

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

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

Claimants

and

**REPUBLIC OF PERU**

Respondent

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

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**AWARD**

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***Members of the Tribunal***

Lucinda Low, President of the Tribunal  
Enrique Barros Bourie, Arbitrator  
José Emilio Nunes Pinto, Arbitrator

***Secretary of the Tribunal***

Patricia Rodríguez Martín

*Date of dispatch to the Parties:*

9 May 2024

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## I. BACKGROUND TO THIS AWARD AND PROCEDURAL HISTORY

1. This Award is the final stage in the case *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru*. It follows from the Decision on Jurisdiction, Liability and Certain Aspects of Quantum, with Further Directions on Quantum, issued by the Tribunal on 11 August 2023 (the “**Decision**”), and now sets out in the form of an award that earlier Decision and the Tribunal’s decisions relating to quantum and costs.
2. In its Decision, the Tribunal set out its decisions on jurisdiction and liability, together with its reasoning and with summaries of the procedural history and the factual background to the case as it stood at the time. The Decision is incorporated in this Award by reference and is attached as **Appendix 1**.<sup>1</sup> Defined terms used in this Award shall have the same meaning as set forth in the Decision, unless otherwise expressly indicated herein.
3. In summary, in the Decision, the Tribunal decided that the Respondent breached the Concession Contract and the Guarantee Agreement as a result of the manner in which it decided to terminate, and ultimately terminated, the Concession Contract. Neither breach, however, was characterized by *dolo* or *culpa inexcusable* as those terms are defined in Peruvian law. The Tribunal further found that the Respondent’s termination of the Contract constituted a violation of the FET standard set forth in Article 2(3) of the BIT, first sentence, as well as the proscription against unjustified treatment set forth in Article 2(3) of the BIT, second sentence.<sup>2</sup>
4. In relation to quantum, in paragraph 985 of the Decision – which set the background for this final stage in these proceedings – the Tribunal determined that the Claimants are entitled to: (A) a total of US\$51,087,826 as Contract Damages, plus interest from the date of valuation;<sup>3</sup> (B) and, for Treaty Damages: (i) costs invested in the Project in an amount of US\$42.5 million;<sup>4</sup> (ii) an entrepreneurial profit on the amount invested to be calculated

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<sup>1</sup> The Tribunal has made a correction to paragraph 914 of the Decision. The revised version of the Decision is attached as Appendix 1.

<sup>2</sup> Decision, para. 902.

<sup>3</sup> Decision, para. 985(ii).

<sup>4</sup> Decision, para. 985(v)(b).

by the Parties;<sup>5</sup> (iii) US\$8,687,826 million, representing the value of the performance bond, which is treated as consequential damage;<sup>6</sup> and (iv) interest on the total amount of damages from the date of valuation, *i.e.*, 13 July 2017, based on the average US dollar lending rate in Peru, compounded annually.<sup>7</sup>

5. In light of these decisions on quantum, in paragraph 986 of the Decision, the Tribunal requested the Parties to seek to use every reasonable effort to try to reach an agreement on the remaining issues relating to quantum and to make joint submissions to the Tribunal.<sup>8</sup> Failing agreement, the Parties were asked to make separate submissions on these points and explain any reasons for disagreement.

6. On 3 October 2023, the Parties informed the Tribunal that they had been able to reach agreement on the following matters (the “**Parties’ Joint Agreement**”):

*1. Damages should be awarded to Sociedad Aeroportuaria Kuntur Wasi S.A. (“Kuntur Wasi”).*

*2. The Parties agree that the amounts awarded to Kuntur Wasi for the following category of damages shall not be subject to taxation by Peru:*

*Costs (gastos incurridos) awarded to Kuntur Wasi under paragraph 985 (ii), (iv), (v)b and pursuant to paragraphs 929 and 963 of the Decision (i.e., US \$42.5 million), and its corresponding interest.*

*3. The Parties agree that the amounts awarded to Kuntur Wasi for the following categories of damages shall be subject to income tax by Peru at a rate of 29.5%:*

*a. Entrepreneurial profit awarded under paragraph 985 (iv) and (v)c and pursuant to paragraphs 963 and 964 of the Decision, and its corresponding interest; and*

*b. The value of the performance bond awarded to Kuntur Wasi under paragraph 985 (ii) and (v)d, and pursuant to paragraphs 929 and 965 of the Decision (i.e., US \$8,687,826), and its corresponding interest.<sup>9</sup>*

7. On that same date, the Parties filed their supplemental submissions which sought to address the remaining issues raised by the Tribunal in its Decision. The Claimants’ submission was

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<sup>5</sup> Decision, para. 985(v)(c).

<sup>6</sup> Decision, para. 985(v)(d).

<sup>7</sup> Decision, para. 985(vii).

<sup>8</sup> Decision, para. 987.

<sup>9</sup> Parties’ Joint Agreement.

accompanied by an “Opinion on the Tribunal’s Questions on Quantum” of the same date signed by the Claimants’ quantum experts Mr. Manuel A. Abdala and Mr. Pablo D. López Zadicoff and two annexes. The Respondent’s submission was accompanied by one Supplemental Expert Report prepared by its quantum expert Mr. Brent C. Kaczmarek and two attachments.

