stated that both Lidercón and MML had excluded Ivesur, the Prequalified Operator, from the preoperative and operative phases of the Concession; it warned that Lidercón had no experience whatsoever in vehicle inspections, and that therefore Ivesur bore no responsibility for any negative consequences arising out of vehicle inspections carried out in Lidercón Perú's plants. It also informed the public at large that these circumstances had led it to initiate an arbitration against Lidercón Perú. Ivesur's claim was dismissed in its entirety four years later because the arbitrators decided that it lacked legal standing to seek termination of the Concession Contract.

85. Between June 2005 and April 2006 Lidercón Perú, Ivesur and MML engaged in negotiations to address difficulties that Lidercón Perú faced in obtaining the necessary authorizations to construct the inspection centers and the consequent need to postpone the deadline set out in the *Contrato de Concesión* for the inspection centers to commence operations. While Lidercón Perú and MML agreed to extend the deadlines, Ivesur opposed any extension because Lidercón Perú had excluded it from participating in the pre-operative phase.

86. On 8 September 2006, Lidercón Perú filed an arbitration against MML under the Concession Contract which was in substance directed at Ivesur, since it was seeking Ivesur's removal from the Contract altogether. MML rejected this request, and counter-claimed instead for the simple termination of the Contract on the grounds that both consortium members had acted in bad faith by not proceeding in accordance with the contractual role originally set out in the *Bases de Licitación*. This case resulted in the 2007 partial settlement agreement denominated *Acuerdo Conciliatorio* (Settlement Agreement), to which

reference will be made in the immediately following section dealing with Liderc3n's relations with MML.

87. The conflict between Liderc3n and Ivesur made their cooperation impossible, and Liderc3n accordingly in September 2007 demanded that MML accept another entity, Denham, as a new Pre-Qualified Operator —although Denham had been unsuccessful in its attempt to qualify as part of a competing project in the course of the bidding process.

88. This was the background of the findings of a Congressional Commission one year after the signature of the Concession Contract which criticized the way in which Liderc3n had effectively ejected the only entity that had the technical expertise and financial strength required to comply with the Contract.

89. Although this narrative indicates significant tensions, the fact that Ivesur's association with Liderc3n ceased in acrimony did not lead to the frustration of the *Contrato de Concesi3n*, which remains in effect as of this writing. This part of the background is therefore not significant to the outcome of this arbitration.

*Liderc3n's Relations with MML prior to the Acuerdo Conciliatorio in August 2007*

90. The Concession Contract called for the inspection centers to be opened in September 2005. There was an agreed postponement to March 2006. Even then, MML was not disposed to grant authorization for the opening. Liderc3n therefore initiated an arbitration, decided in its favor in January 2007, with an award ordering MML to authorize the immediate opening of the first center and the two others upon their completion. MML remained dissatisfied and sought the setting aside of the award.

91. That controversy flowed into the one which had already led to the arbitration commenced in September 2006 (see above) relating to Ivesur's withdrawal from the project. Negotiations between MML and



Lidercón resulted in an *Acuerdo Conciliatorio* in August 2007 which Peru refers to as “the 2007 Partial Settlement Agreement”. The first two inspection centers were accordingly opened in September 2007, and the total number of centers was increased to five, although the opening dates were variously extended —to mid-March 2008 in the case of the final one, i.e. two and a half years later than the deadlines of the Contract.

92. In the end (for present purposes) the import of the 2007 *Acuerdo Conciliatorio* is that it wiped the slate clean between MML and Lidercón Perú; all disputes were withdrawn and any potential claims extant were waived. Although the State itself is not a party as such to this document, Peru explicitly accepts this conclusion in Paragraph 91 of its Counter-Memorial.

#### *Lidercón’s Relations with MML Immediately After the Acuerdo Conciliatorio in August 2007*

93. The peace reached in August 2007 was not of long duration. The first-opened centers were in MML’s view unable to meet the demand, as customers had to face more than 24-hour waits to be inspected. The fourth of the five centers (scheduled pursuant to the *Acuerdo Conciliatorio* to open on 10 October 2007) was never delivered, and led MML to seek the termination of the Concession Contract by a Mayoral Declaration of *Caducidad* (termination) in February 2008, leading to yet another arbitration, which proceeded by way of consolidation to incorporate three additional cases also commenced by Lidercón after the *Acuerdo Conciliatorio* (not counting two which were terminated for failure of deposit of the required arbitration fees). These arbitral proceedings were concluded in 2011 by an award which is a central feature of this case, that is to say after the *Ley ITV* and the 2008 Regulation adopted pursuant to the *Ley ITV*, had come into effect.

### *The 2008 Ley ITV and the 2008 Regulation*

94. The issue of attribution of regulatory authority described in the above-quoted Paragraphs 27-28 of Peru's Counter-Memorial (see Paragraph 56 above) was dealt with by the adoption in 2008 of a National Vehicle Inspection Law (the "*Ley ITV*") intended to create, as the object defined in Article 1, a "national system" of technical vehicle inspections.

95. The new Law followed a Congressional inquiry into the Lidercón Concession which had concluded that it had been awarded with insufficient attention to Lidercón, S.L.'s lack of experience, that it had created a monopoly in violation of the General Transportation Law, and that the uncertainty with respect to MML's powers to authorize vehicle inspections should be resolved by Congressional action. The report following this inquiry was followed by the deliberation and enactment of the *Ley ITV*.

96. Specifically, the *Ley ITV* designated the Ministry, in Article 3, as having "exclusive competence" with respect to approving and overseeing vehicle inspections throughout the nation, thus preparing the ground for MTC's issuance of the 2008 Regulation. It also made it clear that concessions for ITV Centers would not be exclusive (Article 3) and that vehicle inspection certificates were valid nationwide (Article 7), i.e. irrespective of the owner's choice of inspection center.

97. Moreover, the Third Final Provision of the *Ley ITV* repealed Article 161(7.6) of the *Ley Orgánica de Municipalidades* (see Paragraph 51 above) and rendered nugatory "*todas las normas que se oponen a la presente Ley*" (all norms that conflict with this law).

98. On the other hand, the first of three "Final Provisions" of the *Ley ITV* provided that the regulatory functions of the Ministry would be "*de aplicación supletoria*" (supplementary application) to any concession contracts entered into under prior law, and that State entities having entered into such Contracts would be responsible for their contractual obligations under their own budgets.

99. In the same vein, the more detailed 2008 Regulation provided, in the second of two “*Disposiciones Complementarias*”, that parties having been granted concessions prior to the entry into effect of the *Ley ITV* could continue performing vehicle inspections, in strict compliance with their contracts and, provided they confirm to the provisions of that Regulation. The precise wording merits quotation:

*Segunda.- Estando a lo dispuesto en la Primera Disposición Final de la Ley No. 29237, Ley del Sistema Nacional de Inspecciones Técnicas, las personas jurídicas que hayan celebrado Contrato de Concesión al amparo de otras normas en materia de revisiones o inspecciones técnicas vehiculares antes de la vigencia de la citada Ley, podrán continuar realizando las inspecciones Técnicas Vehiculares materia de su contrato de concesión en estricto cumplimiento de los alcances del mismo, previa adecuación a las disposiciones señaladas en el presente Reglamento mediante la presentación ante el Ministerio de Transportes y Comunicaciones del Certificado de Inspección Inicial del CITV, el Certificado de Homologación de Equipos del CITV y la Constancia de Calibración de Equipos del CITV dispuestos en el presente Reglamento, los mismos que deberán ser emitidos de conformidad con lo establecido en la Segunda Disposición Complementaria Transitoria del presente Reglamento. En estos casos, la obligatoriedad y exigibilidad de las Inspecciones Técnicas Vehiculares se sujetarán al cronograma que con carácter general apruebe la DGTT mediante Resolución Directoral.*

*Las entidades del Estado que participaron en los contratos referidos en el párrafo anterior ejercen sus obligaciones contractuales con cargo a sus respectivos presupuestos.*

English translation:

Second.- In accordance with the First Final Provision of Law No. 29237, Law of the National System of Technical

Inspections, the legal persons that have entered into a Concession Contract under other norms on technical vehicle inspections or revisions before of the entry into force of the aforementioned Law, may continue to carry out the Technical Vehicle Inspections subject to their concession contract in strict compliance with the scope of that contract, provided that they previously conform to the provisions of this Regulation by submitting to the Ministry of Transportation and Communications the CITV Initial Inspection Certificate, the CITV Equipment Conformity Certificate and the CITV Equipment Calibration Certificate provided for in this Regulation, which certificates shall be issued in accordance with the provisions of the Second Provisional Supplementary Provision of this Regulation. In these cases, the mandatory nature and enforceability of the Technical Vehicle Inspections will be subject to the schedule that the DGTT generally approves by means of a Directive Resolution.

The State entities that participated in the contracts referred in the previous paragraph exercise their contractual obligations in accordance with their respective budgets.

### *The Situation Created for MML and Liderc3n by the Ley ITV*

100. As seen above, by the time of the enactment of the *Ley ITV* the Municipality had already declared the Concession Contract to be void, and Liderc3n had reacted by filing an arbitration to challenge that action.

101. The manner in which the *Ley ITV*, as well as the 2008 Regulation issued by the Ministry, dealt with *already existing* concession contracts (in effect the Liderc3n Contract) was thereafter subject to debate in the then-pending arbitration between MML and Liderc3n, and continued into the present ICSID proceedings.

102. Once the 2008 Regulation was adopted in August 2008, new applications emerged for authorizations to establish vehicle inspection centers throughout Peru. In March 2009, an *informe* (report) of the Ministry (No. 574-2009-MTC/08) made clear that in the absence of “*un pronunciamiento arbitral*” (a decision from an arbitral tribunal) to contrary effect, the Ministry was obliged to respect both the *Contrato* and its exclusivity clause, and therefore reject any applications by other parties for authorization to carry out vehicle inspections in Lima. As late as 2 December 2015, another *informe* (No.919-2015-MTC/15.01), referring to the *Disposición Primera Final* of the *Ley ITV*, confirmed the same position to the effect that no competing authorizations would be granted within the Province of Lima. That this was the Ministry’s position was confirmed by Ms. Arias in the course of her cross-examination.

103. The Ministry declined to approve any applications for centers in Lima until the INDECOPI Tribunal confirmed that the Ministry’s rejection of applications based on the Contract’s exclusivity clause was unlawful.

104. INDECOPI, the Peruvian competition authority, is a large agency of the Peruvian State attached to the Prime Minister’s office. Its elaborate organization includes Specialized Commissions that act in first instance, one of which is the *Comisión de Eliminación de Barreras Burocráticas* (Elimination of Bureaucratic Barriers Commission) [previously *Comisión de Acceso al Mercado* (Market Access Commission)] (hereafter the “*Comisión*” or “Commission”) and of the INDECOPI Tribunal, comprised of Specialized Chambers (*Salas Especializadas*) of the INDECOPI Tribunal at the appellate level, including the *Sala Especializada en Defensa de la Competencia* (Specialized Chamber for the Defense of Competition). The Commissions conduct investigations and issue administrative decisions on the matters within their competence, and their decisions can be appealed before the corresponding Chamber of the INDECOPI Tribunal. The Tribunal’s decisions can then be challenged before the Peruvian courts.

105. Article 61 of the Peruvian Constitution prohibits monopolies. INDECOPI’s tasks include ensuring compliance with this prohibition

by investigating “bureaucratic barriers” to competition created by governmental entities and ordering them to be eliminated. Decisions of the INDECOPI Tribunal are obligatory. Officials who fail to act in accordance with them may, as Ms Arias testified without contradiction, be sanctioned and fined *personally* (T. 856:1-8).

106. The Technical Secretary of the *Comisión*, as already explained, wrote a report on 1 September 2004 in response to an inquiry from a member of Congress. A passage of that report has already been quoted in Paragraph 76 above.

107. *Ordinance* 506 did little more than to affirm the obligatory nature of inspections in the province of Lima, which as explained by Mr. Ruiz in his witness statement was insufficient “*para regular las revisiones técnicas en Lima*” (to regulate the technical inspections in Lima). As noted, *Ordinance* 694 broadened the exclusivity of the Concession (see Paragraph 77). It also established the mandatory program for recurring vehicle inspections. However, vehicle inspections would not begin for another three years and *Ordinance* 694 does not appear to have attracted much attention until then.

108. On 8 September 2007, MML authorized the commercial operation of the first two of Lidercón Perú’s inspection centres. The previous day, it published *Ordenanza* 1064, which amended *Ordenanza* 694 by establishing the new mandatory program for recurring vehicle inspections (to which MML and Lidercón Perú had agreed in the *Acuerdo Conciliatorio*; see Paragraph 91). On September 11, the Technical Secretary of the INDECOPI *Commission* recommended conducting an inquiry in order to determine if the exclusivity provisions contained in *Ordenanza 694* created an illegal and irrational bureaucratic barrier. (INDECOPI’s authority is limited to the review of laws and regulations issued by the government. It does not have jurisdiction to rule on the enforceability of contracts.) Two days later, on September 13, INDECOPI *ex officio* initiated the proceeding.

109. Lidercón Perú was invited to submit its observations as an interested “third party” but the Commission recorded that Lidercón Perú failed to avail itself of that opportunity.

110. On 24 January 2008, the Commission entered a detailed *Resolución* deeming MML’s *Ordenanza* 694 to have created an unconstitutional barrier to competition, which:

*afecta a los potenciales competidores de la empresa concesionaria y sobre todo, a los ciudadanos que se ven forzados a contratar un servicio monopolístico para poder desarrollar sus actividades económicas.*

English translation:

affects potential competitors of the concessionaire company and, above all, the citizens who are forced to hire a monopolistic service in order to perform their economic activities.

111. After declaring it to constitute a bureaucratic barrier, the Commission ordered that the *Ordenanza* be forwarded to the public prosecutor to initiate an action for unconstitutionality.