## II. THE REMITS OF THE DECISION

8. As stated above, in paragraph 986 of the Decision, the Tribunal requested the Parties to try to reach agreement, and failing their agreement, to make separate submissions on the following three issues:

*(i) First, as set forth in paragraph 964, a new calculation of damages under the cost approach, taking into account the items of cost this Decision has found to be admissible and no others, and applying the interest rate set forth in this Decision, needs to be performed.*

*(ii) Second, as set forth in paragraph 982, the Tribunal requests that the parties provide a submission as to the average US dollar lending rate in Peru for the relevant period to date for the Tribunal’s consideration.*

*(iii) Third and finally, as set forth in paragraph 984, the Tribunal instructs the Parties to make submissions of the Parties on whether damages should be awarded to Kuntur Wasi, Corporación América, or some combination of the two. It also instructs the Parties to make submissions on the taxability of the award in Peru under the two alternatives.*

9. Paragraph 964 of the Decision referenced in subparagraph (i) quoted above, states as follows:

964. The Respondent’s expert did not set forth any calculation of entrepreneurial profit in his initial report but addressed this in his second report. As a result of the Tribunal’s conclusions that the market value of the Concession at the time of the breach was US\$42.5 million, rather than US\$34.4 million, however, a new calculation of entrepreneurial profit needs to be made. The Tribunal therefore instructs the parties to prepare a new calculation based on this decision. [internal footnotes omitted]

10. In paragraph 985, the Tribunal provided guidance on the approach that should be taken for the calculation of entrepreneurial profit:

*c. entrepreneurial profit shall be calculated on the above damages by use of the same methodology as is described in paragraphs 892, 893 above (i.e., the average of the two calculations described in paras. 892 and 893).*

11. Paragraphs 892 and 893, referenced in the preceding paragraph, in turn read as follows:

*892. The entrepreneurial profit calculation is based on the average of two calculations: the Claimants' WACC over the three years they managed the Project, and a revised DCF comparison. The first of these calculations yields a total profit of 25.62%, which, applied to US\$34.4 million, amounts to an entrepreneurial profit of US\$8.8 million (and a market value conclusion of US\$43.2 million). [internal footnotes omitted] ("methodology 1")*

*893. As to the second calculation, Mr. Kaczmarek relied on the DCF approach, making one adjustment to his DCF model (which includes Mr. Ricover's corrections): Mr. Kaczmarek assumed that the Chinchero Airport would have opened on schedule and therefore, all cash flows would [effectively] be discontinued by three fewer years as of 14 July 2017 (compared with 4 July 2014) given that the Project would have been three years closer to being operational. Under this approach, the entrepreneurial profit element would be calculated as the difference between the two DCF model results, which is US\$9.7 million. Adding that amount to the costs (US\$34.4 million), yields a market value conclusion of US\$44.1 million. [internal footnotes omitted] ("methodology 2")*

12. Finally, in relation to the interest rate, paragraph 982 of the Decision reads:

*982. With respect to the question of what the appropriate interest rate would be, the Respondent's objection to the WACC appears to be that it considers the WACC to be a long-term interest rate, which is not appropriate on the facts of this case. Since there appears to be agreement between the Parties' experts that the average US dollar lending rate in Peru is an appropriate alternative rate, the Tribunal requests that the parties prepare a calculation based on that rate for the Tribunal's consideration.*

### **III. RELIEF SOUGHT**

13. In its Memorial, the Claimant sought the following relief in these proceedings:

*674. En base a los argumentos señalados en este Memorial, Kuntur Wasi solicita que el Tribunal Arbitral emita un laudo declarando y/o ordenando que:*

*a) El Tribunal es competente para resolver las disputas de Kuntur Wasi relativas al Contrato de Concesión y al Contrato de Garantía.*

*b) Perú ha incumplido el Contrato de Concesión, el Contrato de Garantía y la legislación peruana dado que:*

*i) Perú declaró la resolución unilateral del Contrato de Concesión de manera ilegal y arbitraria.*

*ii) Perú no actuó de forma consistente con sus propios actos.*

*iii) Perú no pagó el Valor del Adelanto.*

*iv) Perú exigió reiteradamente la devolución del Área de Concesión.*

- v) Perú se benefició del EDI sin pagar por ello.
- vi) Perú repudió el Contrato de Concesión.
- vii) Perú dañó la imagen, el honor y buena reputación de Kuntur Wasi, sus accionistas y funcionarios.
- c) Los incumplimientos ilícitos de Perú constituyen actos dolosos y de culpa inexcusable bajo derecho peruano.
- d) La resolución comunicada por Perú el 13 de julio de 2017 mediante Oficio No. 142-2017-MTC/01 es inválida e ineficaz y, por tanto, no produjo ningún efecto en el Contrato de Concesión.
- e) La resolución comunicada por Kuntur Wasi el 7 de febrero de 2018 a través de la Carta No. 018-2018-KW es válida y, por tanto, produce efectos jurídicos en el Contrato de Concesión.
- f) En caso no se acepte la pretensión señalada en el literal e) anterior, el presente Contrato de Concesión se declare resuelto por los diversos incumplimientos del Perú.
- g) Perú debe indemnizar y pagar a Kuntur Wasi el monto de US\$ 283.7 millones por los daños y perjuicios sufridos que se han detallado en este Memorial como consecuencia de los incumplimientos al Contrato de Concesión, al Contrato de Garantía, y a la legislación peruana.
- h) Perú ha dañado la buena imagen, honor y reputación de Kuntur Wasi y de sus accionistas y funcionarios y, en consecuencia, que Perú indemnice y pague a Kuntur Wasi un monto que será determinado por el Tribunal, monto que no deberá ser menor al 20% del monto principal de daños reclamados.
- i) Perú asuma y pague todos los costos del presente arbitraje, incluyendo los honorarios de los árbitros, del CIADI, así como todos los gastos que se incurran para ejercer la defensa del caso.
- j) Perú asuma y pague los intereses sobre los montos indemnizatorios otorgados hasta el efectivo y total cumplimiento del eventual laudo condenatorio que el Tribunal emita.
- k) Las sumas otorgadas a los Demandantes no estarán sujetas a tributo ni a compensación de ninguna índole en Perú y, si lo estuvieran, Perú deberá cubrir cualquier pago requerido por las autoridades tributarias derivado del laudo.
- l) Se otorgue cualquier otro remedio que el Tribunal estime pertinente.