112. Both MML and Lidercón appealed to the INDECOPI Tribunal, which on 22 August 2008 upheld the Commission’s decision in a 126-paragraph decision, containing notably (at Paragraph 116 of the decision) this rejection of MML’s argument to the effect that the very bidding process ensured competitive behavior:

*... el servicio de revisiones técnicas no tiene características de monopolio natural y de la información que obra en el expediente, no encuentra justificación jurídica o económica la asignación exclusiva de su operación a un competidor otorgando con ello un monopolio legal. Durante el informe oral ante la Sala, la*

*Municipalidad señaló que la exclusividad en el servicio buscaba asegurar la rentabilidad del operador.<sup>44</sup> Sin embargo, dicho argumento resulta inaceptable para justificar el otorgamiento de un monopolio.*

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*(44) En la audiencia de informe oral realizada el 10 de junio de 2008, cuando se preguntó al representante de la Municipalidad el por qué de la exclusividad en el servicio de revisiones técnicas vehiculares, señaló lo siguiente:*

***Municipalidad Metropolitana de Lima:*** *Debido a que durante dieciocho años no hubo revisiones técnicas fue necesario comenzar todo el proceso de cero. Para eso se hizo, se contrató a una firma evaluadora de mercado que detectó que la única forma de que fuera rentable para un privado ejercer este servicio público, dado que la Municipalidad es deficitaria, no tiene plata para hacer este tipo de cosas por otras consideraciones económicas, se decidió que lo mejor era que lo hiciera un privado, entonces (...)*

***Sala:*** *Discúlpeme, me está diciendo usted que los monopolios son rentables. La única manera de rentabilizar es a través de garantizar (...) un monopolio.*

***Municipalidad Metropolitana de Lima:*** *(...) Como todos los contratos de concesión de monopolios naturales hay que garantizarle al privado la estabilidad del contrato.*

English translation:

... technical inspection services do not have the characteristics of natural monopoly and the information in the case file provides no economic or legal justification for the allowing a competitor to operate as a legal monopoly. In the course of oral submissions before the Chamber, the Municipality argued that the exclusivity of service was intended to ensure the profitability of the



operator.<sup>44</sup> This argument, however, does not justify the grant of a monopoly.

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FOOTNOTE 44. In the course of the oral hearings on 10 June 2008, when the representative of the Municipality was asked the reason for exclusivity, he offered this:

**MML:** Given that for 18 years there were no technical inspections it was necessary to start from zero. Therefore advice was taken from a firm which analysed the market and found that the only way to make it profitable for a private party to carry out this public service, given that the Municipality operates with a deficit, and does not have the funds do carry out these kinds of things for other economic reasons, it was decided that the best would be to have it done by a private entity, and so ...

**Chamber:** Excuse me, you are telling me that monopolies are profitable. The only way to achieve positive returns is by granting a ... monopoly.

**MML:** ... Like all concession contracts for natural monopolies, one must assure the private party of contractual stability.

113. In November 2008, MML formally repealed Ordinances 506, 694 and 1064 (along with Ordinance 1120 which had temporarily suspended vehicle inspections) in order to conform its legal framework to the *Ley ITV*, which had generally abrogated all norms that were contrary to the *Ley ITV*. Yet the *Contrato de Concesión* remained in force and protected under the First Final Provision of the *Ley ITV*. The difficulty thus created came to a head on numerous occasions. As early as January 2009, Check & Go S.A.C. applied to MTC to obtain authorization to operate an ITV center within the Province of Lima. Other companies followed suit.

114. Prior to deciding Check & Go's application, MTC sought not only the opinion of its own legal counsel's office regarding the exclusivity clause of the Concession Contract in relation to the Final Provisions of the *Ley ITV*, but also that of external law firms. MTC

denied authorization for Check & Go to operate within the Province of Lima because “it is under an obligation to respect the concession contract entered into by LIDERCÓN and the Municipalidad Metropolitana de Lima and therefore it cannot grant other operators authority within the jurisdiction of Lima Metropolitana.” MTC consequently denied Check & Go’s administrative appeal for the same reasons. This led Check & Go to resort to INDECOPI.

115. In 2009 the INDECOPI *Comisión* concluded that MTC’s denial of Check & Go’s application was an illegal bureaucratic barrier because MTC had not shown that the Contract was in force at the time, given that MML had previously declared the *caducidad* of the Contract. MTC then lodged an appeal with the INDECOPI Tribunal, arguing yet again that it was under an obligation to respect the Concession Contract’s exclusivity provision. MTC requested that Lidercón Perú be summoned to participate in the appeal as an intervenor because it was a party to the *Contrato de Concesión* and it had obtained an injunction against the *Declaratoria de Caducidad* in the arbitration proceedings, which had been granted, thus suspending its effects pending the conclusion of the arbitration.

116. On 11 April 2011, the INDECOPI Tribunal confirmed the Commission’s determination that the MTC’s denial of Check & Go’s application was an illegal bureaucratic barrier because it had not been shown that after the *Declaratoria de Nulidad* the Concession Contract had remained in force. At the same time, the Tribunal stated that its decision had no bearing on whether the Concession Contract (and its exclusivity clause) was valid or not, because that matter was subject to the jurisdiction of arbitration tribunals or the judiciary. Thus, it cautioned that its decision was limited to Check & Go and only in respect of the specific application that had been denied.

117. Check & Go sought in parallel to nullify the MTC decision before the *Corte Superior de Justicia* of Lima. Both proceedings ran concurrently (although the court case took longer to be decided). Lidercón Perú also intervened in that proceeding. On 22 January 2011, the Court rejected Check & Go’s complaint. It concluded that the Concession Contract and its exclusivity clause were protected under Article 62 of the Peruvian Constitution (which upholds the

stability of contracts). It found that the Concession Contract was in force when MTC denied Check & Go's application because the arbitral tribunal had granted injunctive relief against the *Declaratoria de Caducidad* and MTC had no authority to grant authorizations that conflicted with the exclusivity clause of the *Contrato de Concesión*.

118. In 2012, about a year after the INDECOPI Tribunal had issued its decision in the Check & Go case, another company, Kensington, applied to MTC for authorization to operate a CITV in the Province of Lima. MTC denied the authorization on the same grounds that it had invoked with respect to Check & Go: in essence, because it was under an obligation to respect the Concession Contract's exclusivity clause. Kensington challenged this decision before the INDECOPI Commission. Both MML and Lidercón Perú were summoned and they appeared to present their views.

119. In December 2013 the Commission issued its decision. It concluded that MTC's denial of Kensington's application was an illegal bureaucratic barrier because the *Ley ITV* did not contemplate that authorizations could be denied on grounds that the *Contrato de Concesión* provided for exclusivity. The Commission made clear that, to the contrary, the *Ley ITV* precluded exclusivity.

120. MTC, MML and Lidercón Perú appealed the decision. On 21 August 2014, the INDECOPI Tribunal confirmed the Commission's decision. Kensington reapplied for authorization in March 2015. In June, the MTC complied with the INDECOPI Tribunal's decision and granted Kensington a 5-year authorization to operate an ITV center, the first it granted for vehicle inspections within Lima.

121. In 2017 Lidercón challenged a decision of the INDECOPI Tribunal that was favorable to yet another one of its competitors, Fermax, before the *Corte Superior de Justicia* of Lima, which joined MTC and MML to the case *en calidad de litisconsortes necesarios activos* (as indispensable active third parties in the proceeding). Once again, INDECOPI's *Resolución* was upheld. In particular, the Court analyzed the much-debated first *disposición final* of the *Ley ITV* as follows:

*Entre los diversos criterios de interpretación de una norma, se encuentra el de la interpretación literal, el cual exige que ello se realice atendiendo el sentido propio de las palabras.*

*En ese entendido, dicha disposición se encuentra referida a la función normativa del MTC, esto es, a la función de reglamentar la ley o emitir normas sobre la materia, más no lo supedita en el ámbito de Lima Metropolitana a la observancia de la cláusula de exclusividad contenida en el contrato de concesión en mención ; ello encuentra asidero además, en que el MTC tampoco podrá contravenir lo establecido por la propia Ley, esto es, que las autorizaciones para el funcionamiento de los CITV se otorgan sin carácter exclusivo.*

English translation:

Literal interpretation, which focuses on the inherent sense of the words used, is one of several criteria used to interpret a norm.

Given this understanding, the provision in question refers to the normative functioning of MTC, namely the function of regulating the law or setting down relevant norms, which is not subordinated, with respect to the zone of metropolitan Lima, to compliance with the exclusivity clause contained in the contract in question; this conclusion moreover finds support in the observation that MTC itself may not disobey what is established in the Law itself, which means that authorisations to operate vehicle inspection centers are to be granted without exclusivity.

### *The 2011 Award and its unenforceability*

122. After MML adopted a *Resolución* (on 7 February 2008) declaring the *caducidad* of the Concession Contract due to Lidercón's alleged failure of performance, Lidercón brought arbitral proceedings

against MML under the rules of the Lima Chamber of Commerce in order to compel compliance with the Contract.

123. On 4 November 2011, the arbitral tribunal rendered its award, comprising 95 single-spaced pages. Its initial substantive determination, in Paragraph I.1 on the first page, refers to the new rules established for the national system of ITVs which had emerged in 2008 as the *Ley ITV*. The arbitrators held simply that although these new rules gave the Ministry “*competencia exclusiva*” (exclusive jurisdiction) with respect to management, inspection, and sanctioning on the national level, Metropolitan Lima constituted an “exception” because it was governed (“*se rige*”) by the Lidercón Concession Contract.

124. In the course of the arbitration, the tribunal had sent a number of letters to the Ministry which went unanswered, including a series of communications between 12 April and 23 August 2011 to the Minister, inviting him to designate someone to represent MTC in “*sesiones de trabajo*” with the arbitrators, to determine whether, as the new competent entity for ITVs, the Ministry could become subrogated in MML’s contractual position and, if so, to consider the implications with regard to existing disputes between Lidercón Perú and MML, and the *caducidad* or required modification of the Contract in light of the *Ley ITV*.

125. The proceedings were thereafter suspended by reason of the withdrawal of one of the arbitrators and difficulties in reconstituting the tribunal, whereupon the two remaining arbitrators, preoccupied by the prospects of what they referred to as indefinite obstacles as well as restrictions and incompatibilities with their professional activity, inquired whether they could proceed as a truncated tribunal and render the award.

126. On 27 July 2011, the arbitrators had received a communication from the Vice-Minister, forwarding the text of an opinion from the MTC General Counsel which concluded, in answer to a letter dated 23 July 2010, that the replacement of MML with MTC as Lidercón Perú’s contracting party was not “*viable*”.

127. Having finally been reconstituted, the tribunal was prepared to render the award when it received a communication from SUTRAN, the MTC agency responsible for the supervision of ITVs, expressing concerns—in light of its regulatory responsibilities—with respect to Lidercón Perú’s refusal to submit to inspections of the functioning of its centers; Lidercón Perú was taking the position that SUTRAN had no authority over it because its activities were entirely governed by the Contract. SUTRAN requested that the arbitrators inform it of how Lidercón Perú was being supervised and which entity the arbitrators had deemed competent to perform this duty.

128. The tribunal found, as explained in the 2011 Award, that SUTRAN was not entitled to expect a response to its questions or receipt of the requested information. Referring to provisional measures which they had put in place, the arbitrators held that “*SUTRAN confunde fiscalización del contrato, de los mecanismos impuestos por el Tribunal Arbitral*” (SUTRAN confuses oversight of the contract and the mechanisms imposed by the Tribunal), related to its provisional measures and referred to SUTRAN’s arguments as “*absolutamente incompatibles con las decisiones adoptados por el Tribunal Arbitral*” (absolutely incompatible with the decisions adopted by the Arbitral Tribunal).

129. The 2011 Award held that MML had not proved that Lidercón had failed to meet its obligations as revised by the 2007 Partial Settlement, and therefore deemed MML’s termination (by Municipal Resolution) to have breached the Contract, which it declared to be in force although the arbitrators ordered revisions of some of its terms, and ordered MML to resume full performance, including the return of a performance bond and compensation for works performed (totaling some US\$ 700,000 plus interest).

130. MML applied for judicial annulment of the 2011 Award before a commercial court of first instance in Lima, which in a brief judgment of 29 September 2015 rejected the application and ordered the 2011 Award to be enforced.

131. MML appealed this decision. Its grounds included, notably, the arguments that carrying out the 2011 Award would violate the Constitution (by allowing the operation of a monopoly), as well as the *Ley ITV*, (by transgressing the prohibition of exclusivity as per its Article 4). The appellate division of the *Corte Superior de Justicia* of Lima rejected MML's appeal by a judgment of 26 July 2016, holding that these arguments could not be raised at this stage given that they had not been argued before the arbitral tribunal.

132. Notwithstanding the 2011 Award, from June 2015 onward the Ministry, as noted above (in Paragraph 120), had slowly begun to authorise other operators to open ITV centers in Lima in compliance with the INDECOPI Tribunal's decisions (and over time had by 2019 given more than 50 such authorizations). In reaction, Liderc3n had sought and obtained a judicial order of *ejecuci3n forzada* (enforcement); MML's appeal from that order was rejected. Thereafter, Liderc3n also obtained the commencement of judicial proceedings against officials of MML and the pronouncement of fines on the Municipality for non-compliance with the 2011 Award.

133. MML appealed the orders of enforcement of the award. On 11 September 2017, the *Corte Superior de Justicia* of Lima rendered its judgment, which Liderc3n criticizes in vehement terms because the Court concluded that the *Ley ITV* had conferred exclusive competence on the Ministry over all matters concerning vehicle inspections and deprived MML of such competence, including to enter into, regulate, amend or adjust the Concession Contract, and to regulate and exercise control or compliance oversight over CITVs. Therefore, it declared that parts of the 2011 Award which called upon the Municipality to act beyond the scope of its competence were unenforceable.

134. In sum, the only enforceable part of the 2011 Award was the payment of the amounts the arbitrators had held were due by MML. (The record shows that they have been paid in principal, C-127, p. 9; there may still be an issue with respect to the computation of interest thereon.)

135. In 2018, Lidercón Perú brought before a constitutional court an *acción de amparo* against the Superior Court's judgment. The constitutional court quickly dismissed it. The court noted that the Superior Court judges had upheld MML's appeal and that Lidercón Perú's complain was simply one of disagreement on the merits of the decision, whereas *amparo* is intended to ensure that constitutional protections, included due process, are not violated, and not as a further means of appeal.

136. This sequence of arbitral and judicial decisions involved MML and Lidercón Perú as disputing parties, but obviously had considerable implications for the Ministry. As a result of yet another *acción de amparo* brought by the Ministry against a different court judgment, the *Corte Superior de Justicia* of Lima on 16 October 2017 upheld the Ministry's petition that the 2011 Award be declared as being *sin efecto legal* (without legal effect) with respect to the Ministry and three third party companies (*terceros coadyuvantes*) competing with Lidercón in Lima.



## ADMISSIBILITY

137. If Lidercón, S.L. is acting without requisite corporate authority, as Peru asserts, its claim could not be brought before *any* jurisdiction. This issue therefore falls to be treated as a matter of admissibility.

138. Peru contends that Mr. Vicario, the purported representative of Lidercón, initiated the present arbitration without necessary authority and has not subsequently established it by ratification. Lidercón retorts that Peru's objection is *absolutamente formalista* (absolutely formalistic), in concluding that Mr. Vicario lacked authority, has incorrectly interpreted the legal import of the ICSID Institution Rules as well as misstating the factual circumstances pertinent thereto; has wrongly conflated the rules for initiation with the requirements of admissibility; and has incredibly concluded that an investor which has expended vast sums of money in these proceedings in the course of three years never consented to this arbitration.

139. Counsel for Lidercón, SL, under the instruction of Mr. Vicario, observed that the latter directly or indirectly controls 99.4 % of its shares, as he confirms in his Third Witness Statement (Paragraph 5) and demonstrates by producing documents from his two relevant holding companies (Zilfeco Inversiones, S.A. and Inversiones y Proyectos Zilfeco, S.L.). Nevertheless, Peru considers that these proceedings are inadmissible because they were not initiated in compliance with the ICSID Institution Rules (which amplify Article 36 of the ICSID Convention). Specifically, Rule 2 requires that a request for arbitration "shall ... (f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request."

140. This objection is based on the discovery that Mr. Vicario's declaration of 18 January 2017 in support of Lidercón, SL's Request incorrectly referred to him as the company's *Administrador Único*, whereas the structure of the company had been transformed on 31 October 2016 so as to be governed by a Board of Directors. (Mr. Vicario himself became a Board Member at the time of ceasing his function as *Administrador Único*.) This also means, in Peru's

submission, that the appointment of Hogan Lovells as counsel with powers of attorney (on 25 November 2016) was also unauthorized.

141. Peru also complains of the fact that the subsequent decision to place the company in liquidation was not disclosed.

142. The objection of lack of authority has raised a number of issues of Spanish law which have been thoroughly debated, and been the subject of extensive legal opinions by the Parties' experts, Dr. Bravo for Peru and Dr. Vaquerizo for Lidercón. (The former was also called to testify before the Tribunal.) It is of course understandable that the significance of purported acts of a Spanish corporate entity are examined in light of Spanish law, but in the Tribunal's view not without hesitation, because in some respects the concerns of Spanish law in this respect are conceived by the legislator in light of the exercise of rights defined by Spanish law, including those of third parties. It is not obvious that the requirement and solutions of Spanish law are necessarily apposite, or exclusively applicable, in conjunction with ICSID proceedings involving claims raised under an international treaty. Nevertheless both sides have pleaded Spanish law, and the Tribunal does not believe that another approach would have yielded a different answer than the one to be given in this case.

143. In one respect, however, it is clear (as also perceived by the Parties) that the issue involves the application of texts which are not part of Spanish law, namely Article 36 of the ICSID Convention and the more detailed Institution Rules to which it refers —specifically Rule 2. Lidercón observes that no particular formal proof is specified. This is unsurprising, given the variety of entities which might make claims as investors, and the various ways in which they document corporate actions.

144. The question then arises as to the consequences of the failure to respect this Rule. It is not a matter of jurisdiction, since ICSID's jurisdictional requirements are exclusively set forth in Article 25 of the ICSID Convention (as possibly affected by the terms of the consent to arbitration in the instrument where it is expressed, be it a contract, a treaty, or a national law). Lidercón insists that as a factual

matter Mr. Vicario, at the moment he decided to commence this ICSID arbitration, was in fact *Administrador Único*. Although his status had changed as of the date of the Request, Peru should not be allowed to build a jurisdictional objection on a mere procedural rule; no “omission, error, or defect” in the Request may be elevated to a jurisdictional criterion.

145. Of course, Rule 2 must be satisfied if the Request is to be registered by ICSID. If the registration was affected with apparently sufficient documentation later shown to be inaccurate, the conclusion does not seem to be that the action is foreclosed, but rather that the defect should be cured. This may lead to difficulties, for example if there was a time limit for commencing the action. Such questions have not been explored in argument here, and can be put to the side at this stage of reasoning since they need not be resolved unless the alleged defect turns out to be decisive.

146. According to Dr. Vaquerizo (in Paragraph 2 of his Opinion), there are no requirements for the formal manifestation of a *voluntad negocial* (transactional will) and such proof is therefore admissible in any form. He maintains that Lidercón’s decision to commence arbitration is sufficiently proved by either the engagement of Hogan Lovells as arbitration counsel or the Notice of Dispute given on 2 May 2016. Given Peru’s failure to respond to the Notice, Mr. Vicario’s instructions to Hogan Lovells demonstrate Lidercón’s consent and constitutes proof of the decision taken to proceed to arbitration in the absence of a constructive reply by the Respondent. Lidercón’s decision was thus taken prior to the end of Mr. Vicario’s service as *Administrador Único*. In Dr. Vaquerizo’s view, the subsequently elected Board of Directors remained bound by the *Administrador Único*’s decision unless they then resolved to revoke or modify them (Paragraph 7).

147. Moreover, the Board of Directors confirmed, by an *Acta de Manifestaciones* notarized on 20 May 2019, its agreement that Mr. Vicario continued to manage the arbitral proceedings which he had decided to pursue while *Administrador Único*. Peru rejects Lidercón’s production of this and numerous other documents dated the same month. In particular, Peru insists that a Declaration of the Board of

Directors confirming Mr. Vicario's decision to proceed, and that he should continue to supervise Lidercón's efforts in this ICSID case, would not cure the defects of the decision to commence ICSID arbitration more than two years before.

148. For his part, Dr. Vaquerizo considers that the Board of Directors validly ratified Mr. Vicario's actions, noting (Paragraphs 33-34) that Peru cannot point to its acquisition of any rights subsequent to Mr. Vicario's acts which could conceivably be jeopardized —such as might be the case with respect to the sale of goods said to have been sold by an invalid but putatively ratified act which, if accepted as a legal transfer of title, would imperil a purchase made subsequently by a third party.

149. The unanimous Members of Lidercón's Board, when ratifying the decision to proceed to arbitration, also indicated that they had become the liquidators of the company. Lidercón affirms that this should also be accepted as signifying the unanimous ratification by the liquidators.

150. Dr. Vaquerizo's evidence demonstrates that a decision by a general shareholders' assembly was not necessary; Spanish law and *jurisprudencia* (jurisprudence) confirms the power of board members (*administradores* or administrators) to take such decisions.

151. Dr. Bravo, although she accepts that the fact that an entity has been placed in liquidation does not affect its corporate capacity, insists that in that event only acts filed formally with the *Registro Mercantil* (Commercial Registry) are opposable to third parties. If it follows, as Peru argues, that the Board Members' ratification has no effect, then, so Lidercón retorts, it would remain the case that Mr. Vicario, still identified as the *Administrador Único* in the *Registro Mercantil* (Commercial Registry), bound the company with his decision; as a purely factual matter, this was unanimously ratified by the board, which means that Peru's contention is "circular and defies logic."

152. Finally, Peru has argued that the fact that the cost of this arbitration exceeds 25% of the assets of the company means that the decision to initiate arbitration required approval by a shareholders' meeting. Lidercón answers that this argument is based on an erroneous interpretation by Dr. Bravo of Article 160(f) of the Spanish *Ley de Sociedades de Capital* (Law of Capital Companies). As Dr. Vaquerizo affirms, Article 160(f) is limited to the context of specific transactions: "acquisitions", "alienations", or "contributions of assets to another entity". Moreover, he notes that this is an exception to the general principle of the authority of the Board, and is to be interpreted restrictively.

153. In the course of her cross-examination, Dr. Bravo was asked whether an *Administrador Único* was empowered to decide on behalf of a company whether to take out a loan, hire a lawyer, or start an arbitration. In each instance, she confirmed that this was the case, as a general proposition, but qualified her answer by referring to the 25% rule. She was then asked to indicate how she appraised the amount of the transaction that should be so limited (and thus to address the relevance of the limitation created under Article 160(f), and notably how the initiation of arbitration could be equated to the three type of transactions defined therein). The following was part of the exchange on this point.

*¿el inicio de un arbitraje es una adquisición de un activo?*

*R: Puede interpretarse como una adquisición de un activo. Si se ganara el arbitraje se va a conseguir el principal activo de la compañía. [T: 1976:15-19]*

English translation:

But the initiation of an arbitration, is that an acquisition of an asset? A: It can be interpreted as the acquisition of an asset. If you win the arbitration, you are going to get assets for the company. [T: 1776:4-8]

154. This is an imaginative proposition, but hardly a straightforward interpretation. Moreover, as was then pointed out by Ms Briones, this seemed at odds with Dr. Bravo's written testimony. It is indeed curious that the answer seemed to contemplate the potential *upside* of arbitration, and not the exposure to *loss*. After some hesitation, Dr. Bravo reoriented herself to the conception of her written opinion, which was to focus on the *costs* of arbitration. Yet even so, she did not indicate how one could know *ex ante* whether this represented 25% of the corporate capital and thus require reinforced authority. Dr. Bravo did not agree with the narrow interpretation of Article 160(f), but even so it seems that the proponent of its application would bear the burden of extending it to a hypothesis rather distant from the natural focus of the wording of the Article.

155. This equivocation with respect to the scope of Article 160(f), especially in the absence of any reference to precedents posing a similar question, rather gives an advantage of persuasiveness to the views of Dr. Vaquerizo.

156. Lidercón relies on two letters signed by Mr. Vicario when he was indisputably *Administrador Único* of the Spanish entity, namely the *Notificación de Controversia* (Notice of Dispute) of 2 May 2016, which expressly accepted “*la oferta de sometimiento a arbitraje internacional realizada por Perú*” (the offer to international arbitration from Peru), and the follow-up letter of 29 August 2016, both addressed to the Peruvian Government and which stated expressly that in the absence of a friendly solution:

*se procederá a iniciar un procedimiento arbitral en los términos previstos en el artículo 9.2 del [Tratado.]*

English translation:

An arbitration proceeding will be initiated in the terms provided in article 9.2 of the [Treaty.]

157. This latter phrase, in the future indicative tense, expressed a positive decision to initiate arbitration in the absence of successful negotiations. At the time, Mr. Vicario was indeed *Administrador Único* of Lidercón, SL. And although he signed this notification as *Administrador Único* of each of the two Lidercón entities, there could be no confusion about which one would be the claimant in arbitration; only the *Spanish* entity could act against Peru under the Treaty. Although he signed his declaration of 18 January 2017 as *Administrador Único*, this seems an inconsequential error; in fact the text of his letter refers to his powers in sending the Notice of Dispute in the past tense:

*me correspondían todas las facultades representativas  
de la sociedad.*

158. It is moreover difficult to see how insistence on non-retroactivity assists Peru. The significant issue is whether Lidercón, here and now, *is acting* with requisite authority, not whether that authority *was extant at the moment of the Request for Arbitration*. The function of the ICSID Institution Rules is “to confer a limited screening power upon the Secretary-General”.<sup>3</sup> Indeed, it has been said that “the Institution Rules apply to the period of time from the filing of a request to the dispatch of the notice of registration.”<sup>4</sup> The registration is not dispositive of any issue save the limited question whether the case will proceed to the constitution of a tribunal, after which it falls to the arbitrators to decide issues of admissibility and jurisdiction, without any indication that such controversies must be resolved as at the date of receipt of the Request.

159. For this reason, and considering the limited function of Institution Rule 2, this objection fails.

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<sup>3</sup> Martina Polasek, “The Threshold for Registration of a Request for Arbitration under the ICSID Convention”, 5 *Dispute Resolution International* 177, at 178 (2011), also noting at 184 that: “The ICSID Convention does not contain any reference to admissibility and it is not a settled matter whether questions of admissibility should be distinguished from questions of jurisdiction.”

<sup>4</sup> *Ibid.*, at note 4.

## JURISDICTION

160. Lidercón's standing as such is not contested; it is a Spanish entity and therefore entitled to avail itself of the Treaty if it can show that its claim falls under its scope. Instead, Peru contends that Lidercón is impermissibly seeking to convert a contractual claim, which is subject as a matter of binding contractual agreement to another arbitral forum, into a claim against the State as a whole on the same foundation of contractual breaches. Lidercón answers (*Dúplica de Jurisdicción*, para. 42) that it:

*no busca únicamente el respeto del Contrato, sino el resarcimiento por múltiples incumplimientos cometidos por los poderes legislativo, ejecutivo y judicial peruanos, entre los cuales también se encuentra --aunque no únicamente-- la falta de respeto por estos terceros del Contrato. La falta de respeto del Contrato por terceros, por definición, demuestra que no nos encontramos meramente ante una disputa contractual.*

English translation:

it seeks not only respect for the Contract, but also redress for multiple infractions committed by the legislative, executive, and judicial arms of Peru, among which are to be found —but not exclusively— the failure by these third parties to respect the Contract. The failure of third parties to respect the Contract by definition proves that we are not faced merely with a contractual dispute.