675. En base a los argumentos señalados en este Memorial, Corporación América y Kuntur Wasi solicitan que el Tribunal Arbitral emita un laudo declarando y/o ordenando que:

- a) El Tribunal es competente para resolver las disputas de Corporación América y Kuntur Wasi relativas al TBI entre Perú y Argentina.
- b) Perú ha violado el TBI entre Perú y Argentina y/o sus obligaciones bajo el derecho internacional.



c) *Perú no ha brindado un tratamiento justo y equitativo ni a Corporación América, ni a Kuntur Wasi, ni a sus inversiones, en violación a lo establecido en el artículo 2(3) del TBI entre Perú y Argentina.*

d) *A través de medidas injustificadas, Perú ha perjudicado la gestión, mantenimiento, uso, goce y disposición de las inversiones de Corporación América y Kuntur Wasi, en violación a lo establecido en el artículo 2(3) del TBI entre Perú y Argentina.*

e) *Perú ha tomado medidas de nacionalización, expropiación, o medidas equivalentes, respecto de las inversiones de Corporación América y Kuntur Wasi en Perú en violación a lo establecido en el artículo 4(2) del TBI entre Perú y Argentina.*

f) *Perú no ha brindado plena protección y seguridad jurídica ni a Corporación América, ni a Kuntur Wasi, ni a sus inversiones, en violación a lo establecido en el artículo 4(1) del TBI entre Perú y Argentina.*

g) *Perú ha violado su obligación de cumplir con obligaciones distintas a las establecidas en el TBI y asumidas con los Demandantes en el Contrato de Concesión y en el Contrato de Garantía.*

h) *Perú debe indemnizar y pagar a Corporación América y Kuntur Wasi el monto de US\$ 283.7 millones por los daños y perjuicios sufridos que se han detallado en este Memorial como consecuencia de las violaciones al TBI entre Perú y Argentina y al derecho internacional.*

i) *Perú ha dañado la buena imagen, honor y reputación de Corporación América y Kuntur Wasi y de los funcionarios de estas compañías y, en consecuencia, que Perú indemnice y pague a Corporación América y Kuntur Wasi un monto que será determinado por el Tribunal, monto que no deberá ser menor al 20% del monto principal de daños reclamados.*

j) *Perú asuma y pague todos los costos del presente arbitraje, incluyendo los honorarios de los árbitros, del CIADI, así como todos los gastos que se incurran para ejercer la defensa del caso.*

k) *Perú asuma y pague los intereses sobre los montos indemnizatorios otorgados hasta el efectivo y total cumplimiento del eventual laudo condenatorio que el Tribunal emita.*

l) *Las sumas otorgadas a los Demandantes no estarán sujetas a tributo ni a compensación de ninguna índole en Perú y, si lo estuvieran, Perú deberá cubrir cualquier pago requerido por las autoridades tributarias derivado del laudo.*

m) *Se otorgue cualquier otro remedio que el Tribunal estime pertinente.*<sup>10</sup>

#### 14. In its Reply, the Claimants asked:

*...que se rechace la objeción a la jurisdicción planteada por Perú. Asimismo, los Demandantes reiteran sus pretensiones y peticiones hechas en el Memorial sobre el Fondo y se reservan el derecho a ampliar, modificar o actualizar las mismas*

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<sup>10</sup> Claimants' Memorial, paras. 674, 675.

*y/o montos indemnizatorios conforme se desarrolle el presente arbitraje.*<sup>11</sup>

15. In its Counter-Memorial and Rejoinder, the Respondent sought the following relief in these proceedings:

*For the foregoing reasons, Respondent respectfully requests that the Tribunal find that it has no jurisdiction over Kuntur Wasi's claims in this case and that Claimants' legal claims have no merit, and award Respondent the costs and fees, including attorneys' fees, it has incurred in this arbitration.*<sup>12</sup>

#### **IV. THE PARTIES' SUBMISSIONS ON QUANTUM**

##### **A. THE CLAIMANTS' SUBMISSION**

16. In order to avoid the risk of double recovery, the Claimants requested that Tribunal order payment to Kuntur Wasi of Treaty Damages only and confirmed that the Claimants will not seek recovery of damages under Concession Contract or the Guarantee Agreement.<sup>13</sup>

##### **(1) Calculation of the entrepreneurial profit for Treaty damages**

17. The Claimants and their experts calculated the entrepreneurial profit on the amount of US\$42.5 million based on the average of two calculations: the Claimants' WACC over the three years they managed the Project; and a "revised DCF comparison".<sup>14</sup>

18. As to the first, Compass Lexecon calculated that given the Project's WACC of 7.59%, the total entrepreneurial profit using methodology 1 would be 24.54% of US\$42.5 million, or US\$10,430,336.<sup>15</sup>

19. As to the "revised DCF comparison", the Claimants submit that the Tribunal made no decision on the appropriate DCF for methodology 2 and that Mr. Kaczmarek's DCF model was neither endorsed by the Tribunal nor appropriate.<sup>16</sup> Therefore, for the DCF

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<sup>11</sup> Claimants' Reply, para. 974.

<sup>12</sup> Respondent's Counter-Memorial, para. 410; Respondent's Rejoinder, para. 640.

<sup>13</sup> Claimants' Submission on the Tribunal's Further Directions on Quantum, 3 October 2023 (the "Claimants' Supplemental Submission"), para. 14.

<sup>14</sup> Claimants' Supplemental Submission, para. 5.

<sup>15</sup> Claimants' Supplemental Submission, para. 6.

<sup>16</sup> Claimants' Supplemental Submission, paras. 7, 8.

comparison, the Claimants calculated the entrepreneurial profit as the difference between the “base case” DCF (*i.e.*, the DCF valuation model that Compass Lexecon presented at the Hearing) and a DCF result that takes the “base case” DCF and discounts it by three years, which yields a total entrepreneurial profit of US\$36,784,238.<sup>17</sup>

20. Alternatively, the Claimants and their experts calculated two alternative DCF models: one based on the Tribunal’s preferences regarding the DCF inputs (under which the entrepreneurial profit would amount to US\$32,802,533)<sup>18</sup> and one based on a simple average between the original DCF models of Compass Lexecon and Mr. Kaczmarek (under which the entrepreneurial profit would amount to US\$23,243,744).<sup>19</sup>

**Table 3: Entrepreneurial Profit Calculation (US\$)**

	Abdala - López Zadicoff DCF	Model Based on Decision Interpretation	Abdala - López Zadicoff and Kaczmarek DCFs
Methodology 1 (¶892)	10,430,336	10,430,336	10,430,336
Methodology 2 (¶893)	36,784,238	32,802,533	23,243,744
(+) DCF Base Value	183,499,306	163,636,450	115,952,134
(-) DCF 3-years lagged	146,715,069	130,833,917	92,708,390
<b>Entrepreneurial Profit</b>	<b>23,607,287</b>	<b>21,616,435</b>	<b>16,837,040</b>

## (2) Calculation of interest

21. The Claimants’ experts calculated one single interest rate for the relevant period – based on the average U.S. dollar lending rate in Peru – between July 2017 to February 2024 to be 4.39%.<sup>20</sup> The Parties’ disagreement on interest centers on how to average the calculation of the interest rate: either one single average for the entire period, or the average lending rate at July for each calendar year. Compass Lexecon suggests that the better approach is

<sup>17</sup> Claimants’ Supplemental Submission, paras. 6, 7; Compass Lexecon’s Opinion on the Tribunal’s Questions on Quantum, 3 October 2023 (“**Compass Lexecon’s Opinion**”), para. 8.

<sup>18</sup> Compass Lexecon’s Opinion, Appendix A, Discussion on Tribunal’s Findings and Preferences on DCF Inputs, paras. 20-22: the inputs that were amended compared to Compass Lexecon’s DCF model presented at the Hearing are the number of visitor/passengers at the airport and the number of international flights. This results in a DCF valuation of US\$163.3 million.

<sup>19</sup> Claimants’ Supplemental Submission, para. 9; Compass Lexecon’s Opinion, paras. 10, 11.

<sup>20</sup> Claimants’ Supplemental Submission, para. 11; A&LZ Damages Calculation Post Decision\_02.23.2024 (version submitted on 28 February 2024).

to calculate a single average rate for the entire relevant period, which yields an annual compound factor of 1.33x.<sup>21</sup> The amounts that result from applying interest are reflected in the table below depending on the DCF method adopted.

**Table 4: FET Damages Results (US\$)**

	Abdala - López Zadicoff DCF	Model Based on Decision Interpretation	Abdala - López Zadicoff and Kaczmarek DCFs
Costs Incurred	42,500,000	42,500,000	42,500,000
Performance Bond	8,687,286	8,687,286	8,687,286
Entrepreneurial Profit	23,607,287	21,616,435	16,837,040
<b>Total as of 7/13/2017</b>	<b>74,794,573</b>	<b>72,803,721</b>	<b>68,024,326</b>
<i>Compound Factor</i>	1.33x	1.33x	1.33x
<i>Interest</i>	24,670,806	24,014,129	22,437,657
<b>Total as of 2/28/2024</b>	<b>99,465,379</b>	<b>96,817,849</b>	<b>90,461,983</b>

### (3) Tax gross up

22. The Claimants request that the Tribunal gross up the categories of damages that Peru admitted in the Parties' Joint Agreement that it would tax (*i.e.*, the Performance Guarantee Bond, the entrepreneurial profit and interest), by 29.5%.<sup>22</sup> According to the Claimants and their experts: (i) the calculations on the entrepreneurial profit are net of the income tax Kuntur Wasi would have had to pay in Peru and by taxing it, Peru is effectively reducing damages; (ii) the performance bond seeks to compensate the Claimants for Peru's improper conduct and Peru should therefore not benefit from the reduced amount that the Claimants would receive by collecting taxes on it; and (iii) interest seeks to compensate the Claimants for the delay in payment, which should not be reduced through a tax.<sup>23</sup>

<sup>21</sup> Compass Lexecon's Opinion, paras. 5, 13. *See also* Compass Lexecon's Opinion, footnote 13; A&LZ Damages Calculation Post Decision\_02.23.2024 (version submitted on 28 February 2024).

<sup>22</sup> Claimants' Supplemental Submission, paras. 15, 16.

<sup>23</sup> Claimants' Supplemental Submission, para. 16; Compass Lexecon's Opinion, para. 15.

## B. THE RESPONDENT’S SUBMISSION

### (1) Entrepreneurial profit

23. The Respondent and its expert, Mr. Kaczmarek, submitted an updated valuation of the entrepreneurial profit using the two methodologies referred to in paragraphs 892 and 893 of the Decision:
24. Methodology 1 took the 7.59% discount rate found in the 2013 ProInversión study and applied this rate for three years (which resulted in a total profit of 24.5%). This profit was then applied to Kuntur Wasi’s allowable costs accepted by the Tribunal in the Decision (in the amount of US\$42.5 million), totalling US\$10,430,336 in entrepreneurial profit.<sup>24</sup>
25. As to methodology 2, Mr. Kaczmarek submits that the calculation is unaffected by the Tribunal’s decisions related to allowable cost, as the decision as to which costs are compensable does not factor into the anticipated cash flows for the Concession.<sup>25</sup> Therefore, the estimate of entrepreneurial profit under the second methodology remained at US\$9,703,250.<sup>26</sup>
26. The result of averaging the two approaches is an entrepreneurial profit of US\$10,066,793.<sup>27</sup>

**Table 3 – Revised Calculation of Claimants’ Damages Using the Cost Approach**

Component	Value
Costs Incurred	42,500,000
Entrepreneurial Profit	10,066,793
Consequential Damages	8,687,826
<b>Total</b>	<b>61,254,619</b>

27. The Respondent and Mr. Kaczmarek take issue with the fact that Compass Lexecon recreated its own DCF model based on an interpretation of the Tribunal’s comments on the

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<sup>24</sup> Respondent’s Supplemental Submission on Quantum, 3 October 2023 (the “**Respondent’s Supplemental Submission**”), para. 7; **Exhibit RER-9**, Supplemental Expert Report of Brent C. Kaczmarek, CFA, 3 October 2023 (“**Kaczmarek Supplemental Report**”), para. 11; Table 1.

<sup>25</sup> **Exhibit RER-9**, Kaczmarek Supplemental Report, para. 15.

<sup>26</sup> **Exhibit RER-9**, Kaczmarek Supplemental Report, para. 15; Table 2.