161. The various precedents Lidercón cites include notably the decision by the Annulment Committee in *Vivendi I* (“it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the Administrative Tribunals of Tucumán by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in ... the BIT” —para. 105); the



award in *RFCC v Morocco* (to the effect that a case no longer concerns the poor performance of a contract if “the State or its emanation went beyond its role as a simple contracting party to play its specific role of a *puissance publique*” —para. 65); and the decision on jurisdiction in *Impregilo v. Pakistan* (“in order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (*puissance publique*), and not as a contracting party, may breach the obligations assumed under the BIT” —para. 260).

162. The Tribunal endorses this important proposition in principle. The question then becomes *whether Peru’s actions in relation to the investor, notably as they affected the latter’s contractual entitlements, were acts of “sovereign authority” beyond the capacity of a simple contracting party that breached the Treaty*. Lidercón conveniently summarizes the instances of such exercise of “imperium” as follows (*Dúplica de Jurisdicción*, para. 47):

(a) *Perú empleó sus potestades legislativas para eliminar un compromiso de exclusividad que parecía incomodarle a través de la aprobación de la Ley de ITVs, tratando además de resolver un supuesto conflicto de competencias en lugar de plantear un recurso ante el Tribunal Constitucional.*

(b) *El INDECOPI, un organismo público, primero mostró su conformidad con la Concesión, y posteriormente cambió de criterio declarando la ilegalidad de la misma por la supuesta existencia de barreras burocráticas.*

(c) *La Resolución de la Corte Superior de Lima de septiembre de 2017 es irrazonable e inadmisibile.*

(d) *Perú ha otorgado un trato discriminatorio a Lidercón respecto de las empresas nacionales y ha sido obligada a operar en un régimen de igualdad con otros operadores que no compiten en las mismas circunstancias.*

(e) *El trato de la Inversión por la judicatura peruana ofende la discrecionalidad judicial y conlleva a un fracaso manifiesto de la justicia natural.*

(f) *Las dos comisiones dependientes de la Comisión de Transportes del Congreso han investigado tanto la licitación como el Contrato desprestigiando y acosando en su actuar a Lidercón.*

English translation:

(a) Peru used its legislative powers by enacting [the Ley ITV] to eliminate an exclusivity undertaking which it found not to its liking, seeking moreover to resolve a supposed conflict of authority (competencias) instead of having recourse to the Constitutional Court.

(b) INDECOPI, a public organ, first manifested its acceptance of the Concession, and then changed the criterion to declare it to be illegal due to the alleged existence of anti-competitive “bureaucratic obstacles”.

(c) The judgment of the Superior Court of Lima in September 2017 was unreasonable and unacceptable.

(d) Peru treated Lidercón in a discriminatory fashion as compared to national enterprises.

(e) The treatment of the Investment by the Peruvian courts offends notions of judicial propriety and has resulted in a manifest violation of natural justice.

(f) The two sub-commissions of the congressional Comisión de Transportes investigated the bidding process as well as the Contract in a manner that discredited Lidercón and undermined its performance.

163. Counsel appearing for both sides have demonstrated impressive familiarity with arbitral decisions that have dealt with more or less similar issues, and the Tribunal (without being held by any rule of *stare decisis*) has been attentive to these decisions and the Parties’

learned arguments by reference to them. The Tribunal does not see the need to belabor its explanations by extensive reference to a burgeoning jurisprudence which is subject to innumerable distinctions created by unique factual circumstances. That said, some prominent citations have achieved recognition as encapsulating important principles. One of these is apposite here, and is to be found in the decision by the *Vivendi I* Annulment Committee (para. 96):

whether there has been a breach of the BIT and whether there has been a breach of a contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract...

and again (para. 98):

where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.

164. It should already be clear from the factual narrative presented above that Lidercón is not seeking to escape from a forum which is not to its liking, or to overcome an adverse ruling for such a forum. To the contrary, Lidercón was satisfied with the 2011 Award, and has defended it against unsuccessful attempts at annulment on the part of its opponent, MML. In other words, Lidercón is not seeking to relitigate a claim which did not prevail in arbitration, but to rescue the benefit of its successful defense in that arbitration by seeking reparation for what it claims to have been Peru's wrongful prevention of the enforcement of the 2011 Award. That is indeed the critical question on the merits. This Tribunal has jurisdiction to hear Lidercón's claims, and Lidercón is entitled to be heard in this forum.

## MERITS

### *Legal bases of the claim under the Treaty*

165. Lidercón contends that Peru has breached the Treaty in the following ways: first, failing to accord fair and equitable treatment (in the form of (a) denial of justice and (b) non-transparent acts in bad faith that—whether taken separately or as “composite conduct”—defeated legitimate expectations); second, imposing unjustified and discriminatory measures, and third, breaching the Concession Contract. The factual bases of these allegations overlap to a considerable degree.

166. The Treaty provision regarding fair and equitable treatment is Article 4(1). It reads as follows:

Each Contracting Party shall guarantee in its territory fair and equitable treatment to the investments made by investors of the other Contracting Party.

167. Lidercón’s Reply at Paragraph 480 relies without reservation on the gloss on the fair and equitable treatment standard articulated in Paragraph 98 of the award in *Waste Management v Mexico II* (2004), and Peru also approves it at Paragraph 388 of its Rejoinder. The ICSID Additional Facility Tribunal in that case wrote that the standard requires proof of:

conduct attributable to the State and harmful to the claimant [that] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or 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.

168. The Treaty standards with respect to unjustified or discriminatory measures are distinct. The former flows from the Treaty's prohibition of *medidas injustificadas* (unjustified measures). Here again, Peru notes that both Parties (Lidercón in Paragraph 404 of its Reply, expressly noting the Parties' concordance in this respect; Peru confirming in Paragraph 482 of its Rejoinder) accept the same gloss on this provision, namely Professor Schreuer's formulations, as recorded and endorsed in *EDF v. Romania* (Paragraph 303), to the effect that an unjustified measure is one that:

inflicts damage on the investor without serving any apparent legitimate purpose; .... is not based in legal standards but on discretion, prejudice or personal preference; ... [or is] taken for reasons that are different from those put forward by the decision maker; [or] in wilful disregard of due process and proper procedure.

169. As for discrimination, Lidercón's Reply, at Paragraph 469, advances the proposition that it arises when there is "unequal treatment of equal circumstances without any justified motive". There are a number of similar formulations, but the Tribunal is satisfied with this one (with the caveat that the word *justified* excludes capricious, irrational, or absurd differentiation; see *Enron v Argentina*, Paragraph 282).

170. Finally, with respect to Lidercón's attempt to assert claims of contractual breach on the basis of an "umbrella clause", it faces a number of obstacles which have been traversed at considerable length in the pleadings, but in the interest of economy of expression the present Tribunal will immediately point out that the attempt fails at the very first hurdle as a matter of plain textual interpretation of the Treaty; what Lidercón presents as an umbrella clause, namely Article 4(2) of the Treaty, is not one at all. It reads as follows:

This treatment shall not be any less favorable than what is granted by each Contracting Party to the investments realized in its territory by investors of a third party that enjoys Most Favorable Nation treatment.

171. The pronoun “this” (*este* in the Treaty’s original Spanish language, which of course is common to both signatory States) refers to the subject of Article 4(1), which is “fair and equitable treatment”. Lidercón has cited no authority for the proposition that the “fair and equitable” standard achieves the transmission of clauses from other treaties which speak of respect for contracts. It is conceivable that contractual rights are dealt with in a manner which breaches the standard of fair and equitable, but that is already covered by Article 4(1) in the present Treaty, and the pronoun in Article 4(2) does not allow its expansion to cover alleged contractual breaches that are not breaches of “this treatment”.

#### *Methodology of the Tribunal’s appraisal*

172. The main features of this dispute emerge from two streams of legal disputation which have engendered extraordinary and ever-expanding arbitral and judicial jousting —ultimately to the disappointment of Lidercón as the aggrieved party.

173. One resulted from INDECOPI’s determination that the Ministry’s rejection of applications by third parties to operate in Lima Metropolitana on grounds that the exclusivity clause in the Concession Contract precluded anyone other than Lidercón Perú from operating there was a barrier to competition, and its consequent order which resulted in the Ministry granting authorizations to Lidercón’s competitors to open ITV centers in Lima Metropolitana.

174. The other arose by reason of reciprocal allegations of non-performance between Lidercón Perú and MML and the latter’s ultimate declaration of the nullity of the Concession Contract. Lidercón Perú initiated a number of arbitration proceedings which were consolidated and resulted in the 2011 Award. Lidercón Perú’s

claim, nonetheless, was ultimately defeated by a judicial determination that declared the main parts of the award unenforceable because MML lost the authority to regulate ITVs, and could no longer perform the Contract.

175. Thus, the combination of the application of the *Ley ITV*, as interpreted by INDECOPI and the Peruvian courts and the determination of unenforceability of the 2011 Award ultimately eliminated Lidercón's fundamental advantage under the Concession Contract.

176. The record of this case is dense. The pleadings have been prolix, reflecting the inherent complexities of the narratives that underlie the claims and defenses: the negotiation and performance of a concession contract involving the private, for-profit supply of technical vehicle inspections required by law, conducted in the context of spatially overlapping administrative authorities in an area of public services not previously subject to national legislation and regulation, and affected by numerous investigations, regulatory adjustments, arbitrations, and other types of proceedings—whether public (judicial and non-judicial) or private (arbitral). The documents put before the arbitrators are voluminous, and subject to variable interpretations, if not indeed inherent ambiguity. Fundamental questions of Peruvian law have been traversed: administrative and constitutional law, the norms pertinent to the attribution of authority between the State and its subdivisions (both vertical/hierarchical and horizontal/geographical), and the interpretation of a Concession Contract perhaps best described as *sui generis*.

177. In this arbitration, all of these contentions and materials must be viewed through the prism of international law, since all claims and defenses involve allegations governed by the Treaty. Fortunately, the Tribunal has been assisted by the high quality of the advocacy conducted by both sides, helping the arbitrators to refine their analysis and reduce what at first blush seemed an intractable narrative into discreet points whose resolution allows the dispute to be decided by reference to a limited number of fundamental determinations.

178. The essential elements of the dispute arise from the uneasy overlapping of competencies between the Ministry and MML with respect to the regulation, authorization and supervision of vehicle inspection centers in the Province of Lima. The Concession Contract granted Lidercón Perú an exclusive right to provide vehicle inspection services within the Province of Lima (see Paragraph 69 above). The scope of that exclusivity was expanded by *Ordenanza 694* to cover, at the time, all vehicle traffic within Lima Metropolitana. However, when the Peruvian Congress proclaimed the *Ley ITV* in 2008, it declared that the Ministry was empowered nation-wide to regulate, authorize and supervise inspection centers and removed any such competence from MML but at the same time stipulated that existing contracts having led to the establishment of such centers entered into by other governmental organs would be respected.

179. On this basis, given that Lidercón's Contract contained an exclusivity provision, the Ministry adopted the policy of rejecting the application for centers by other candidates. This policy was examined by INDECOPI, which found the Ministry's denials to constitute a bureaucratic barrier to competition. INDECOPI's decisions in this respect have, according to Mr. Jiménez's witness statement (dated 4 June 2019) been upheld on each of the 12 occasions it has been challenged before the courts of first instance (cited in his footnote 41, and a part of the evidence of this case) and confirmed by Superior Court of Lima in one case. More detail is provided in the section below dealing specifically with the role of INDECOPI.

180. So ultimately the central issues crystallize in two simple questions:

a. did any actions or determinations of instrumentalities of the Peruvian State contribute to extinguish the Concession's exclusivity in a manner attributable to the State and constituting a breach of the Treaty?

b. was Lidercón Perú entitled, by virtue of the Concession Contract with MML, to resist the Ministry's (specifically SUTRAN) attempts to inspect its inspection centers?



181. For their part, and applying their law, certain courts of Peru have ultimately decided against the concessionaire. The question for the present Tribunal therefore becomes whether conduct attributable to the Respondent has breached the Treaty. As a matter of international law, the instrumentalities whose conduct is in question may be those found to be responsible for the losses occasioned by the outcome endorsed by the courts, or indeed the courts themselves if they have administered justice in a fundamentally flawed way.

182. Given the complexity of the case, it seems unhelpful to deal with the merits of the dispute by reviewing a list of abstract propositions, as this may lead to sterile catalogues of isolated points scored by one side or the other. The hesitations and uncertainties as to the emerging ITV regime puts a high-intensity spotlight on Bullet Point 13 of Clause 1.1 of the Concession Contract (see Paragraph 67 above).

183. What is of interest to the present Tribunal is not to derive impressions of opinions and expectations of various interested parties at various moments of the evolution of this transformation, but to determine the legal position as expressed by the proper authority at the requisite level of hierarchy.

184. The Tribunal will therefore evaluate the overall conduct of the relevant actors one by one in light of an ascertainment of the regulatory framework, leading to a final part of this Merits section recapitulating the appraisal of that conduct in terms of its effect on Lidercón's individualized claims.

*Lidercón conduct as an investor claiming entitlement to legal protection under the Treaty*

185. The examination of Lidercón's stance follows two main vectors. First, the legitimate *ex ante* expectations of the investor, taking the word *legitimate* not as an abstract legal standard to be applied universally, but as the reasonable understanding of an investor in the context of the environment in which it was contemplating investing. Second, at the other end of the chronology, the focus will be on the

investor's own obligations – viewed as the counterpart of the entitlement to rely on the Treaty – in reaction to developments which it considered to be adverse.