<sup>27</sup> **Exhibit RER-9**, Kaczmarek Supplemental Report, para. 16; Table 3.

various inputs used in the Income Approach.<sup>28</sup> According to the Respondent and its expert, the Tribunal merely asked the Parties to recalculate the entrepreneurial profit using the same methodology presented by Mr. Kaczmarek in his Second Report but using a higher cost figure identified by the Tribunal in its Decision.<sup>29</sup>

28. Furthermore, the Respondent's expert also criticizes Compass Lexecon's calculation because: (i) it does not make any adjustments to costs or non-aeronautical revenues; (ii) it produces a valuation of US\$163.6 million, which is inconsistent with the Tribunal's decision that the value of the Concession at the time of termination was approximately US\$42.5 million; and (iii) because it suggests that the Concession was worth US\$130.8 million as of the bid acceptance date, which is also inconsistent with the Tribunal's decision that the value of the Concession was near zero as of the date when the Claimants' bid was accepted.<sup>30</sup>

## **(2) Calculation of interest**

29. The Respondent's expert confirmed that the data source and the historical figures for the interest rate calculations are agreed with the Claimants' experts. The only difference with the Claimants' experts in relation to interest lies in the fact that the Respondent applies the U.S. dollar lending rate in Peru for each full year, at which point interest is compounded and the interest rate as of that date is applied for the following year – as opposed to averaging the rate for the entire relevant period.<sup>31</sup> According to Mr. Kaczmarek, the Respondent's approach is more consistent with the economic reality of how the Claimants would have been affected by changes in short-term (one year) borrowing rates. Moreover, given the current rising interest rate environment, a single average interest rate is likely to increase the interest due in past years even though interest rates were lower historically.<sup>32</sup>

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<sup>28</sup> **Exhibit RER-9**, Kaczmarek Supplemental Report, para. 19.

<sup>29</sup> **Exhibit RER-9**, Kaczmarek Supplemental Report, paras. 13, 21.

<sup>30</sup> **Exhibit RER-9**, Kaczmarek Supplemental Report, paras. 23-25.

<sup>31</sup> Respondent's Supplemental Submission, para. 13; **Exhibit RER-9**, Kaczmarek Supplemental Report, para. 17.

<sup>32</sup> **Exhibit RER-9**, Kaczmarek Supplemental Report, para. 33.

Based on his methodology, the Respondent's expert calculates the Claimants' loss, including interest through 28 February 2024, to be US\$80,847,255.<sup>33</sup>

### **(3) Tax Gross up**

30. The Respondent contends that a tax gross up for applicable Peruvian taxes is not required to provide full compensation. As to the entrepreneurial profit, the Respondent argues that the analysis that the Tribunal is entrusted to carry out is akin to a simulated transaction on the valuation date in that it compensates the Claimants for the amounts they would have obtained had they sold their interest in the Concession on the valuation date. Under normal circumstances, when a company receives a profit for the sale of its assets, the company is required to pay taxes on that profit.<sup>34</sup> As to the performance bond, the Respondent argues that the Concession Contract does not provide that that value would be granted "free of tax" and therefore there is no reason to exempt the Claimants from their tax obligations under Peruvian law.<sup>35</sup>

## **V. THE TRIBUNAL'S DECISIONS ON QUANTUM**

31. At the outset, the Tribunal notes the Parties' agreement that all damages awarded to the Claimants should be awarded to Kuntur Wasi.<sup>36</sup> In order to avoid any risk of double recovery, the Claimants have requested that the Tribunal order payment to Kuntur Wasi of Treaty damages only.<sup>37</sup> They have further confirmed that they will not seek recovery of contract damages or damages under the Guarantee Agreement, if the Tribunal agrees with this request and "Peru effectively pays".<sup>38</sup> The Tribunal accepts the Parties' agreement on payment to Kuntur Wasi and directs the Claimants not to seek to collect damages under the Contract or the Guarantee Agreement.

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<sup>33</sup> Exhibit RER-9, Kaczmarek Supplemental Report, Appendix J (version submitted on 28 February 2024).

<sup>34</sup> Respondent's Supplemental Submission, para. 17.

<sup>35</sup> Respondent's Supplemental Submission, para. 18.

<sup>36</sup> Parties' Joint Agreement.

<sup>37</sup> Claimants' Supplemental Submission, para. 14.

<sup>38</sup> Claimants' Supplemental Submission, para. 14.

32. There are three issues remaining to be determined by the Tribunal: (1) the amount of entrepreneurial profit for Treaty damages; (2) the method by which interest is to be calculated; and (3) whether there should be any gross-ups for Peruvian taxes levied on Kuntur Wasi in relation to the entrepreneurial profit, performance bond, or interest.

**A. ENTREPRENEURIAL PROFIT**

33. With respect to the issue of the amount of entrepreneurial profit for Treaty damages, the Tribunal considers that the Respondent's calculation is the more appropriate one. The Tribunal agrees with the Respondent that the calculation of the Claimants under their interpretation of the "revised DCF comparison" is inconsistent with the Decision in its implied valuation of the Contract and would provide the Claimants with a windfall. Accordingly, the Tribunal determines that the entrepreneurial profit to be used in the calculation of damages is US\$10,066,793.

**B. INTEREST**

34. With respect to the calculation of interest, the Tribunal likewise considers the approach taken by the Respondent to be the more appropriate one. Calculating interest based on the average lending rate for each calendar year from the date of valuation, 13 July 2017 (taking into account the current average rate in July, *i.e.*, the month in which the Contract was terminated), rather than an average for the entire period, is more consistent not only with the instructions of the Tribunal but also with economic reality and general practice. Furthermore, it avoids the distortive effect, in a period of rising interest rates, that a calculation for the entire period would produce. Accordingly, the Tribunal determines that interest should be calculated starting on the date of breach and continuing to the date of payment based on the average U.S. dollar lending rate in July of each year based on the average rate for the preceding 12 months. Using this approach, total damages through 28 February 2024 amount to US\$80,847,255.



### C. TAX GROSS-UP

35. With respect to the third issue, the tax gross-up, the parties are in agreement that the entrepreneurial profit and the performance bond are subject to income tax in Peru at the rate of 29.5%. They disagree, however, as to whether each of those categories of damage should be grossed up for such taxes.
36. In the Tribunal's view, the entrepreneurial profit has the character of ordinary income and it would therefore be logical to subject receipts of this nature to taxation in Peru when received by Kuntur Wasi. However, it appears to the Tribunal that the calculations of the amount of entrepreneurial profit to Kuntur Wasi were in fact reduced by both parties' experts to take into account income taxes, such that not grossing up this element would effectively penalize Kuntur Wasi.
37. The Second Report of the Respondent's expert, Mr. Kaczmarek, contains a calculation of entrepreneurial profit under Methodology 1 based on the WACC for the Project. The formula adopted by Mr. Kaczmarek includes the element of income tax under the variable "T", which in September 2013 was apparently 33.3%.<sup>39</sup> Thus, it appears to the Tribunal that his calculation reduced the amount of entrepreneurial profit by the amount of anticipated income tax.
38. Under methodology 2, Mr. Kaczmarek calculated the entrepreneurial profit based on the DCF between 2014 and 2017. Mr. Kaczmarek's calculation, using figures from Compass Lexecon which were also confirmed by Mr. Ricover, explicitly took into account income taxes of 29.5% in his calculation of "*Flujo Libre de Caja – Kuntur Wasi*".<sup>40</sup>
39. Indeed, Compass Lexecon notes in its Opinion on the Tribunal's Questions on Quantum dated 3 October 2023 that "the entrepreneurial profit calculations, both in ours and Mr.

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<sup>39</sup> See **Exhibit RER-5**, Second Kaczmarek Report, p. 14; **Exhibit CLEX-21**, PROINVERSION, *Análisis Técnico y Evaluación*, September 2013, p. 53.

<sup>40</sup> See **Exhibit RER-5**, Second Kaczmarek Report, Appendix G, change the Valuation Date on tab "FFD Kuntur Wasi" tab to 4 July 2014, calculation sheets for "FFD Kuntur Wasi" and "WACC".

Kaczmarek's models, have been computed net of the income tax the Project would have had to pay in Peru."<sup>41</sup>

40. Thus, both methods of calculating entrepreneurial profit appear to reduce the amount for anticipated taxes in Peru, at the same 29.5% rate that the parties now agree is the relevant tax rate. It therefore appears to the Tribunal that not grossing up this amount correspondingly would inappropriately reduce the amount of damages payable to Kuntur Wasi in relation to this element. Accordingly, the Tribunal has determined that the amount of entrepreneurial profit it has awarded in paragraph 30 above, namely, US\$10,066,793, should be grossed up for income taxes at the agreed rate.
41. As for the amount payable in respect of the value of the performance guarantee bond (*valor de la garantía de fiel cumplimiento*), while the Concession Contract does not define the legal character of the bond's value, the Tribunal accepts the Claimants' submission that it represents a kind of penalty designed as compensation for the improper termination of the Contract.<sup>42</sup> From the perspective of international law, the *Chorzow Factory* principles state that the Claimants are entitled to full compensation for the losses incurred as a result of the Treaty violations, including consequential damages such as the value of the performance bond.<sup>43</sup>
42. The Parties seem to agree on the taxability in Peru of the value of the performance bond. The Tribunal therefore determines that, to the extent payment of this bond's value by the Respondent generates income tax consequences to Kuntur Wasi, the amount payable should be grossed up to ensure that Kuntur Wasi receives the full value established in the Decision (*i.e.*, US\$8,687,826).
43. With respect to the interest payable on the various components of damages, the Tribunal is of the view that whether to gross up any interest turns on the concept to which it is attached. If the concept is taxable, and subject to gross-up under the decisions of this Tribunal, so interest on that concept should be subject to gross-up to the date of payment of the amounts

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<sup>41</sup> Compass Lexecon's Opinion, para. 15. *See also* Claimants' Supplemental Submission, para. 16.

<sup>42</sup> Decision, para. 914.

<sup>43</sup> Decision, para. 965.

established in this Award, to ensure full compensation. Accordingly, both interest on the entrepreneurial profit and the performance bond, to the extent taxable in the case of the latter, should be correspondingly grossed up from the Valuation Date of 13 July 2017 to the date of payment of the amounts established in this Award.

44. The Claimants have submitted that 29.5% would be the rate at which any income deemed to accrue to Kuntur Wasi would be taxed by Peru at this time, a rate that has not been disputed by the Respondent. Accordingly, unless any taxation of this element is renounced by Peru, the value of the entrepreneurial profit, performance bond, and any interest associated with these concepts should be grossed up by that amount.

45. In summary, the Tribunal decides with respect to the remaining damage issues as follows:

- a. With respect to entrepreneurial profit, the Tribunal awards damages to Kuntur Wasi, in an amount of US\$10,066,793, plus interest, to be grossed up by 29.5% for Peruvian income taxes.
- b. With respect to interest, it shall be calculated from the date of breach, 13 July 2017, to the date of full payment of the amounts established in this Award, based on the average U.S. dollar lending rate in force in July of each year averaged for the preceding 12 months, as calculated by the Respondent.
- c. The value of the performance bond, if subject to taxation in Peru upon payment to Kuntur Wasi, plus interest, shall be grossed up for such taxes, at the rate of 29.5% for any Peruvian income taxes.