186. Legitimate expectations are of course a traditional and proper consideration when appraising the treatment of foreign investors. Before wondering about the meaning to attribute to the word *legitimate*, however, one needs to consider not only the State's conduct, but also that of the investor in order to ascertain whether there were any *expectations* at all, including with regard to matters of legal security. The Tribunal proceeds on the basis of a notionally objective standard, namely what an ordinarily prudent investor would have been looking at when weighing the risks of signing the Concession Contract in September 2004.

187. Vehicle inspection was something new in Peru. The Government was adjusting to the post-Fujimori era. A comprehensive new law for the Ministry of Transport and Communications had come into effect in 1999. It generally designated the MTC as regulator and manager of ITVs.

188. The relevance of the factual context should be obvious. Lidercón was not investing in a familiar environment in which its venture involved a well-known, much-regulated industry with a long history of a stable administrative regime, such as the operation of toll roads in certain countries. To the contrary, this experience was new to both sides. Indeed, Mr. Vicario confirmed before the present Tribunal what was evident in the bidding process: that neither Lidercón nor he had in fact ever operated a vehicle inspection center anywhere before commencing the venture in Peru (T: 302:9-22-303:1-13.).

189. As for the environment in which he was investing, the fields were entirely green. Mr. Tarazona testified that Peruvians were unfamiliar with an obligation to submitting their vehicles to technical inspection. It was therefore an important and challenging task of public administration, and moreover one which was being confronted in the immediate wake of what he called the “turbulent epoch” of the Fujimori years. The public authorities were finding their way.

190. There was an obvious dimension of policy to the matter; safe and sound motor vehicles have an evident effect on traffic safety as well as on pollution. Legislators are likely to be justly concerned with the details of envisaged reforms, and the extent to which it might be appropriate to entrust their implementation to public-private cooperation. (Shoddy regulatory regimes are immediately exposed to the specter of corruption, such as trafficking in certificates of conformity.) The capital city of Lima, by far the most concerned with traffic congestion and environmental degradation, might feel a particular urgency and entitlement to address the problem.

191. At the same time, the Ministry was an obvious locus of regulatory control. The starting point was the 1999 Law, which in Article 16 designated MTC as the regulator and manager of the national vehicle inspection system, without providing many specifics. The implementing Regulation was not ready until 2001. It notably confirmed the Ministry's authority to regulate and supervise vehicle inspections throughout Peru (Article 52(e) and 54), granted vehicle owners the right to select the center of their choice (Article 52(f)), and stated that the Ministry would create a national database system to connect with all centers for the purpose of issuing certificates (Article 52(h)).

192. Yet, at the same time other laws and regulations were being adopted, and agreements entered into that either contemplated delegation of powers to municipalities, such as the *Ley de Bases de la Descentralización* (2002), the *Ley Marco de Promoción de la Inversión Descentralizada* (2003) or, notably, the Organic Law on Municipalities, that conferred explicit, seemingly overlapping competencies on MML. Indeed, Article 161 listed among the *competencias y funciones* of MML to “verify and control the performance of vehicles through periodic technical inspections”.

193. In May 2003, MML issued *Ordenanza 506* that made ITVs mandatory in Lima Metropolitana and provided that public or private entities to provide ITV services would be selected by MML. On the other hand, it was rather quickly determined that the 2001 Regulation needed more development, and in October 2003 a new Regulation was issued by the Ministry providing as follows:

- (i) The present Title provides the technical and administrative procedures of the Technical Inspections system for vehicles, and the basic norms for the installation and functioning of the Vehicle Inspection Plant that provides such service. (Art. 101.)
  
- (ii) The Technical Inspection procedure will only be carried out in authorized Technical Inspection Plants. (Art. 102.)
  
- (iii) The user of the service shall decide freely the Inspection Plant where it wishes its vehicle to pass the Technical Inspection. (Art. 106.)
  
- (iv) The Ministry is the competent authority for granting concessions in favour of Inspection Companies so that they operate the Technical Inspection Plants through periodic tender processes. (Art. 119.)

194. In September 2004, only four days before the Concession Contract was signed, MML issued *Ordenanza 694*, which to a large extent incorporated the content of the 2003 Regulation.

195. In the context of this evolving regulatory framework, Lidercón and MML included in the Concession Contract Bullet Point 13, and Clauses 19.4 and 23.2. Bullet Point 13 explicitly refers to *Ley Orgánica de Municipalidades* and *Ordenanza 506* as normative sources, among others, and then adds those that *modify, derogate, complement, replace or interpret* all of those sources. All of them encompass significant potential alterations of the contractual regime; even the notion of “complement” would bring in other applicable rules that were not listed, such as *Ordenanza 694*, or could generate new ones by way of supplying answers in the event of lacunae or ambiguity.

196. Public authorities may fail to accord fair and equitable treatment if they create legitimate expectations that they subsequently fail to meet. To be legitimate, however, an expectation must be of a nature to induce reasonable reliance.

197. Moreover, Lidercón and MML explicitly included equilibrium and “adverse-change” Clauses in the *Contrato de Concesión*, Clauses 23.2 and 19.4 (see Paragraphs 72-73). These provisions made it explicitly clear that regulatory changes could alter the Concession’s economic and financial equilibrium or prevent MML from complying with its contractual obligations, and provided for appropriate remedies.

198. Clause 19.4 of the Contract in particular provided that Lidercón Perú had the right to terminate the Contract and to attribute fault to MML if an amendment to an applicable law affected the implementation of the Contract or prevented MML from performing its contractual obligations. It seems fair to infer that this provision was designed to prevent MML from insisting that because it was not directly responsible for the new legislation it could require Lidercón Perú to continue performing. The Contract thus treated such new legislation as attracting the liability of MML.

199. A final aspect of Lidercón’s conduct to be examined here is its approach to the way its own activity was to be inspected. To recall Juvenal’s famous question *quis custodet ipsos custodes?* Who watches the watchman? If Lidercón issues certificates, who was to verify that this function, of great significance in terms of road safety and pollution control, is carried out properly?

200. As hard as it is to believe, it seems that in the context of the hesitations as to the evolution of the once overlapping competencies of the Ministry and MML, and as to the maintenance in principle of the Concession Contract notwithstanding the establishment in the *Ley ITV* of the exclusivity of the former’s role with respect to the regulation and supervision of ITVs, Lidercón took the position not only that it was *contractually* entitled to be regulated by MML even after MML had ceased to act in that capacity, but that this meant that Lidercón had the

right to shut the doors of its inspection centers to the inspection teams of the Ministry (operating by its subordinate agency SUTRAN) notwithstanding the *legislated authority* under which they were acting by virtue of the *Ley ITV*. The astonishing reality therefore is that Lidercón Perú's centers have simply not been inspected since 2011 at the latest, as Mr. Barrios acknowledged. (T: 530). He explained that “*estábamos en nuestro derecho de no dejar que una autoridad que no tiene facultades nos fiscalice*” (T: 531:17-19) (“we have the right not to allow an authority that does not have the power to supervise us”, [English T: 495:18-20]) and that “*a través del contrato como fiscalizadores no los podíamos dejar y nunca los hemos dejado de ese manera*” (T: 553:5-10) (“but if you are coming here as supervisors, you cannot come in, in such capacity” [English T: 515:4-6]).

201. There have been incidents of temporary closure and attendant disruption of Lidercón centers as a result of this intransigence on its part. The brazenness of Lidercón's insistence on living in the alternative universe of the impregnable Contract is remarkable —as is the relative forbearance of the Peruvian authorities in tolerating this state of affairs. Contracts with public authorities which call for services rendered to the public are of course in principle legally binding, but when they are modified in accordance with new legislation or regulations the consequence of prejudice to the private party is generally found in compensation rather than specific performance, not in self-judgment on the part of the latter.

202. Lidercón remarkably seeks to justify its stance by invoking Article 46 of the Peruvian Constitution, which in translation reads as follows:

No one owes obedience to a usurper government or to anyone who assumes public office in violation of the Constitution and the law.

The civil population has the right to insurrection in defense of the constitutional order.

Acts of those who usurp public office are null and void.

203. Mr. Barrios was asked how in his perception one is entitled to react when one believes that officials are not operating within their powers; can any citizen determine on their own that an official does not have authority to enter an inspection site and on that basis deny access? He answered: *“Es correcto. Bajo la Constitución del Perú es correcto.”* (T: 692:19-20) (“That is right. Under the Constitution of Peru, that is correct.” [English T: 636:21-22]). And so, when Mr. Barrios was asked to provide the date of the last time a Lidercón center was inspected by either SUTRAN or a municipal supervisor, he answered: *“Por la SUTRAN nunca.”* As for MML, *“me parece que fue marzo de – abril de 2008”.* (T: 569:17-19.) (“By SUTRAN? Never.”... “it seems to me that it was March or April of 2008” [English T: 529:20-22] He stated that SUTRAN was welcome to come *“de forma informal”* (T: 553:4) (“informally” [English T: 515:2]) to see Lidercón’s superior technology, but *“nunca los hemos dejado que nos fiscalicen”* (T: 555:4-5) (“we have never allowed them to oversee us” (English T: 516:18]).

204. Lidercón’s argument is thus to the effect that the Ministry is a usurper inasmuch as its insistence on inspecting Lidercón’s centers is contrary to the Concession Contract, and therefore Lidercón has the right to resist. This is ill-conceived. Parties holding contracts with public bodies do not have the right, whenever there is a dispute, to consider that the administration’s alleged breach of a contract “usurps public office” because it is a violation of “the law” (i.e. the validity of contracts, which is also guaranteed by the Peruvian Constitution in Article 62) and therefore entitles them to “insurrection”. This should not even have to be explained. Article 46 clearly finds its origin in the impulse to protect the constitutional order against coups d’état, and has no place to play as a self-granted “remedy” on the part of businessmen contending that an administrative contract has been breached.

205. In closing argument, counsel for Lidercón sought to make something of Ms. Canales’ answer when asked about Article 46 of the Constitution, and she answered that *“el ciudadano no tiene que obedecer una disposición de una autoridad que no tiene competencia”* (T: 1130:9-11) (“a citizen does not have to obey a provision by an authority that is not competent” [English T: 1025:12-14]). This was presented as reflecting something of an extraordinary characteristic of the Peruvian constitutional order. But it is not, and it is sufficient to

consider her words to see that this is what one would expect in any system which considers itself obedient to the rule of law. Of course officials acting *ultra vires* do not have to be obeyed once it is established that their orders constitute an excess of power. But that does not mean that citizens are the judge of *ultra vires*, and welcome to take the law into their own hands whenever they feel aggrieved by an official whom they consider guilty of trespass.

206. In sum, Lidercón could not have had an expectation that the Concession Contract would be insulated from legislative or regulatory changes, and did not have a Constitutional right to refuse to be inspected by the Ministry. This does not exclude the possibility that Lidercón's contractual entitlements might have been impaired by acts attributable to the State in ways that breached the Treaty, and so we now turn to examine the conduct of the public bodies which interacted with Lidercón.

#### *MML's conduct as Lidercón's contracting party*

207. MML did not argue that the exclusivity clause was unenforceable; its officials apparently believed the contrary.

208. Lidercón makes much of the fact that the first of the *Disposiciones Finales* of the 2008 *Ley ITV* acknowledged the survival of concession agreements entered into "*antes de la vigencia de esta Ley*" (before this law was enacted). But that provision itself was subject to obedience of its legal framework (as was the Concession Contract itself), and the *Ley ITV* was naturally a significant intervening factor in that legal construct.

209. The simple fact to bear in mind is that this first specific National Law on Technical Vehicle Inspections —the *Ley ITV*— did not see the light of day until 2008.

210. Unlike the situation in some well-known cases in the annals of ICSID, this is not one where the investor has been run out of town. To the contrary, the *Ley ITV* included what counsel for Lidercón



memorably referred to as a “carve-out” with respect to existing contracts, including those entered into by other public bodies which no longer would have the authority to select *entidades revisoras*.

211. The Ministry thereafter upheld the exclusivity clause of the *Contrato de Concesión* until the INDECOPI and Peruvian courts ruled that rejecting applications on the basis of that contractual provision was an illegal bureaucratic barrier and ordered it to decide applications strictly in terms of compliance with the requirements set out in the Law and its Regulations. Although MML disagreed with the 2011 Award and sought by the means legally available to it to seek its nullification, it complied with the ultimate judicial partial upholding of the 2011 Award and thus accepted to pay amounts held to have been due contractually.

212. So the Concession Contract has as a plain factual matter endured to this day. The issue at hand therefore pertains to the immutability of discrete aspects of that agreement, namely exclusivity and the role of MML as the supervisory authority. Here one finds that MML adopted a prudent course, already at the stage of drafting the Contract; it took shape in the form of Clauses 19.4 and 23.2, which in combination with Bullet Point 13 might be referred to as the very opposites of a stabilization clause. Lidercón chose not to pursue the remedies provided in these provisions and instead sought to fight for the preservation of its exclusivity rather than seeking these adjustments on account of its loss.

213. MML remains Lidercón’s co-contractant. Although the contractual exclusivity was ultimately declared unenforceable by the Peruvian Courts (where appeals are still pending), which may well have the consequence that Lidercón’s ambitions were disappointed, it remained open to it to seek the contractually contemplated adjustments on that account.

214. There may be a contractual promise that in the event a contractual provision is found to be unenforceable, the entire contract must (or may) be deemed ineffective. Or, to the contrary, a contract may provide that in such an event it is no longer possible for either

party to rely on the terms of the contract as written. In the present case, Bullet Point 13 is clearly a rather far-reaching example of the latter category. In such circumstances it may be possible for one party to make a binding agreement to the effect that in such a case it will have to make defined payments of compensation for the adverse consequences to its co-contractant.