46. Together with the damages established in the Decision, the total damages payable to Kuntur Wasi are therefore as follows:

<b>Component</b>	<b>Value</b>	<b>With Pre-Award Interest</b>	<b>Tax Gross up @ 29.5%</b>
Costs Incurred	\$ 42,500,000	\$ 56,093,865	
Entrepreneurial Profit	\$ 10,066,793	\$ 13,286,714	\$ 5,559,689
Performance Bond	\$ 8,687,826	\$ 11,466,676	\$ 4,798,113
<b>Total</b>	<b>\$ 61,254,619</b>	<b>\$ 80,847,255</b>	<b>\$ 91,205,056</b>

## VI. COSTS

### A. THE CLAIMANTS' COSTS

47. The Claimants submit that they incurred a total of US\$7,942,938.81 in costs, fees and expenses in connection with the present arbitration (excluding advances made to ICSID). The Claimants summarize their costs as follows:<sup>44</sup>

<b>Legal Fees and expenses</b>	
<b>King &amp; Spalding</b>	
Fees	US\$3,867,393.50
Costs and expenses	US\$87,148.95
<b>Bullard Falla Ezcurra +</b>	
Fees	US\$1,620,190.60
Costs and expenses	US\$32,684.37
<b>Hernández &amp; Cia</b>	US\$9,774.33
<b>Expert's Fees and expenses</b>	
Compass Lexecon	US\$1,557,010.26
Mott McDonald	US\$321,596.35
Christoph Schreuer	US\$176,252.05
María Teresa Quiñones Alayza	US\$135,705.90
Eduardo Benavides Torres	US\$110,182.50
ICSID Lodging Fee	US\$25,000.00
<b>Total</b>	<b>US\$7,942,938.81</b>

48. The Claimants also state that King & Spalding and Bullard Falla Ezcurra + have been engaged by the Claimants on a success fee basis. The Claimants have not, however, requested recovery of those additional amounts.

49. The Claimants request that the Tribunal order the Respondent to pay the full expenses incurred by the Claimant in connection with the present arbitration.<sup>45</sup> In the view of the Claimants, their costs are reasonable in light of the complexity of the case, its duration and the damage caused to the Claimants by the Respondent.<sup>46</sup>

<sup>44</sup> Claimants' Cost Statement, 20 November 2023, para. 2. The amount corresponding to ICSID's administrative fees (US\$625,000) is included in Section C below.

<sup>45</sup> Claimants' Cost Statement, 20 November 2023, para. 3.

<sup>46</sup> Claimants' Cost Statement, 20 November 2023, para. 2.

## B. THE RESPONDENT'S COSTS

50. The Respondent submits that it incurred a total of US\$8,600,238.82 in fees and costs (excluding advances made to ICSID). More specifically, the Respondent submits that it incurred the following costs:<sup>47</sup>

<b>Legal fees and expenses</b>	
Sidley Austin LLP	US\$5,688,434.05
Stanimir A. Alexandrov PLLC	US\$705,428.00
Baker Botts LLP	US\$38,959.00
Estudio Navarro & Pazos Abogados	US\$148,531.68
Estudio Payet, Rey, Cauvi, Pérez Abogados	US\$78,435.81
<b>Expert fees and expenses</b>	
Enrique Ferrando	US\$109,900.00
Andrés Ricover	US\$475,050.28
IAV Advisors LLC (Brent C. Kaczmarek)	US\$755,500.00
AlixPartners (John D. Finnerty)	US\$600,000.00
<b>Total</b>	<b>US\$8,600,238.82</b>

## C. THE COSTS OF THE ARBITRATION

51. The costs of arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to:

<b>Arbitrators' fees and expenses</b>	
Lucinda A. Low	US\$188,123.15
Enrique Barros Bourie	US\$298,824.30
José Emilio Nunes Pinto	US\$160,625.00
ICSID's Administrative Fees	US\$262,000.00
Direct expenses	US\$219,381.13
<b>Total:</b>	<b>US\$1,128,953.58</b>

52. These costs have been paid out of the advances made by the Parties in equal parts.<sup>48</sup> As a result, each Party's share of the costs of arbitration amounts to US\$564,476.79. The ICSID Secretariat will provide the Parties with a statement of the case account in due course.

## D. THE TRIBUNAL'S DECISION ON COSTS

<sup>47</sup> Respondent's Cost Statement, 20 November 2023, pages 2-9. The amount corresponding to ICSID's administrative fees (US\$625,000) is included in Section C below.

<sup>48</sup> The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

53. Article 61(2) of the ICSID Convention provides:

*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

54. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

55. As the Parties' cost submissions reflect, this was a complex case, with 10 contract claims and 4 Treaty claims. Although the Claimants prevailed on several of their claims, they did not prevail on all aspects of those claims, in particular with respect to the contract claims, that the termination was carried out with *dolo* or *culpa inexcusable* (gross negligence). They asserted a number of claims on which they did not prevail. The applicable arbitration rules give the Tribunal discretion regarding whether and how to allocate costs. After deliberation, the Tribunal has determined that each Party should bear its own legal and expert costs and share in the costs of the proceeding equally.

## VII. DECISIONS AND AWARD

56. As reflected in the Decision, the Tribunal has decided as follows:

- a. that it has jurisdiction over Kuntur Wasi's Treaty claims under both the ICSID Convention and the BIT;<sup>49</sup>
- b. with respect to the contractual claims of the Claimants, that:
  - i. Peru breached the Concession Contract by terminating it without a well- founded reason of public interest;<sup>50</sup> however, in doing so, Peru did not act in bad faith and in violation of the doctrine of *actos propios*;<sup>51</sup>

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<sup>49</sup> Decision, paras. 239, 275, and 285. The Tribunal determined that it did not need in light of this decision to decide whether Corporación América could maintain contractual claims via the BIT's MFN clause.

<sup>50</sup> Decision, para. 427.

<sup>51</sup> Decision, para. 452.

- ii. the termination communicated by Peru on 13 July 2017 did not have the effect of terminating the contractual relationship and that the latter remained in force until the termination communicated by Kuntur Wasi on 7 February 2018;<sup>52</sup>
  - iii. Peru's failure to make the Advance Payment did not constitute a breach of its obligations under the Concession Contract, as amended;<sup>53</sup>
  - iv. Peru's demand for early return of the Concession area did not constitute a contractual breach;<sup>54</sup>
  - v. Peru did not breach the Concession Contract by failing to pay for the EDI (without prejudice to full compensation for the EDI as an element of damage for wrongful termination);<sup>55</sup>
  - vi. Peru did not repudiate the Concession Contract by its statements regarding non-compliance;<sup>56</sup>
  - vii. Peru's conduct was a violation of the Guarantee Agreement as well as of the Concession Contract, albeit one without further consequences as a matter of Peruvian law;<sup>57</sup>
  - viii. Peru did not act with *dolo* or *culpa inexcusable* in connection with its contractual breach;<sup>58</sup>
  - ix. Peru is not liable for asserted damage to the image, honor and good reputation of Kuntur Wasi and its shareholders.<sup>59</sup>
- c. With respect to the Treaty claims asserted by the Claimants, that Peru's conduct violated the positive obligation set forth in Article 2(3) of the BIT to provide fair and equitable treatment to the Claimants' investments,<sup>60</sup> as well as the negative obligation set forth in that same article not to engage in conduct prejudicing the management, maintenance, use, enjoyment or disposition through unjustified

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<sup>52</sup> Decision, para. 475.