### *The Ministry's exercise of its regulatory functions*

215. Lidercón argues that it is no longer certain who its contracting party is, and that this is stark evidence of mistreatment. The Tribunal disagrees. For one thing, it is perfectly clear who the regulator is in terms of controlling Lidercón's vehicle inspections; it can only be the Ministry, acting through its organ SUTRAN; there is no competing regulator seeking to insist that it has a permanent contractual or legal right (or for that matter duty) to fill this role. Lidercón has no entitlement to a contractual right to choose as "its" regulator a municipal body which no longer performs this role —and is excluded from it by positive legislation in the form of the *Ley ITV*.

216. The Ministry was not required to take over the Concession Contract. Quite to the contrary, the text of the 2008 *Ley ITV*, when acknowledging the continued survival of previously signed contracts, made it clear that they would fall under the budgetary responsibility of the entity that signed them. There can therefore be no criticism of the Ministry where the Peruvian courts have ruled that it was not bound by the 2011 Award.

217. Dr. Cantuarias, a prominent Peruvian lawyer and academic (since 2010 Dean of Faculty of Law of the Universidad del Pacífico) who is well known in international circles for his scholarly writings and frequent service as arbitrator, appeared in this case as an expert called by Lidercón. His testimony was of particular interest in respect of the following statements he made on the stand.

218. For one thing he advanced the following proposition.

*Lo que se le exige al MTC es que como cabeza del sistema haga cumplir la ley, y la ley no solamente es la legislación, son los fallos judiciales que pasan a la calidad de cosa juzgada. [T: 1637:5-9]*

English translation:

What is required of the MTC is that, as the head of the system, it must carry out the law, and the law is not just the legislation. It is also the judicial rulings that become res judicata. [T: 1469:1-4]

219. Secondly, Dr. Cantuarias said this:

*Lo que yo he dicho es que hay una cabeza del sistema en base a la nueva ley del 2008, que es el MTC. Y el MTC como cabeza del sistema no solamente está obligada a cumplir las leyes escritas, sino también verificar que sus subordinados cumplan las leyes y los fallos. [T: 1638:2-8]*

English translation:

What I have said is that there is a head of the system based on the 2008 Law, and the MTC as the Head of the System is not only obligated to carry out the written laws, but also verify that its subordinates carry out the laws and judicial judgments. [T: 1469:19-22 to 1470:1-2]

220. This proposition rather serves to advance the Respondent's case, and puts into question Lidercón's adamant refusal to accept the new rules of 2008 as well as the ultimate restriction on the enforceability of the 2011 Award.

221. Finally, there was this statement, which ostensibly supports the Claimant, but in fact invites the present Tribunal to consider the *juego* of the Contract in its full legal environment, including the contractual provisions and the ultimate disposition of the obligations derived thereunder pursuant to the *lex arbitri*, examined subject to any breach of Treaty obligations attributable to the State.

*Lo que está afirmando es que la nueva ley aplica en todo aquello que no contravenga las reglas de juego del contrato de concesión. [T: 1665:21-22 to 1666:1]*

English translation:

They are confirming that the new law applies to everything that does not contradict the Concession Contract. [1495:17-19]

222. The Second Complementary Final Provision of the 2008 Regulation that acknowledged the survival of prior concession contracts made clear that this was on the footing that they would adapt to the new Regulation (*previa adecuación a las disposiciones señaladas en el presente Reglamento*) (“prior adaptation to the provisions indicated in this Regulation”). Ms Arias testified that this required obedience with the new provisions, and that they related to “[r]equisitos técnicos, de recursos humanos, infraestructura, sistema tecnológico y demás reglas que establecería el reglamento de inspecciones técnicas” (T: 947:17-20) (“technical aspects, human resources, infrastructure, technological aspects, and other rules that would be included under the technical regulations.” [English T: 869:7-9]).

223. Mr. Vicario testified that Lidercón filed the documentation to comply with the “new technical regulations” on 10 September 2008 (C-26, confirmed by the copy of a request for certification of the East Center, R-477), and the other fact witness for Lidercón, Mr. Barrios, accepted that Lidercón centers did indeed comply with the 2008

Regulation in this respect (T: 543) and in December 2008 the Ministry confirmed that it had. Mr. Barrios, however, maintained that in Peru “*tenemos dos sistemas de revisiones técnicas: el sistema de concesión, que es el contrato nuestro; y tenemos el sistema de autorizaciones que da el Ministerio*” (T: 546:8-11) (“we have two systems of technical inspection, the Concession system, which is our Contract, and also we have the authorization system provided by the MTC” [English T :508:21-22 to 509:1-2]). Indeed, he acknowledged that Lidercón’s centers could not be deemed to be “CITVs” as such, because they needed certification from the Ministry. Ms. Canales’s testimony was consistent with this statement: Lidercón stations had not sought authorization to operate from the Ministry —nor indeed from MML (T: 976:4-16), as confirmed by MML itself by a letter from Mr. Luchetti dated 30 December 2015.

224. Ms. Canales confirmed in her testimony that “*cuando un centro ha estado adecuado, entonces los certificados ... tienen validez nacional*” (T: 1118:18-21) (“when a center has been “*adecuado*” ... then - the certificates ... are valid nationally” [English T: 1014:11-15) and that “[n]uestra misión como SUTRAN es verificar que se cumplan ... nuestra ley y sus normas complementarias” (T: 1120:1-3) (“[o]ur misión at SUTRAN is to make sure that ... the Regulations ... are abided by [English T: 1015:15-17]). She explained to the Tribunal that SUTRAN verified calibrations:

*que los equipos que se utilizan para poder hacer las inspecciones técnicas vehiculares cumplan con tener las calibraciones semestrales que señala la norma, tenemos también que verificar que los ingenieros que se han acreditado por las plantas de inspección técnica vehicular sean los que efectivamente están en ese momento, tanto el ingeniero supervisor de la planta o los ingenieros, dependiendo de la cantidad de líneas que haya. Y los técnicos de línea, que son los encargados de hacer las revisiones y de aplicar los equipamientos, hacer las pruebas que corresponden en la línea [T: 1144:20-22 to 1145:1-11].*

English translation:

to check that the equipment that is used to perform the vehicle inspections meet the requirements of having calibration at six-month intervals, as indicated in the Regulation. We also need to verify that the engineers accredited by the inspection centers are the ones who are there at that time, both the supervising engineer of the station or the engineers, depending on the number of lines they have, and the line technicians, who are the ones in charge of actually performing the inspections and applying the equipment doing the tests online—in the line. [T: 1038:7-18]

*The conduct of INDECOPI and the Peruvian courts?*

225. INDECOPI does not rule on the lawfulness or otherwise of contracts, but rather on the impermissible erection by public authorities of bureaucratic barriers to competition (which is how INDECOPI characterized MML's *Ordenanza* 694).

226. There is simply no evidence of a failure of due process in what the present Arbitral Tribunal has been shown of the Peruvian court proceedings relating to the Concession Contract. Nor can it be said that the reasoning of the Peruvian judgments is so inept as to be inexplicable otherwise than as the result of bias against the foreign investor, or otherwise deserving of condemnation as “clearly improper and discreditable” to use the familiar expression of the ICSID *Mondev* award (in para. 127). Lidercón, S.L. may have faced powerful opposition by business rivals; it may have been the victim of local politics, as can happen when opponents of a government take aim at project approved by it; members of legislative bodies may launch annoying inquiries perceived as unfair. But such difficulties are not faced by foreigners alone; the issue is whether the legal system properly hears claims of legal entitlement.

227. Two direct authors of Lidercón's misfortune as pleaded are clear: INDECOPI and the Peruvian courts (the latter taken collectively, in the interest of simplification). It seems clear that the INDECOPI *Tribunal* functionally plays a judicial role, and that it as well as the ordinary courts could *ex hypothesis* be culpable of a denial of justice.

228. The effects of the 2011 Award have been litigated in the Peruvian courts. The Claimant is discontent with judicial determinations to the effect that elements of that 2011 Award are unenforceable. The essential question then becomes the extent of the present Arbitral Tribunal's authority to examine whether Lidercón has asserted cognizable breaches of the Treaty related to actions of the Peruvian courts.

229. Whether national courts uphold national awards is a matter of national law, which may be liberal or restrictive with respect of arbitral authority and the finality of arbitral awards. But all national legal systems must have some ultimate limit of unenforceability; for example, "awards" signed at gunpoint, or by a child, cannot be given effect.

230. What international law does require is that foreigners are not mistreated by national courts to a degree that satisfy the criteria of the delict of denial of justice. Therefore, the task of the present Tribunal is not to assess the quality of the work of the Peruvian arbitral tribunals, but the judicial conduct which has led to the partial unenforceability of the 2011 Award.

231. Denial of justice is a well-known form of breach of the fair and equitable treatment ("FET") standard. It is a central claim advanced by Lidercón, and will be dealt with in a separate section to follow. But FET breaches may take a great variety of other forms, such as deceptive conduct, coercive misapplication by executive instrumentalities of laws and regulations, harassment, and the like. Thus, claims of violation of the FET standard vary greatly in terms of the intensity of the debate due to the inherent degree of offensiveness of the accusation against the respondent. Extortionate abuse of the power of public authority, if proven, will readily be deemed to fall short of the FET standards,

whereas the disappointment of legitimate expectations is at once less sensitive and harder to elevate to a breach of international law, given the difficulty for a claimant to establish that a shortfall in the fulfillment of its expectations gives rise to a cause of action.

232. Lidercón began its closing oral submissions by insisting that Peru could and did not contest the fact that the 2011 Award, having survived a challenge before the national courts, has *res judicata* effect under Peruvian law (as per Article 59 of the Decreto Legislativo No. 2017, which is in effect the Peruvian Arbitration Act). Counsel took the occasion to repeat no less than six answers from Dr. Sánchez upon cross-examination precisely to that effect.

233. The importance of the 2011 Award for present purposes was that it deemed the *Contrato de Concesión* to be in force, including its provision on exclusivity. It must be noted, however, that a legal instrument may be partially unenforceable; the *Contrato* can remain valid even if some of its elements cannot be enforced or applied.

234. Peru emphasizes the importance of the following five elements of the Contract: (i) it was limited geographically to the Province of Lima (beyond which MML has no jurisdiction); (ii) it required the building of at least three inspection centers where services of a defined standard would be rendered, specific cash investments, and specific payments to MML; (iii) the concessionaire's exclusivity did not cover all cars that habitually circulate in Lima (which may be driven by individuals resident elsewhere); (iv) it contains a comprehensive dispute resolution clause calling for arbitration in Lima; and (v) it is not a *Contrato-Ley* (which stabilizes its legal regime as of its signature), but to the contrary was subject to a variable legal regime the importance of which is evident in this summary description in Paragraphs 66-69 of Peru's Counter-Memorial (footnotes omitted):

67. Accordingly, when it signed the Contract, Lidercón Perú agreed that the legal norms listed in the Contract—including the Organic Law on Municipalities that gave the MML (limited) competence over vehicle inspections in Lima and municipal Ordinance No. 506 that regulated



vehicle inspections in Lima— would govern the relationship between the parties. Lidercón Perú must have known or understood that those legal norms evolved: they could be modified, or even repealed and that any such changes to those laws would then govern the Concession. Importantly, the Contract does not contain a stabilization clause or any other promise to Claimant that the applicable legal norms would remain as they existed at the time the Contract was signed.

68. Further support for the understanding that the Contract was an agreement subject to future changes in applicable legal norms can be found in Clause 23.2 of the Contract...

69. Thus, the parties expressly anticipated that changes to the Applicable Laws could impact the Contract and provided procedures for proposing amendments to the Contract in the event of such changes. If the parties were unable to agree within 30 days on how to reestablish the economic equilibrium of the Contract, either of the parties could seek to resolve the dispute through the dispute settlement mechanism established in the Contract.

235. Lidercón refers to the sequence of pronouncements by INDECOPI as a “flip-flop”, i.e. an arbitrary change of position tantamount to a breach of the Treaty. Its complaint begins with the memorandum of 1<sup>st</sup> September 2004 of the Technical Secretary of the relevant Commission of INDECOPI (see Paragraph 62 above), which Lidercón considers to be a ratification on the part of INDECOPI of the *Contrato de Concesión* and its exclusivity provision. The Tribunal disagrees for a number of reasons.

236. INDECOPI was created in 1992 under a Decree Law. Its decision-making processes are elaborate and codified. With respect to the issue of present relevance, ultimately the relevant Chamber of the INDECOPI Tribunal follows a methodology laid out in a 1997 Resolution on Criteria for Determining Bureaucratic Barriers which has been produced before the present Tribunal and described in the

witness statements of Mr. García-Godos and Ms. Hooker, both of whom appeared in the hearings.

237. On 20 August 2004, a member of the Peruvian Congress (Pedro Morales Mansilla) lodged a formal request with the Presidency of INDECOPI to determine whether the inspection fees to be charged under the authority of MML and moreover the *Contrato de Concesión* itself contravened “*las normas de libre mercado, posición de dominio o situación monopólica*” (in translation, “free trade rules, dominance position or monopolistic situation”). This request was sent on to the *Comisión de Acceso al Mercado* (now known as the *Comisión de Eliminación de Barreras Burocráticas*), which on 26 August in turn instructed its Technical Secretary to evaluate whether the Commission could open an investigation. His conclusion was negative.

238. The Technical Secretary’s conclusions were limited to the two questions posed by Congressman Morales. With respect to the fee structure to be implemented under the concession, he noted that MML had not issued an administrative act mandating the collection of fees, so the issue was not ripe to be determined. As to whether the Concession violated competition laws, he concluded that it did not. He explained that technical vehicle revisions concessions could not be deemed a legal monopoly because the subject of the concession was not a private initiative economic activity, but rather a public activity or a public function that was, in itself an exclusive activity of the public administration, but which was to be provided with the participation of the private sector. He added that the law allowed awarding concessions through public tendering which, itself, was a mechanism that promoted competition and economies of scale and scope would dictate whether the competent authority opted to award the concession to one or more operators.