<sup>53</sup> Decision, para. 499.

<sup>54</sup> Decision, para. 511.

<sup>55</sup> Decision, para. 520.

<sup>56</sup> Decision, para. 536.

<sup>57</sup> Decision, para. 552.

<sup>58</sup> Decision, para. 577.

<sup>59</sup> Decision, para. 598.

<sup>60</sup> Decision, para. 601.

measures.<sup>61</sup> The Tribunal considered it unnecessary, in light of its determination that these provisions were violated, to decide the Claimants' remaining Treaty claims, for expropriation, and failure to provide full protection and security, as well as its claim under an umbrella clause it sought to have imported by virtue of the Treaty's MFN provision.<sup>62</sup>

- d. With respect to damages, the Tribunal's decisions were set out in paragraph 985 of the Decision, as follows:

*985. With respect to the issues of quantum in this case, the Tribunal has decided as follows:*

*(i) Damages for contractual breaches will be governed by the terms of the Concession Contract and/or Peruvian law, as appropriate, while damages for treaty breaches shall be governed by the terms of the BIT or international law, as appropriate;*

*(ii) The damages that can be claimed for breach of the Concession Contract are those provided under Section 15.5 of that Contract, the gastos incurridos, i.e., US\$42.4 million, plus the value of the performance bond, US\$8,687,826, with interest from the date of valuation, i.e., 13 July 2017.*

*(iii) The Guarantee Agreement does not augment the damages that are payable as a matter of contract or Peruvian law.*

*(iv) For the FET breach, the Chorzow Factory standard of full reparation shall be applied, using the cost approach of calculating damages, which will value the Claimant's investment in the Project plus an entrepreneurial profit, plus any consequential damages that are not taken into account in the investment figure.*

*(v) in relation to the claimed costs:*

*a. no damages shall be paid in relation to the construction delay claim of US\$4.9 million;*

*b. the claims for the EDI of \$27.6 million, bidding and structuring costs of US\$6.1 million, financial structuring costs of US\$2.0 million; supervisory costs of US\$1.1 million payable to OSITRAN; taxes of US\$1.3 million not associated with EDI, and operating expenses of US\$4.4 million, shall be recoverable by Kuntur Wasi, for a total of US\$42.5 million.*

*c. entrepreneurial profit shall be calculated on the above damages by use of the same methodology as is described in paragraphs 892, 893 above (i.e., the average of the two calculations described in paras. 892 and 893).*

*d. The performance bond of US\$8,687,826 million shall be treated as*

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<sup>61</sup> Decision, para. 601.

<sup>62</sup> Decision, paras. 780, 789, and 800.



*consequential damages.*

*e. no damages shall be paid in relation to the PyC contingent claim of US\$48.5 million for lost profits.*

*(vi) no moral damages shall be due and owing.*

*(vii) interest calculations on damages (including consequential damages as well as damages calculated under the costs approach) from the date of valuation shall be based on the average US dollar lending rate in Peru, compounded annually.*

e. The Tribunal instructed the parties to make further submissions on the following questions relating to damages:

*(i) First, as set forth in paragraph 964, a new calculation of damages under the cost approach, taking into account the items of cost this Decision has found to be admissible and no others, and applying the interest rate set forth in this Decision, needs to be performed.*

*(ii) Second, as set forth in paragraph 982, the Tribunal requests that the parties provide a submission as to the average US dollar lending rate in Peru for the relevant period to date for the Tribunal's consideration.*

*(iii) Third and finally, as set forth in paragraph 984, the Tribunal instructs the Parties to make submissions of the Parties on whether damages should be awarded to Kuntur Wasi, Corporación América, or some combination of the two. It also instructs the Parties to make submissions on the taxability of the award in Peru under the two alternatives.<sup>63</sup>*

57. These decisions are incorporated into this Award as noted earlier and reaffirmed. With respect to the remaining damages issues not addressed by the Joint Agreement, the Tribunal has decided as follows:

- a. the entrepreneurial profit to be used in the calculation of damages is US\$10,066,793;
- b. interest should be calculated starting on the date of breach, 13 July 2017, and continuing to the date of payment based on the average U.S. dollar lending rate in July of each year based on the average rate for the preceding 12 months; and

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<sup>63</sup> Decision, para. 986.

- c. Entrepreneurial profit and the performance bond, and accrued interest thereon, should be grossed up for Peruvian taxes at the rate of 29.5%.

58. In light of the Claimants' undertaking to seek damages for Treaty breaches only, to avoid double recovery, and the parties' agreement that damages should be paid to Kuntur Wasi, the Tribunal orders that damages in the amount of US\$91,205,056 (including interest to 28 February 2024) should be paid to Kuntur Wasi, together with any additional interest that has accrued at the rate established in this Award to the date of payment; compounded annually.

59. Each Party shall bear its own legal and expert costs in this matter and shall share equally in the administrative costs of the proceedings.

It is so ordered.

Issued in English and Spanish on 9 May 2024, with both versions being equally authentic.

[Signed]

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Enrique Barros Bourie  
Arbitrator

Date: **MAY 06 2024**

[Signed]

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José Emilio Nunes Pinto  
Arbitrator

Date: **MAY 06 2024**

[Signed]

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Lucinda Low  
President of the Tribunal

Date: **MAY 09 2024**

## **APPENDIX 1**

**Decision on Jurisdiction, Liability and Certain Aspects of Quantum, with Further Directions on Quantum**