239. The report thus simply responded to the inquiry by Mr. Morales. That does not convert the memorandum to a binding determination, and —above all— does not entitle Lidercón to treat it for the purposes of a claim under the Treaty as a representation made (A) to Lidercón and (B) by the State.

240. Lidercón invokes Article 62 of the Peruvian Constitution, which provides that:

*La libertad de contratar garantiza que las partes pueden pactar válidamente según las normas vigentes al tiempo del contrato. Los términos contractuales no pueden ser modificadas por leyes o otras disposiciones de cualquier clase. Los conflictos derivados de la relación contractual sólo se solucionan en la vía arbitral o en la judicial, según los mecanismos de protección previstos en el contrato o contemplados en la ley.*

English translation:

The freedom of contract guarantees that parties may validly negotiate, according to the rules in effect at the time of the contract. Contractual terms may not be modified by laws or any other provision whatsoever. Conflicts deriving from contractual relations may be resolved solely through arbitration or judicial recourse, in accordance with the protective mechanisms provided for in the contract, or established by law.

241. In the first place, one readily perceives the immediate difficulty in Lidercón's attempt to rely on this Article. The constitutional directive is that "contractual terms may not be modified by laws or other dispositions of any category." Yet Clauses 19.4 and 23.2 of *this Contract* explicitly contemplate that legislation and other norms that regulated the concession, and indeed even *the interpretation* of such norms could change; and they provide for remedies if those changes affected MML's ability to comply with its obligations under the contract in such a way that impaired Lidercón's investment or other property; or if they altered the economic and financial equilibrium in relation to Lidercón's investment, property or the operation of its ITV plants, or the enforcement of the Concession Contract.

242. Lidercón’s conundrum is not resolved by Dra. Quiñones’ assertion, in the course of developing that proposition in Paragraphs 66-69 of the Opinion relied upon by Lidercón, that Peruvian law “*no admite la modificación unilateral de un contrato administrativo*” (paragraph 68) (“does not allow a unilateral modification of an administrative contract”) because, while the Concession Contract itself was not unilaterally amended by MML —or the Peruvian State acting through other agents— both parties to the Contract acknowledged that the laws and regulations that governed the Contract could change and agreed on the remedies if such changes significantly affected Lidercón’s investment or the Contract’s economic and financial equilibrium, including by a supervening failure of MML to perform its contractual obligations. Indeed, Dra. Quiñones accepted the contractual remedy for such situations: While she reiterated that, even if the *Disposiciones Finales Primera* of the *Ley ITV* and *Segunda* of its Regulations did not exist, “an interpretation that a subsequent law can modify or “leave without effects” what has been stipulated in a Concession Contract is inadmissible”, she added in a footnote: “What in any event would have occurred, had the New *Ley ITV* not included the *Primera Disposición Final*, is that Lidercón Perú would have had a right to terminate the Concession Contract, the Grantor of the Concession having committed a serious breach, as provided for in clause 19.4, if the Municipality were unable to guarantee the exclusivity agreed to under clause 2.4” (Expert Report of Dra. María Teresa Quiñones, para. 70, footnote 85) .

### *The conduct of other officials*

243. Lidercón suggests that there were forces hostile to its involvement, and indeed that INDECOPI’s actions were fomented by its competitors. This may or may not be the case, but is of no moment in assessing the treatment by the officials whose acts are attributable to the Government. Competitors are what they are, and they are quite likely to call attention to legal impediments to the actions of their rivals —and all the more so if they concern alleged illegal restraint of competition. (Hints of influence trafficking have not been backed by evidence, were not seriously pursued with specificity, and are given no traction by the Tribunal.) This is the challenge of modern markets, and it behooves all actors to ensure that they have covered their legal bases. Governments may encourage foreign investors, as indeed they do when

they enter into BITs, but they do not promise that private parties will welcome them with open arms. Competition is competition, and may be fierce. Local business interests may have allies in the political arena, as well as in the media. Governments do not promise foreigners to be exempt from opposition; the foreigner is entitled to respect for law and the absence of complicity and other forms of discrimination. In this case, there is no such evidence. To the contrary, it is striking that MML's attempt to achieve the nullification of the Concession Contract as such has been rejected by Peruvian arbitrators and courts until this day.

244. While the actions of a legislature may deprive a foreign investor of its entitlements under international law, the State cannot be liable simply because the investor believes that Congressional debates demonstrate xenophobia or clientelism. Legislators are entitled to express their opinions robustly, even if they espouse protectionism. For liability to be engaged under the Treaty, there must have been unjustifiable effects attributable to the State itself. The relevant laws were —purely and simply, as a matter of contractual stipulation— literally vouchsafed full prospective latitude by virtue of Bullet Point 13. The conclusion is that in the Contract, MML and Lidercón specifically contemplated the actions that are at the source of Lidercón's grievances under the Treaty, which are premised on the proposition of disregard for contractual rights attributable to the State, and they agreed on the appropriate remedies. Lidercón has failed to avail itself of such remedies. Therefore, its claims here simply cannot be directed at the conduct of the entities of the Peruvian State responsible for taking such actions.

245. When the Technical Secretary of INDECOPI's Commission issued his 2004 *Informe*, neither the Concession Contract nor *Ordenanza 694* yet existed. In reaching his conclusions, the Technical Secretary did not conduct hearings or otherwise adjudicate between competing theses. His opinion was that an investigation was not warranted at that time. The 2004 *Informe* and INDECOPI's later determinations regarding *Ordenanza 694* or the Ministry's denials of authorization to operate in Lima Metropolitana are not proof of inconsistency, but the ordinary functioning of decision-making in response to different circumstances and at different moments in time with respect to which intermediate assessments are by definition

inconclusive (unless interested parties create finality by accepting them). INDECOPI's decisions are subject to challenge. The 2004 decision not to initiate an investigation was not challenged by Congress, the applicant in that case. Instead, Congress decided to conduct its own investigation. As for the *Ordenanza 694* proceedings and those initiated by rejected would-be operators under the *Ley ITV*, the Commission's decisions concerned different matters viewed through the prism of an altered regulatory framework. Both sets of actions were challenged before —and confirmed by— the INDECOPI Tribunal. The point of having a final adjudicatory authority, namely the Tribunal, means that INDECOPI does not “flip-flop” (to use the expression of Lidercón's counsel) when it reaches decisions that deal differently with different circumstances and texts. In the end, there was only one final decision of INDECOPI.

*Recapitulation: effect of the Tribunal's conclusions on the individual claims*

246. By reference to the recapitulation put forward in the Claimant's Reply, reproduced in Paragraph 165 above, herewith a synthesis of the results of the Tribunal's appraisal of the evidence on Lidercón's claims:

*(a) The alleged use by Peru of its “potestades legislativas” to eliminate an inconvenient agreement of exclusivity, moreover attempting to resolve a putative conflict of competencias instead of seizing the Tribunal Constitucional.*

247. When one then reads the Contract, one perceives that this initial question falls away, since the terms of the document provide that the *Ley Aplicable* to it is subject to the comprehensive list of mutations found in Bullet Point 13. Clause 19.4 tells the Concessionaire exactly what it should do if performance of the Contract is impeded by legislation, and Clause 23.2 provides a mechanism for financial adjustment in the event the profitability of the Concession or the concessionaire's investment or property were to be significantly affected or impaired. That is a complete answer to this part of the claim.

Nevertheless, in light of the debate that has unfurled before the present Tribunal, some additional observations seem called for.

*(b) The seemingly contradictory position taken by INDECOPI, having accepted the terms of the Concession but later changing its criterion to declare its illegality on account of the alleged existence of “bureaucratic barriers”.*

248. The INDECOPI 2004 *Informe* and INDECOPI's later determinations regarding *Ordenanza 694* or the Ministry's denial of authorizations to operate in Lima Metropolitana are not proof of inconsistency, but the familiar functioning of decision-making concerning different circumstances and at different moments in time.

249. Following a request by Congressman Morales after the Concession was awarded in August 2004, INDECOPI's Market Access Commission decided not to initiate an investigation based on a report prepared by its Technical Secretary that concluded that no fees had formally been imposed yet, so there was nothing to investigate, no administrative act to consider in respect of Congressman Morales's first request. Regarding his second request, the Technical Secretary concluded that the exclusive concession was not contrary to the free market, dominance and monopolies rules so an investigation was not warranted. Mr. Lucchetti explained the nature of INDECOPI's responses to requests by Congress and the short timeframe that INDECOPI had to prepare them. The report did not purport to provide a full-fledged, comprehensive analysis or opinion about the concession. At the time, the concession had been awarded but the Concession Contract had yet to be signed, *Ordenanza 694* had not been issued, commencement of operations under the Concession were still a long way off and, thus, no fees had been imposed on potential users of ITVs, so there would have been little to investigate, had the Commission decided otherwise.

250. Three years later, after *Ordenanza 1064* officialized the ITV schedule (agreed to by Lidercón Perú and MML in the context of their settlement negotiations in one of the arbitration proceedings), and

operations under the Concession became imminent, the INDECOPI Commission decided to initiate an investigation into the exclusivity provisions contained in *Ordenanza 694*. MML was summoned, it was given an opportunity to present objections and defend the legality of its acts (namely *Ordenanza 694*) and a hearing was held. More importantly, the Commission's decision was subject to appeal before the INDECOPI Tribunal—and indeed it was appealed.

251. The Tribunal finds no fault in the Commission declining a request by Congress to investigate in 2004 and its decision to investigate *ex-officio* in 2007, or in its having arrived at different—even opposite—conclusions in one instance and the other. There was nothing arbitrary about it. The circumstances, including the status of the concession and the necessary documents to implement it, commencement of operations and the impact on vehicle owners, were vastly different in one instance and the other. The decision to decline to investigate in 2004 might have been subject to appeal but Congress, who would have been the aggrieved party, did not do so. The Commission's decision of 2008 was appealed and then confirmed by the INDECOPI Tribunal. Regardless, the issue quickly became moot because the *Ley ITV* generally repealed “all norms opposed to this Law” and MML followed suit shortly after and expressly declared Ordinances 506, 694, 1064 and 1120 inapplicable.

252. INDECOPI's decisions on the Ministry's denial of authorizations to operate within MML's jurisdiction after the entry into force of the *Ley ITV* are of a different nature altogether. The legal framework in which the concession operated and MML exercised its jurisdiction changed with the adoption of the *Ley ITV* and its Regulations. INDECOPI's Commission analyzed the Ministry's obligations in the context of this new legal framework. Those decisions were appealed and confirmed by the INDECOPI Tribunal in every case. Lidercón Perú sought to annul one of those decisions on grounds that the *Ley ITV* had preserved the Concession Contract, which granted Lidercón Perú exclusivity within Lima Metropolitana and was declared valid by the 2011 Arbitral Award, and the application of the law was subordinate to the Concession Contract. The Superior Court of Lima rejected its complaint. It reasoned that the applicable legal provisions related to the Ministry's administrative function, not the Concession Contract, were at the basis of its analysis. It added that the 2011 Award



was *res judicata* but only as between the parties to the arbitration; it did not bind the Ministry or INDECOPI; and it could not be enforced against third parties. It also clarified that the *Ley ITV* was not subordinate to the Concession Contract. The Court went further and determined —albeit in a single brief paragraph— that the Concession Contract’s exclusivity clause was contrary to Article 61 of the Constitution. In any event, like INDECOPI, it ruled that the Ministry had to assess whether applicants met the legal requirements to obtain an authorization and it could not deny their application based on the Concession Contract’s exclusivity clause.

253. MML’s drafters were prudent enough, in Clauses 19 and 23, to anticipate such possible impediments to the realization of the contractual stipulations.

254. There are many Peruvian court judgments on file in this arbitration, and Lidercón has prevailed on a number of occasions. But in the end it is the maintenance of its exclusivity which was the prize, and Lidercón therefore is adamant in its criticism of the judgment rendered by the *Corte Superior de Justicia* of Lima in September 2017 (C-128), which held that although the 2011 Award was valid as between the signatories to the Concession Contract and enforceable in terms of MML’s duty to make certain payments ordered in the 2011 Award, the decisions concerning amendments to, or performance of, the Concession Contract were not enforceable.

255. Lidercón affects outrage at the notion that the final 2011 Award which has survived an application for annulment could nevertheless be refused enforcement. Yet, it is not surprising that enforcement may be denied where the relevant party has been deprived through legislation of the ability to comply with the award or where it implicates the rights of third parties who are not bound by the relevant arbitration agreement, and whose interests were not represented in the arbitral proceedings.

256. Ultimately, the *res judicata* character of the 2011 Award, undeniable in and of itself, is of no avail to Lidercón. The determinations of the arbitrators were final as a matter of contract.

They cannot be relitigated. Indeed, they cannot be overturned as a matter of contractual interpretation. But that does not prevent a court from taking an autonomous and unrestricted view as to the award's enforceability.

*(c) The “irrazonable e inadmissible” judgment of the Corte Superior of Lima in September 2017.*

257. The 2011 Award is a curiosity because it seems that the arbitrators were focused on the Concession Contract almost to the exclusion of the supervening regulatory texts (the *Ley ITV* and its implementing Regulation of 2008) which their award hardly analyzed. For instance, the 2011 Award declared, with hardly any reasoning at all, that MML was bound by *Ordenanzas 506* and *694* notwithstanding that the latter was not incorporated into the Concession Contract and they had been repealed by the *Ley ITV* three years before and specifically declared inapplicable by MML shortly thereafter.

258. Regardless, the conclusion is that Lidercón has not complained of due process violations on the part of the Peruvian courts, and there has been no showing of a miscarriage of justice violative of international law.

259. The Tribunal's attention has been drawn in particular to the judgment of the First Constitutional Court of Lima handed down on 1 July 2019 in the case brought by the Ministry jointly against (1) Lidercón Peru, (2) MML, and (3) the arbitral tribunal that rendered the 2011 Award. The Ministry prevailed on the basis that it had not been a party to the arbitration so the 2011 Award could not be enforced against it; and because, by requiring MML to comply with the Concession Contract, the 2011 Award infringed on the *competencia y funciones* of the Ministry, since the *Ley ITV* had given it exclusive authority over ITVs. This is of course a legitimate objective to be pursued by the Ministry, and the burden of proving arbitrariness, discrimination, or other forms of abuse of power is exacting. In looking at the 2011 Award and its numerous judicial sequels, the present Tribunal finds no such evidence.

260. Turning in particular to the multiplication of arbitral and (especially) judicial disputation in the wake of the 2011 Award, the following observations seem relevant in light of the evidence. Beginning with the arbitrators, they seemed to confront a highly unusual problem.

261. The arbitrators were faced with MML's declaration of the termination of the Concession Contract on 7 February 2008, invoking failure of performance in accordance with the 2007 Partial Settlement Agreement. The legal framework was instantly changed by the *Ley ITV* and the 2008 Regulation.

262. The arbitrators also took on a role as conciliators, with no success.

263. Finally, the effect of the 2011 Award was indeed to reinstate *Ordenanza* 694, which the *Ley ITV* had repealed, since the arbitral tribunal considered that vehicles registered in Lima had to be brought to Liderc3n's centers. Moreover, the 2011 Award prescribed amendments to the Contract, perhaps with the best intentions but meeting resolute resistance. (They declared the Contract to be extended by five years to compensate Liderc3n for MML's wrongful termination, the elimination of MML's right to reversion of assets used in performance of the Contract, and an increase of Liderc3n's service fee.)

264. As already seen, Liderc3n prevailed in initial judicial skirmishes relating to the 2011 Award. But MML and the Ministry sought invalidation of the 2011 Award. Liderc3n takes umbrage at this resistance as being abusive, but the present Tribunal finds its complaint unfounded. Parties are entitled to seek recourse against unfavorable awards and judgments to the extent permitted by law. Success on appeal vindicates the rejection of prior decisions. Liderc3n invites the present Tribunal to ignore the 11 September 2017 decision of the *Corte Superior de Justicia of Lima*; to do so would require a showing of manifest judicial impropriety which Liderc3n has not established. The 2017 judgment dealt with (and accepted) the proposition that MML was statutorily incapable of performing the

Contract in view of the fact that the *Ley ITV* had taken away its authority to regulate or supervise ITVs.

265. But since MML decided to declare the *caducidad* of the Contract, the initiatives and reactions (or indeed the absence of initiatives and reactions) on the part of all the protagonists to the ensuing politico-commercial drama —whether MML, Lidercón, the Ministry or indeed the national arbitrators and judges— did not set a stage conducive to cohesive choreography. Each of the protagonists seemed to take steps intended to resolve a tense and legally ambiguous situation, but each was pursuing different objectives with incompatible visions of the proper solution, resulting in what might without exaggeration be called an imbroglia. As each of these actors proceeded, the knots seemed to tighten rather than come undone.

266. Judgments or other decisions having tantamount to judicial effect constitute a breach of the fair and equitable treatment standards attributable to the State of which the adjudicatory body is a part only if they were the result of a failure of due process, or if the decision is so deficient as to constitute a decision which no reasonably competent court could have reached, and therefore a denial of justice.

267. There is no allegation in this case of a failure of due process, nor can the present Tribunal conclude that the Peruvian judgments of which Lidercón complains are aberrant to the point of being explicable only as a denial of justice.

*(d) Peru's allegedly discriminatory treatment of Lidercón as compared to national operators.*

268. As already seen in subsection (a) above legislative changes were anticipated by Bullet Point 13 and by Clauses 19 and 23, of which Lidercón choose not to avail itself.

269. Again, this is a complete answer to the claim with respect to Peru's regulatory reforms, but leaves open the possibility that in the

actual *performance* of its regulatory or supervisory tasks the Ministry conducted itself in a manner which ran afoul of Peru's obligations to the foreign investor under the Treaty.

(e) *Treatment of the investment by the Peruvian judiciary in a manner that "ofende la discrecionalidad judicial y conlleva a un fracaso manifiesto de la justicia natural" (offends judicial discretion and leads to a manifest failure of natural justice).*

270. Denial of justice may take two forms. In broad terms, they are (A) a failure of due process, and (B) decisions so lacking in seriousness as to indicate bias. (In perhaps the best-known formulation of the latter, after noting that "an unjust judgment may and often does afford strong evidence that the court was dishonest", Fitzmaurice wrote that the case may be "conclusive ... if the evidence be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could have given," Gerald Fitzmaurice, "The Meaning of the Term 'Denial of Justice'", 13 *British Yearbook of International Law* 112-113 (1932).)

271. Seeking to extend State responsibility for breaches of BITs by judicial conduct even in cases where there has been no denial of justice, Lidercón presents the novel argument that "*es posible que se produzca una violación del Tratado como resultado del efecto de las medidas administrativas tomadas contra la Inversión y los resultados de los procedimientos locales iniciados para corregirlas*", *Dúplica de Jurisdicción*, Paragraph 66 ("it is possible that a violation of the Treaty may occur as a result of the effect of the administrative measures taken against the Investment and the results of the local procedures initiated to correct them). Its counsel has resourcefully produced an interesting and (it seems) original doctrinal comment to the effect that:

If the original measure came so close to being a treaty breach that only the availability of local remedies prevented it from qualifying as such, *the host State may effectively have an obligation to provide redress through its domestic courts to avoid that consequence.* The failure

to do so may well have the consequence that the original measure finally crystallizes into a breach, even in circumstances where the court proceedings do not give rise to a denial of justice. (Emphasis added.) (CL-136, Hanno Wehland, “Domestic Courts and Investment Treaty Tribunals: The Effect of Local Recourse Against Administrative Measures on the Breach of Investment Protection Standards”, in M. Scherer, ed., *J. Int. Arb.* 224-5 (2019)).

272. The italics added to this passage suggest that in the defined circumstances the local courts, even in the absence of a denial of justice, if wrong, should be corrected at the international level. Although the article certainly merits consideration, it seems that this proposition, even if presented as one uniquely applicable to BITs, cannot (at least yet) claim endorsement in decided cases. In particular, as Peru points out, the *Alghanim v. Jordan* case cited by the author rejected the claim, going no further than to acknowledge possible liability only in the circumstances outlined as follows in Paragraph 366 of their award, of which subparagraph (b) seems a striking echo of Fitzmaurice:

- (a) The Tribunal will not set itself up as a court of further appeal to determine the correctness of the decision of either the [tax agency] or the Jordanian courts as a matter of Jordanian law.
- (b) Rather, it will consider whether the judgment of the Court of Cassation was inexcusable (being one that no reasonably competent court could arrive at *in order to decide whether the Claimants have suffered a denial of justice* and thus been subjected to arbitrary treatment.
- (c) The Tribunal will refer to Jordanian law for the purpose of making this assessment, but not for the purpose of substituting its decision for that of the Court of Cassation.
- (d) Unless the Tribunal finds that the judgments of the Jordanian courts gave rise to a denial of justice, the consequences will be that the [tax agency] cannot

be faulted for having acted on a construction of the law validated by the courts.” (Emphasis added.)

273. At any rate, it is not necessary for the present Tribunal to take a position as to Lidercón’s interesting argument, because in this case the Peruvian adjudications of which Lidercón complains were resolved in accordance with Peruvian law, and there is no competing autonomous substantive standard of international law with respect to the claim in question that would trump Peruvian law. (If for instance there were substantial differences between a national law and international law with respect to a matter of expropriation, a BIT tribunal might consider that it has the authority and indeed the duty to ensure that the international requirements are met; that may not be the case in other areas where there is no autonomous standard of international law.)

*(f) Congressional investigations which investigated both the bidding and the Contract in a manner which was disdainful of Lidercón and undermined its performance.*

274. A State cannot be held liable under international law for the fact that a national legislative assembly comprised of representatives elected from the ranks of a variety of political movements frequently, as a function of the democratic process, raise harsh criticisms of the actions of executive and administrative officials, and by ricochet of private parties who contract with the public sector. No more need be said.

## CONCLUDING OBSERVATIONS

275. The Tribunal notes that one of the slides (number 169) accompanying Lidercón’s closing oral presentation contained a differently worded list of “Peru’s BIT Violations”, presented graphically as six circles containing the following sentences: “Peru violated Lidercón’s legitimate expectations”, “Peru denied justice to Lidercón”, “Peru violated Lidercón’s due process”, “Peru failed to act transparently”, “Peru adopted unreasonable measures”, and “Peru

adopted discriminatory measures”. Lidercón did not seek to make a formal amendment of its pleadings at this stage, and the six sentences were not developed orally given that the slide came at the end of the presentation as time was running out. In any event, the Tribunal considers that all of the six claims as thus worded have been dealt with in this Merits section and call for no comment save to observe with respect to the reference to “due process” that Lidercón has not previously asserted that it was not heard in the multiple legal proceedings that have arisen in the troubled story of this venture. Inasmuch as the expression “due process” appears to have been employed in this instance as a generic reference to allegations of unfairness and arbitrariness which overlap with the other grievances expressed on the slide, the Tribunal is satisfied that it has given full reasons for its conclusion that there was no violation of due process.

276. There is unfinished business between Lidercón and Peruvian government entities that this Award cannot deal with comprehensively. Lidercón has not abandoned its inspection centers, government entities continue to exercise their regulatory and supervisory powers over them and there is ongoing litigation involving the same or similar issues that have been put before this Tribunal. The relations between Lidercón Perú and MML as co-contractants, and between Lidercón Perú and the Ministry as regulator, have been contentious and appear until this moment to be at something of a stalemate. Lidercón has insisted in maintaining a concession contract the terms of which are no longer viable under the current legal framework as interpreted by Peruvian courts. Lidercón and the Ministry have remained unwilling to explore how they might cooperate in rescuing a practical arrangements in the wreckage of the Contract. The Ministry asks that Lidercón simply get in line with other operators who function under the *Ley ITV* and its implementing Regulation. Mr. Barrios has testified that the automated systems of Lidercón’s inspection centers are connected “*en tiempo real*” with the Ministry, and that the certificates emitted by Lidercón automatically enter into its system (T: 645-647), yet Lidercón insists that it should not be subject to inspections by the only entity now conducting them, and complains that no one wishes to speak to it as *its contractual partner*.

277. The situation is one of considerable disorder. In fact it corresponds to the type of hypotheses envisaged by Clause 19.4 of the



Contract (namely that of regulatory changes that impede MML's performance of the Contract; see Paragraph 72), but Lidercón chose to fight the regulatory regime rather than to avail itself of the contractual solution. Still, given that the *Ley ITV* allowed pre-existing contracts to endure providing that they conformed to the relevant laws and regulations, Peru cannot ignore the situation of an investor who relied on that general principle if it now seeks adjustments of its *modus operandi* in cooperation with the regulators. This Tribunal does not, however, have the mission or the mandate to devise practical solutions and will do no more than to discharge its mission to decide the issues presented to it in the ambit of the pleadings.

## COSTS

278. The Tribunal acknowledges the high professional quality and courteousness of the presentations of this case by counsel for both sides, which has greatly assisted the Tribunal in its endeavor to deal with its unusual factual and legal complexity.

279. The Parties have claimed costs as follows: Lidercón EUR 3,609,986.49 plus USD 642,106.77, and Peru USD 6,742,880.54. The amount claimed by the parties included the advance payments made to ICSID. The dollar amounts received from each party by ICSID amounted to the following: Lidercón USD 524,823.00 and Peru USD 525,000.00. The final costs of arbitration amounted to USD 929,402.93. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

280. The claim in this case has failed. On the other hand, Peru's threshold objections have been found to be unmeritorious, and they were given significant attention (and therefore resulted in significant costs). Moreover, the evolving regulatory framework of the first decade of the century created challenges for the foreign investor as a contracting party which to some extent remain unresolved by this Award, which deals only with claims under the Treaty.


281. As for the reasonableness of the expenditures on both sides, the Tribunal considers that neither side has made excessive claims, but that some discount must be made for inefficiencies which incurred on both sides.

282. In the exercise of their discretion the arbitrators conclude that it is appropriate to order the Claimant to reimburse to the Respondent 60% of the latter's contribution to the costs of the arbitration, as well as 60% of the cost of presenting its defense. The single exception to the unanimous character of this Award relates to this disposition of the claims with respect to costs, which is decided by majority; one of the arbitrators disagrees with the magnitude of costs awarded in light of what he considers to be the bona fide differences between the Parties, the existence of which being to a significant degree attributable to both sides.

#### **DISPOSITIVE DETERMINATIONS**

283. For the above reasons, the Arbitral Tribunal

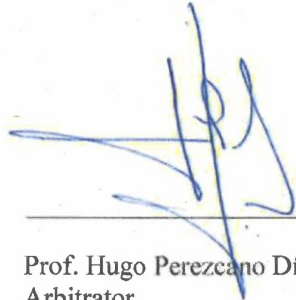
1. *Declares* itself to have jurisdiction to hear the claims raised;
2. *Declares* the claims to be admissible;
3. *Rejects* the claims in their entirety in the absence of proof of breach of the Treaty;
4. *Orders* the Claimant to pay the Respondent USD 4,006,516.64 on account of costs;
5. *Observes* that the Concession Contract remains in force, with effects yet to be determined as necessary, preferably by negotiated accommodations rather than renewed disputation.



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Dr. Francisco González de Cossío  
Arbitrator

Date: **21 FEB 2020**



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Prof. Hugo Perezcano Díaz  
Arbitrator

Date: **28 FEB 2020**



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Prof. Jan Paulsson  
President of the Tribunal

Date: **04 MAR 2020**